

# Twelve Problems with Substantive Due Process

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## ABSTRACT

*I present twelve quick problems for the idea that “without due process of law” in the Fifth or Fourteenth Amendments can be tolerably paraphrased as “unreasonably”:*

1. *Textually, Magna Carta and its progeny treat “due process of law” as a restriction on methods of proving accusations.*
2. *These statutes’ contexts make clear that they limit royal power rather than giving the king a massive power (and duty) to review earlier statutes for reasonableness.*
3. *The most promising purported early instance of reasonableness review, Dr. Bonham’s Case, makes no mention of Magna Carta or its progeny.*
4. *Blackstone says that, while regrettable, prospectively-adopted and lawfully-imposed disproportionate sentences are consistent with Magna Carta and its progeny.*
5. *“Process” in the Sixth Amendment refers to fact-finding writs.*
6. *No purported instances of antebellum substantive due process adopt a reasonableness reading.*
7. *Republicans simultaneously condemned slavery as immoral but held that slaves could be “lawfully claimed” and fugitives “lawfully reclaimed.”*
8. *Responding to Dred Scott, Lincoln explained the Fifth Amendment as a requirement of prospectivity and lawfulness, not an absolute protection for liberty or property.*
9. *Republicans held that “duly convicted” in the Thirteenth Amendment required conviction by due process of law, but allowed disproportionate, unreasonable sentences.*
10. *“Law” in the Privileges or Immunities Clause can be unreasonable or unjust.*
11. *Reverdy Johnson embraced due process while opposing the Civil Rights Act of 1866 and condemning the Privileges or Immunities Clause as vague and open-ended.*

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12. *The history of citizens-only privileges makes the Privileges or Immunities Clause the only plausible source for a constitutional ban on unreasonable discrimination.*

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#### INTRODUCTION

I structure my Article normatively, as twelve attacks on the doctrine stemming from *Munn v. Illinois*<sup>1</sup> and exemplified most notoriously in *Lochner v. New York*<sup>2</sup> and *Roe v. Wade*<sup>3</sup> that any *unreasonable* restrictions on liberty are ipso facto *unconstitutional*. The *Munn* tradition holds that we can tolerably paraphrase “without due process of law” in the Fifth and Fourteenth Amendments as “unreasonably.” But we cannot: our Due Process Clauses only require that governments act *lawfully*, not that restraints on liberty have a sufficiently weighty justification. Disproportionate and otherwise deeply unjust laws can therefore be enforced with “due process of law.” Limits on the substantive *content* of law appear elsewhere, such as in the First Amendment<sup>4</sup> or the Fourteenth Amendment’s Privileges or Immunities Clause.<sup>5</sup>

My take on *Dred Scott v. Sandford* thus distinguishes sharply between the Court’s holding on due process (which the Court used to declare the Missouri Compromise unconstitutional) and its holding on federal citizenship (which the

1. 94 U.S. 113, 125 (1877) (noting that under “some circumstances,” price regulations may violate due process); *see also* *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (explaining due process requires “real and substantial relation” to end); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888) (stating that due process requires “equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property”); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (“The ‘liberty’ mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”).

2. 198 U.S. 45, 56 (1905) (“In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.”).

3. 410 U.S. 113, 153 (1973) (grounding abortion rights in “the Fourteenth Amendment’s concept of personal liberty”); *id.* at 159 (assessing what interests are “reasonable and appropriate” for state to pursue in regulating abortion).

4. U.S. CONST. amend. I (“Congress shall *make no law* . . . .” (emphasis added)).

5. U.S. CONST. amend. XIV, § 1 (“No state shall *make or enforce any law* which shall . . . .” (emphasis added)).

Court denied to African Americans). Following Lincoln<sup>6</sup> and S.S. Nicholas,<sup>7</sup> and of course my conference-sidekick Matt Franck,<sup>8</sup> I see the Court's due-process holding as making a simple mistake: assuming that moving to free territories with slaves is not itself a violation of the law. The key steps in the reasoning leading to the Court's citizenship holding, however—the Court's inference of the lack of citizenship for African Americans from their lack of equal citizenship, and seeing a lack of equal citizenship in African Americans' subjection to marital segregation—were actually incorporated into the Privileges or Immunities Clause. Equal citizenship is the substantive core of the Fourteenth Amendment—a core that depends on the same two conditional claims that *Dred Scott* embraced, but turned upside down. *Dred Scott* inferred the lack of African-American citizenship from their lack of equal citizenship, which it inferred from degrading practices like marital segregation. With the Fourteenth Amendment guaranteeing freedmen the rights of American citizenship, however, these conditionals promote equality. Citizenship entails equal citizenship, which in turn entails freedom from government-imposed stigma. *Dred Scott's modus tollens* and Republicans' *modus ponens* thus use the same premise: citizens must be treated equally and with respect.

I assess *Roe* similarly distinguishing due-process rights from those of citizenship. *Roe's* reliance on substantive due process was of course fatally flawed. However, Privileges or Immunities Clause challenges to abortion regulations are not frivolous on their face. Republicans repeatedly presupposed in 1866 that women would be entitled to the same civil rights as similarly-situated fellow citizens of the United States. The lack of women's voting rights was used as the explanation for why it was constitutional under the Privileges or Immunities Clause to deny voting rights to the freedmen. Reliance on substantive due process is therefore a mere surface flaw in *Roe* that could be remedied by switching to the Privileges or Immunities Clause. The most fundamental problem with *Roe* was not subjecting abortion restrictions to scrutiny, but its mishandling of the actual arguments about abortion. Professor Arkes has shown admirably, both in this symposium and elsewhere, how poorly the Court dealt with arguments for fetal personhood.<sup>9</sup> As I will explain, the Court similarly mangled the two main arguments for abortion rights, those of Judith Thomson and Michael Tooley.

My twelve problems with substantive due process consist of three quartets: four English problems, four antebellum American, and four from Reconstruction.

PROBLEM 1: THE TEXTS OF THE PREDECESSOR ENGLISH STATUTES CONCERN  
LAWFULNESS, NOT SUBSTANTIVE REASONABLENESS

Chapter 39 of Magna Carta says, "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go

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6. See *infra* note 70 and accompanying text.

7. See *infra* note 71 and accompanying text.

8. See *infra* note 53 and accompanying text.

9. See Arkes, *supra* note \*.

against him or send against him, *except by the lawful judgment of his peers or by the law of the land.*<sup>10</sup> It is a prohibition on the *methods* by which the king was to act. “By” translates the Latin “per” in the original “*per legale iudicium parium suorum vel per legem terrae.*”<sup>11</sup>

Chapter 39 reinforces the importance of the law in a way quite natural for those already possessing control over the law’s content. Parliament’s legislative power is the power to tell the king the substantive content of the laws. Parliament maintained control over the substantive content and reasonableness of the law itself simply by *being Parliament*—that is, by possessing legislative power. The Reconstruction Republicans in Congress, for their part, exercised substantive control over the reasonableness of state law through the Fourteenth Amendment’s Privileges or Immunities Clause. The power to determine the content of the law—exercised by Parliament in 1215, and Congress in 1868, under the Privileges or Immunities Clause—is, however, naturally supplemented by bans on lawless action or inaction. Even the most powerful control over lawmaking would mean little if executive officials were free to act *outside* the law. Chapter 39 therefore insists that the king can only rule over free men *lawfully*. This principle became the Fifth and Fourteenth Amendments’ Due Process Clauses. A related worry was that Parliament might pass laws that the king left unenforced. Chapter 40 therefore requires that the king affirmatively enforce the law: “Nulli vendemus, nulli negabimus, aut differemus, rectum aut iusticiam.”<sup>12</sup> “We will not sell, or deny, or delay right or justice to anyone.”<sup>13</sup> As I have argued at great length elsewhere, this principle became the Fourteenth Amendment’s Equal Protection Clause.<sup>14</sup>

Because chapter 20 of Magna Carta separately bans certain sorts of excessive fines—“ameracements” imposed by the king’s discretionary mercy in lieu of harsher punishment—it would be awkwardly redundant if chapter 39 were also to contain a generic prohibition on unreasonably excessive deprivations of property. Chapter 20 requires for freemen that such fines “for a slight offence” be “in accordance with the degree of the offence” and that those “for a grave offence” be “in accordance with the gravity of the offence.”<sup>15</sup> Chapter 39 presumably does not duplicate this provision; Blackstone, for instance, discusses the rules against

10. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (2d ed. 1914) (English translation) (emphasis added).

11. 1 STATUTES OF THE REALM 11 (1215) (emphasis added).

12. *Id.*

13. McKechnie, *supra* note 10, at 395.

14. See Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEO. MASON U. CIV. RTS. L.J. 219, 296 (2009). Some later forms of Chapter 39 require that the king not deprive freemen of their liberties, in the plural. See, e.g., 25 Edw. I, Magna Charta, c. 29, 1 STATUTES OF THE REALM 117 (1297) (“No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him,] but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”). This plural form can be read to reflect a similar sort of rule-of-law requirement as Chapter 40: the king was not permitted to alter freemen’s legal rights or liberties as determined by Parliament.

15. McKechnie, *supra* note 10, at 284.

excessive fines without mentioning Magna Carta law-of-the-land provisions or their progeny anywhere in the context.<sup>16</sup>

Chapter 39 was clarified in six statutes passed under Edward III, who reigned from 1327 to 1377. All six clearly aim at the administrative regularity of the king's actions, not their substantive justification. Here is the statute of 1331: "[N]o man from henceforth shall be attached by any accusation nor forejudged of life or limb, nor his lands, tenements, goods, nor chattels seised into the King's hands, *against the form of the Great Charter, and the law of the land.*"<sup>17</sup> Magna Carta concerns the "form" of the manner in which the king acted and accused people. Forejudgment without proper judicial inquiry was prohibited.

The 1351 statute cites Chapter 39 in a whereas clause, then adds:

[N]one shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by *process made by writ original at the common law*; nor that none be out of his franchises, nor of his freeholds, unless he be duly *brought into answer*, and forejudged of the same by the *course of the law*; and if any thing be done against the same, it shall be redressed and holden for none.<sup>18</sup>

Here we see "process" used to refer to the method, or "manner," by which the king acted. To be "brought into answer" according to the "course of the law" is required.

Three years later, in 1354, the "due process of law" formulation is born, though it is just a juggling of words used in 1351: "[N]o man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to Death, without being *brought in Answer by due Process of the Law.*"<sup>19</sup> "Due Process of the Law" is used, plainly, as a restriction on the *method by which subjects were brought in answer*. Later formulations like the Fifth Amendment would leave out the words "being brought in answer by," but the original context makes crystal clear that "due process" was simply a method of answering accusations.

In 1362, we get another reiteration of Magna Carta, and the requirement that it be "put in due execution, without putting disturbance, or making arrest contrary to them *by special command*, or in other manner."<sup>20</sup> The concern was with

16. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 378–79 (1769).

17. 5 Edw. 3, c. 9, 1 STATUTES OF THE REALM 267 (1331) (emphasis added).

18. 25 Edw. 3, stat. 5, c. 4, 1 STATUTES OF THE REALM 321 (1351) (emphasis added).

19. 28 Edw. 3, c. 3, 1 STATUTES OF THE REALM 345 (1354) (emphasis added).

20. 36 Edw. 3, Roll of Parliament no. 9, in PARLIAMENT ROLLS OF MEDIEVAL ENGLAND (1362) (emphasis added). Some have taken Edward's assent to the petition to make it a statute. See, e.g., HERBERT BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW: AND EXEMPLIFIED BY CASES 178 (1885) (argument of Edward Littleton in *Darnel's Case* from 1627) (contending Edward's answer "makes it an act of Parliament"). Others are doubtful. See, e.g., Charles Donahue, Jr., *Magna Charta in the Fourteenth Century: From Law to Symbol?: Reflections on the "Six Statutes,"* 25

lawless “special command.” The same statute also said that Magna Carta required “that no man be taken or imprisoned by special command without Indictment, or other *due process to be made by the law*.”<sup>21</sup> The statute recited that “oftentimes it hath been, and yet is, many are hindered, taken and imprisoned without Indictment, or other *process made by the law upon them*.” The statute requires “those to be delivered, which are so taken by special command against the form of the Charter and Statutes as aforesaid.”<sup>22</sup>

The next year, in 1363, a statute paraphrased Magna Carta as requiring “that no man be taken or imprisoned, or put out of his freehold, without due process of the law,”<sup>23</sup> but noted that “nevertheless divers persons make false suggestions to the King himself, as well for malice as otherwise, whereof the King is often grieved, and divers of the realm put in great damages, contrary to the form of the same statute.”<sup>24</sup> It then required that “all they that make such suggestions be sent, with their suggestions, to the chancellor or treasurer, and they and ever of them . . . endure the same pain that the other should have had . . . and that then process of the law be made against them: without being taken or imprisoned, against the form of the same charter, and other statutes.”<sup>25</sup> We see the direct equation of Magna Carta and “due process of the law” and, again, a concern with “form.”

In the last of Edward III’s six elaborations of Magna Carta, we get a 1368 statutory complaint about the

mischiefs and damages done to divers of his commons by false accusers, which oftentimes have made their accusations more for revenge and singular benefit, than for the profit of the King, or of his people, which accused persons, some have been taken, and sometime caused to come before the King’s council by writ, and otherwise upon grievous pain against the law.<sup>26</sup>

The statute required “for the good governance of the commons, that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original.”<sup>27</sup> Again we see a concern with “good governance” and the methods by which people are “put to answer.” Due process is a method of answering accusations.

Parliament’s 1628 complaint against Charles I in the Petition of Right reiterated Magna Carta and the statutes of Edward III. Sections 3 and 4 repeated Magna Carta Chapter 39 and the due-process statute of 1354.<sup>28</sup> Section 5 then said that

Wm. & Mary Bill. Rts. J. 591, 606 (2016) (Edward’s reply to the petition “is a bit vague”); *id.* at 605 (calling 1362 petition the “fourth of the six so-called statutes”).

21. 36 Edw. 3, Roll of Parliament no. 20 (emphasis added).

22. 36 Edw. 3, Roll of Parliament no. 22 (emphasis added).

23. 37 Edw. 3, c. 18, 1 STATUTES OF THE REALM 382 (1363).

24. *Id.*

25. *Id.*

26. 42 Edw. 3, c. 3, 1 STATUTES OF THE REALM 388 (1368).

27. *Id.*

28. 3 Car. 1, c. 1, §§ 3–4, 5 STATUTES OF THE REALM 23–24 (1628).

against the tenor of the said statutes . . . divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of habeas corpus, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer according to the law.<sup>29</sup>

As in 1362, royal "special command" and the lack of a specified "cause" were Parliament's target, and as in 1368, the demand was the opportunity to "make answer."

Section 7 of the Petition invoked the 1351 statute, which itself had invoked Magna Carta, and complained about "commissioners with power and authority to proceed within the land, according to the justice of martial law" who would "by such summary course and order as is agreeable to martial law, and is used in armies in time of war, to proceed to the trial and condemnation of such offenders, and them to cause to be executed and put to death according to the law martial."<sup>30</sup> Parliament again identifies executive lawlessness as Magna Carta's concern: a "summary course and order" in the methods of "trial and condemnation" of a sort only appropriate in war.

Finally, the Habeas Corpus Act of 1679 set out very detailed regulations of "officers, to whose custody any of the King's subjects have been committed for criminal or supposed criminal matters."<sup>31</sup> They were to "certify the true causes of his detainer or imprisonment."<sup>32</sup> Release was required "unless it shall appear . . . that the party so committed is detained upon a legal process, order or warrant, out of some court that hath jurisdiction of criminal matters, or by some warrant signed and sealed with the hand and seal of any of the said justices or barons, or some justice or justices of the peace, for such matters or offences for the which by the law the prisoner is not bailable."<sup>33</sup> The statute also required that "no person or persons which shall be delivered or set at large upon any habeas corpus, shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the *legal order and process* of such court wherein he or they shall be bound by recognizance to appear, or other court having *jurisdiction of the cause*."<sup>34</sup> The Habeas Corpus Act uses "legal process"—a phrase grammatically synonymous, of course, with "process of law"—as a requirement of proper jurisdiction. Again, the rule of law—i.e., the institutional arrangement of law-speaking authority, or jurisdiction—was Parliament's concern.

29. *Id.* § 5 at 24.

30. *Id.* § 7.

31. 31 Car. 2, par. 1, 5 STATUTES OF THE REALM 935 (1679).

32. *Id.*

33. *Id.*, par. 2, at 936.

34. *Id.*, par. 5 (emphasis added).



PROBLEM 2: IN CONTEXT, PREDECESSOR ENGLISH STATUTES OBVIOUSLY DID NOT  
GRANT THE KING PARLIAMENT-TRUMPING REASONABLENESS REVIEW

The contexts of these English statutes, like their texts, show plainly that due process is not a requirement of substantive reasonableness. All nine of them were parliamentary *restrictions* on royal power, not expansions. The Parliaments of the thirteenth, fourteenth, and seventeenth centuries were not granting John, Edward III, or the Charleses the power to review Parliament's own earlier statutes for substantive reasonableness. But if "without due process of law" (or its predecessor principles) means "unreasonably," then Parliament was doing just that: telling the king not to behave unreasonably, any earlier acts of Parliament notwithstanding. The morally-adequate-justification interpretation of "due process of law" makes no sense at all as a *demand* given by a Parliament to a king. Parliament was not telling the king not to detain people unless detention was morally justified; it was telling the king not to detain people *lawlessly*, i.e., inconsistently with what Parliament had decreed.

My point about context should not be overread. I make no general contention that, in America, constitutional principles taken from England govern only the executive and not legislatures. What the English Parliament imposed on their king, the American people impose more generally on all parts of their government; when transplanted here and placed in the mouth of the people as our constitutional author, such principles taken from England now bind the legislature too. Pictorially:

England	America		
Parliament	The People		
↓		↓	
Due Process &c.	Due Process &c.		
↓	↙	↓	↘
King & king's officials	Legislative Officials	Executive Officials	Judicial Officials

Context cannot trump text for those oath-bound to the principle expressed in the text. But we must read the principles expressed in a common English/American text so that they can make sense in *either* English *or* American constitutional soil. If a principle which the American constitutions now put above all three branches is genuinely the *same* principle as the one which Parliament used to put itself over the king, that principle must make sense in its original context, not just the American one. Principles of due process must therefore make sense *both* as a demand from Parliament to the king, as they functioned originally in England, and as a demand from the people to all three branches of government, as they function here. A reasonableness principle fails such a test.

PROBLEM 3: THE ABSENCE OF DUE PROCESS IN *BONHAM'S CASE*

A great deal of ink<sup>35</sup> has been spilled over *Dr. Bonham's Case* from 1610,<sup>36</sup> in which Edward Coke—the same force behind the parliamentary complaints with Charles I in the Petition of Right—held that statutes contrary to reason were void.<sup>37</sup> In general, I agree with Blackstone's view that *Bonham's Case* stands only for an interpretive principle akin to the absurd-results canon. We are not to *interpret* Parliament to have enacted something absurd and contrary to reason, but if Parliament is unmistakably clear, its own judgment about absurdity or its lack is controlling.<sup>38</sup> The interpretation of *Bonham's Case* as such, however, is not my chief concern. I want to stress only what the case tells us about the interpretation of the Due Process Clause. If “by the law of the land” or “by due process of law” meant “reasonably” in a way that would invite the king's agents to assess the reasonableness of acts of Parliament, it would be bizarre for Coke not to mention these provisions in the case.

## PROBLEM 4: BLACKSTONE SAYS DISPROPORTIONATE SENTENCES ARE CONSISTENT WITH MAGNA CARTA AND WITH THE 1331 AND 1354 STATUTES

Moving ahead to the eighteenth-century immediate English background to the American founding, here is Blackstone's commentary on the relationship of criminal punishments to Magna Carta:

At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical: and that whenever any laws direct such

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35. S.E. Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543, 543 n.1 (1938) (literature was “voluminous and repetitious” even eighty years ago); R.H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEG. ANALYSIS 328 (2009) (literature on the case is “more voluminous and more repetitious” now).

36. 77 Eng. Rep. 638, 646 (1610).

37. *Id.* at 652 (“[T]he common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . .”).

38. 1 BLACKSTONE, *supra* note 16, at 91 (1765) (“[A]cts of parliament that are impossible to be performed are of no validity: and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it. . . . Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel. [Here Blackstone cites *Bonham's Case*.] But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.”). Thanks to Matt Franck for pointing out this passage at the conference. For a review of some of the literature taking a similar line, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1689–92 (2012).

destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it. The statute law of England does therefore very seldom, and the common law does never, inflict any punishment extending to life or limb, unless upon the highest necessity: and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law.<sup>39</sup>

As authority, Blackstone then quotes Magna Carta Clause 39 (in Latin) and the 1331 and 1354 statutes, i.e., due process of law.<sup>40</sup> Note particularly here Blackstone's distinction between what English law does *rarely* and what it never does at all, which he says tracks the distinction between execution for "light and trivial causes" and execution "without the express warrant of law." The "highest necessity" for the destruction of life and limb—i.e., substantive reasonableness or proportionality—is *usually* present. But Blackstone claims that statutes imposing disproportionate punishments will themselves *always* give notice to subjects in advance, because of Magna Carta and its progeny such as the 1354 due-process statute. Disproportionate punishment itself, it is plain, does not violate those statutes as Blackstone reads them. They require an "express warrant of law," but *not* reasonableness.

#### PROBLEM 5: SIXTH AMENDMENT "PROCESS" REFERS TO FACT-FINDING WRITS

Arriving in America after our English tour, consider first a surprisingly-neglected aspect of our constitutional text, not yet pointed out in the due-process literature that I have read: defendants' Sixth Amendment right "to have compulsory *process* for obtaining witnesses in his favor."<sup>41</sup> Sixth Amendment "process" is an order from a court requiring people to answer questions, just as in 1354 "due process of law" was a method by which defendants were themselves "brought in answer." Fifth-Sixth Amendment semantic parity therefore undermines substantive due process. Keith Jurow's 1975 article, while it does not mention the Sixth Amendment, digs into the history of the word "process," and gives a conclusion that fits perfectly with this reading:

Assuredly there may have been disagreement about what process was "due" in a particular circumstance, but the word "process" itself meant writs. To be more precise, it referred to those writs which summoned parties to appear in

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39. BLACKSTONE, *supra* note 16, at 133. Note that Blackstone's definition of lawlessness making a constitution "in the highest degree tyrannical" fits hand-in-glove with Madison's definition in *Federalist No. 47*: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Blackstone and Madison's fears were the same: a single power, subject to no one else, both formulating rules and applying them to harm particular people.

40. BLACKSTONE, *supra* note 16, at 133–34.

41. U.S. CONST. AMEND. VI. Note the generic "his," by the way—women defendants obviously had such rights too. *Id.*

court, as well as those by which execution of judgments was carried out. There are numerous examples that this very specific use of the term “process” continued without change long after the fourteenth century.<sup>42</sup>

On a related note, it does seem plausible to me that a general right to introduce evidence on material issues is an element of “due process of law” even outside the criminal context. Courts considering constitutional questions are duty-bound not to ignore material considerations—not to decide the Constitution’s requirements based on an incomplete presentation of the material facts. The Due Process Clause itself does not make particular facts material, but when other law, like the Privileges or Immunities Clause, makes those facts material, due process requires courts to make a full investigation and not leave on the table valuable evidence about those considerations. Accordingly, cases like *O’Gorman & Young v. Hartford Fire Insurance*<sup>43</sup> were wrongly decided.<sup>44</sup> In that case, the Court refused to draw any adverse inference from the government’s failure to justify its regulations, despite conceding that if regulatory distinctions were unjustified, they would in fact be unconstitutional. *A fortiori*, later cases like *Williamson v. Lee Optical*<sup>45</sup> are too deferential to the government. The four *O’Gorman* dissenters would have made an adverse inference from the government’s failure to justify its regulatory distinction, and so placed a burden of *production* on the government.<sup>46</sup> But this sort of burden is consistent with placing the burden of *persuasion*, as usual, on the party challenging a statute as unconstitutional. *Production* burdens properly depend on who would have the relevant evidence, if it existed; *persuasion* burdens properly depend on whether errors of omission or errors of commission are more serious.

PROBLEM 6: ANTEBELLUM SUBSTANTIVE DUE PROCESS EXAMPLES CONCERN ONLY  
ANTI-RETROACTIVITY PRINCIPLES, NOT REASONABLENESS REVIEW

Ryan Williams has recently canvassed this material with care in his Yale Law Journal piece, *The One and Only Substantive Due Process Clause*,<sup>47</sup> and it has generated a similarly careful and helpful response by Nathan Chapman and Michael McConnell.<sup>48</sup> Williams classifies the protection of vested rights and the requirement of legal generality as “substantive.”<sup>49</sup> However, despite this

42. Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEG. HIST. 265, 272 (1975).

43. 282 U.S. 251, 257–58 (1931).

44. See Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Vagueness, Executive Review, and Precedent*, 54 SANTA CLARA L. REV. 403, 444–46 (2014) (criticizing *O’Gorman* along this line).

45. 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

46. *O’Gorman*, 282 U.S. at 268 (adverse inference about reasonableness of rates required, “no extraordinary conditions having been disclosed by the defendant”).

47. Ryan Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

48. Chapman & McConnell, *supra* note 38.

49. *Id.* at 423–25.

questionable terminological choice, Williams makes clear that there is no significant antebellum support for the view that “without due process of law” means “unreasonably.” Williams writes: “[W]ith respect to the broader police power and fundamental rights versions of substantive due process . . . neither . . . had gained widespread support by the time of the Fourteenth Amendment’s enactment in 1868.”<sup>50</sup> He adds, “[T]he two characteristic features of *Lochner*-era police powers jurisprudence—close judicial scrutiny of legislative ends and means and the focus on protection of individual ‘liberty’—had not yet become widely embraced by the time of the Fourteenth Amendment’s enactment.”<sup>51</sup> Williams acknowledges the sharp distinction between antebellum cases and the reasonableness-based reading of due process that emerged in *Munn* and its progeny: “The version of substantive due process that predominated during the *Lochner* era is distinguishable from both the vested rights and general law interpretations described above. Unlike those interpretations . . . the *Lochner*-era Court focused principally on the reasonableness of challenged legislation . . .”<sup>52</sup> Matt Franck has recently canvassed twenty-one of the most-frequently-cited antebellum examples of substantive due process and shown (in my favorite pound-for-pound footnote of all time) that “none invalidated a statute of general application and prospective effect, regulating future behavior or conduct, which is the central characteristic of the modern substantive due process rulings that gave the doctrine its name.”<sup>53</sup>

I object most to Williams’s title. As he notes himself, anti-retroactivity vested-rights rules are not the same sort of substantive due process we see in cases like *Munn*, *Lochner*, *Roe*, and *Obergefell*. We should not give vested-rights rules a name that suggests a stronger conceptual tie to *Lochner* and its kin than actually exists. Williams’s title is thus apt to mislead those who do not look carefully at the details of his exposition.<sup>54</sup>

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50. Williams, *supra* note 47, at 498.

51. *Id.* at 499.

52. *Id.* at 426.

53. Matthew J. Franck, *What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over “Substance” and “Process,”* 4 AM. POL. THOUGHT 120, 130–31 n.16 (2015) (reviewing Bayard v. Singleton, 3 N.C. 42 (N.C. Sup. Ct. 1787); Bowman v. Middleton, 1 Bay 252 (S.C. 1792); Butler v. Craig, 2 H. & McH. 214 (Md. 1787); Ham v. McClaws, 1 Bay 93 (S.C. Ct. of Common Pleas 1789); State v., 1 Hayw. 38 (N.C. Superior Ct. 1794); Zylstra v. Corp. of City of Charleston, 1 Bay 382 (S.C. Ct. of Common Pleas 1794); Lindsay v. E. Bay St. Comm’rs, 2 Bay 38 (S.C. Ct. of Common Pleas 1796); Tr. of the Univ. of North Carolina v. Foy, 5 N.C. 58 (1805); Holden v. James, 11 Mass. 396 (1814); Townsend v. Townsend, 7 Tenn. 1 (1821); Vanzant v. Waddel, 10 Tenn. 260 (Tenn. 1829); Hoke v. Henderson, 15 N.C. 1 (1833); Jones’s Heirs v. Perry, 18 Tenn. 59 (1836); In re John & Cherry Sts., 19 Wend. 659 (N.Y. 1838); Ex parte Woods, 3 Ark. 532 (1841); Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843); Brown v. Hummel, 6 Pa. 86 (1847); Ross v. Irving, 14 Ill. 170 (Ill. Sup. Ct. 1852); Newland v. Marsh, 19 Ill. 376 (Ill. Sup. Ct. 1857); Sears v. Cottrell, 5 Mich. 251 (Mich. 1858); and Sadler v. Langham, 34 Ala. 311 (1859)).

54. In addition to preferring a different characterization of the material relevant to the Fourteenth Amendment, I also disagree with Williams’s view that strong anti-retroactivity principles were *not* embodied in the *Fifth* Amendment. As was seen above, *supra* notes 39 and 40 and accompanying text, Blackstone noted that disproportionate laws satisfied due process because they gave notice in advance to violators, and as will be seen below, *infra* note 70 and accompanying text, Lincoln noted that the

As Williams also notes,<sup>55</sup> some cases, beginning with several in Tennessee, contain language requiring that a “law of the land” apply to “all persons or officers who are or may be in the same situation and circumstances”<sup>56</sup> or that it “operat[e] equally,”<sup>57</sup> not be “partial,”<sup>58</sup> or give “unpopular individuals and minorities . . . equal rights.”<sup>59</sup> If taken to refer to moral reality—that is, similar-situatedness, equality, and impartiality *with respect to the morally-proper goals of the state*—such language could embody a strong ban on discrimination. But we could read these terms instead to refer to similarity and equality *with respect to a statute’s generally-expressed property*. Statutes, to be properly general, must *specify something about* those to whom it applies, rather than simply designating or picking them out by name.

The glaringly prominent example of discriminatory deprivation of liberty—racially-based slavery—counsels strongly against the strong antidiscrimination reading of the Tennessee cases and their progeny. Williams tells a strikingly Southern substantive-due-process origin story: all three states he counts as adopting it by 1838,<sup>60</sup> and nine of the fourteen before 1860,<sup>61</sup> enslaved people on racial grounds. None of the judges in any of these states seem to have ever considered that their racially-discriminatory laws perpetuating slavery might be subject to attack as insufficiently general.

PROBLEM 7: REPUBLICANS MORALLY CONDEMNED SLAVERY BUT AGREED THAT SLAVES COULD BE “LAWFULLY CLAIMED” AND “LAWFULLY RECLAIMED”

Approaching closer in time to the Fourteenth Amendment, as Williams notes, “a handful of statements” from some abolitionists “connected due process with an abstract and nonspecific guarantee of liberty, suggesting that any interference with natural rights would violate due process.”<sup>62</sup> These ideas had *some* influence among important Republicans: in April 1864, shortly after losing the Thirteenth Amendment drafting debate, Charles Sumner appealed to “the ancient truth that injustice cannot be ‘law,’ but is always to be regarded as an ‘abuse’ or a ‘violence,’ even though expressed in the form of ‘law.’”<sup>63</sup> In February 1866, attempting to explain how his early proposal in the pre-Fourteenth-Amendment discussions was already contained in the Fifth Amendment, John Bingham spoke of

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Missouri Compromise satisfied Fifth Amendment due process only because it was passed “in advance” of confiscations. Blackstone and Lincoln’s readings seem compelling to me as readings of the Fifth Amendment and its background principles, not just the Fourteenth Amendment’s.

55. Williams, *supra* note 45, at 462 n.247.

56. Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 103, 123 (1854).

57. Jones’s Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 71–72 (1836).

58. Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 605 (1831).

59. Wally’s Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 557 (1831).

60. Williams, *supra* note 45, at 462 (Carolinas and Tennessee).

61. *Id.* at 463 (adding Alabama, Arkansas, Georgia, Maryland, Mississippi, and Texas).

62. *Id.* at 477.

63. CONG. GLOBE, 38th Cong. 1st Sess. 1712 (1864).

law in its *highest sense*, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.<sup>64</sup>

Note, however, that Bingham himself saw the context-sensitivity of the word “law.” Eighty years before, James Madison likewise referred to the context-sensitivity of “legal” in his explanation of the drafting of the fugitive slave clause: “[T]he term ‘legally’ was struck out, and ‘under the laws thereof,’ inserted after the word ‘State,’ in compliance with the wish of some who thought the term legal equivocal, and favoring the idea that slavery was legal in a moral view.”<sup>65</sup>

It is true, then, that natural-rights readings of “law” were on offer during Reconstruction, and Sumner was also right that natural-rights usages of the word “law” go back very far, at least to Cicero. It is quite plain, however, that Sumner and Bingham’s usages were outliers, even among Republicans. The Northwest Ordinance of 1787, Missouri Compromise of 1820, and Wilmot Proviso of 1847—three texts whose prestige in Republican eyes could scarcely be overstated—use “lawfully” positivistically, not in a way that implies justice, reasonableness, or consistency with natural rights. The Ordinance, Compromise, and Proviso all declare territories free on the condition that slaves “lawfully claimed” elsewhere—lawfully claimed under, moreover, racially-discriminatory laws—may still be “lawfully reclaimed.”<sup>66</sup> Moreover, Republicans who celebrated the Ordinance, Compromise, and Proviso in one breath would often condemn the injustice of slavery in their next.<sup>67</sup> To be *lawfully* claimed or reclaimed as a slave was obviously not to be *morally* or *justly* or *reasonably* claimed.

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64. CONG. GLOBE, 39th Cong. 1st Sess. 1094 (1866) (emphasis added). Bingham here displays his characteristic love of “euphony and indefiniteness of meaning.” See GEORGE S. BOUTWELL, 2 REMINISCENCES OF SIXTY YEARS IN PUBLIC AFFAIRS 41–42 (1902) (noting that Bingham was “charm[ed]” by these qualities of the Privileges or Immunities Clause).

65. 5 ELLIOT’S DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 550 (1845) (Madison’s notes for September 15, 1787).

66. See An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50, 53 (Aug. 7, 1789) (readopting Northwest Ordinance of July 13, 1787); Act of Mar. 6, 1820, 3 Stat. 545, 548, § 8; CONG. GLOBE, 29th Cong., 2d Sess. 303 (1847).

67. See, e.g., Letter from Abraham Lincoln to A.G. Hodges (Apr. 4, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 281 (Basler ed., 1953) (“If slavery is not wrong, nothing is wrong.”); Address at Cooper Institute, N.Y.C., Feb. 27, 1860, in 3 *id.* at 539 (Republicans “declare our belief that slavery is wrong”); CHARLES V. DELAND, HISTORY OF JACKSON COUNTY, MICHIGAN 178 (1903) (resolutions of July 6, 1854, founding of Republican Party in Michigan) (“slavery is the violation of the rights of man as a man”); Platform and Resolutions, VT. WATCHMAN & STATE JOURNAL, July 21, 1854, at 2 (“[T]he institution of Slavery is a great moral, social, and political evil.”); and Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL’Y 73, 98 (2017).

PROBLEM 8: LINCOLN'S RESPONSE TO *DRED SCOTT* MAKES THE CLASSIC ANTI-SUBSTANTIVE-DUE-PROCESS INFERENCE FROM THE FIFTH AMENDMENT

My last antebellum problem for substantive due process stems from Lincoln's response to *Dred Scott*. The Court's reasoning here—I italicize the key mistake—goes by very quickly: “[A]n act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular Territory of the United States, *and who had committed no offence against the laws*, could hardly be dignified with the name of due process of law.”<sup>68</sup> The Court's misstep here is its failure to recognize that the Missouri Compromise was itself a law *forbidding slaveholders to bring slaves into free territory*, not merely confiscating slaves once there. Carrying slaves into free territory was of course an “offence against the laws.”<sup>69</sup> In making this point in his notes for the Lincoln-Douglas debates, Lincoln made clear that the Fifth Amendment protected life, liberty, and property only with guarantees of lawfulness, not absolutely:

The Constitution itself impliedly admits that a person may be deprived of property by “due process of law,” and the Republicans hold that if there be a law of Congress or territorial legislature telling the slaveholder in advance that he shall not bring his slave into the Territory upon pain of forfeiture, and he still will bring him, he will be deprived of his property in such slave by “due process of law.” And the same would be true in the case of taking a slave into a State against a State constitution or law prohibiting slavery.<sup>70</sup>

S.S. Nicholas made the same point at somewhat greater length in his response to *Dred*:

If it had not come from so high a source, the intimation that the prohibition *deprived* a slave-owner of his property within the meaning of the Constitution, would be deemed the excess of absurdity. So long as his slave remains outside the territory the law does not touch the property. If he brings it within the territory, and thereby subjects the slave to emancipation by operation of law, it is his own voluntary act in *violation of law*, and the consequent loss, whether considered as a penalty or otherwise, is appropriate and just according to the long-established usage of American legislation. It is his voluntary act in connection with the law gives the negro power to have him summoned before a court and get his right condemned by a judgment, just as smuggled goods are condemned. Or the master may sue to recover and get his right adjudged, and in either way he is deprived of his property by *due process of law*, according to

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68. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (emphasis added).

69. The element of *entry into* the territory *with* slaves is an important distinction between the Missouri Compromise and other proposed legislation, like a D.C. slavery ban, which would free large numbers of slaves already residing there.

70. Abraham Lincoln, *Notes for Speeches*, in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 67, at 101. (Basler ed., 1953).



any proper interpretation of that technical phrase.<sup>71</sup>

The difference between *Dred Scott* on the one hand and Lincoln and Nicholas on the other is narrower than we might expect. *Dred Scott* allowed that those who commit an “offence against the laws” may be subject to forfeitures. But the Court read the Missouri Compromise’s forfeiture from an awkwardly cramped, *ex post* perspective. It imagined the Missouri Compromise operating only to confiscate slaves *already* in the taboo portions of the territories. We are invited to see federal power swooping in to confront the north-of-36-30 slaveholder and taking away his property merely for something that happened in the past. But Lincoln and Nicholas construed the Compromise more naturally, as a prohibition on settlers *entering* those areas with slaves. *Crossing* the 36-30 line (or the boundary of Missouri) with slaves was the key “offence against the laws,” not merely *being found* north of the line with them. Taney, Lincoln and Nicholas all agreed that due process was a right to have one’s rights properly adjudicated according to pre-existing law. They differed only on whether the Compromise could be seen as pre-existing or not.

PROBLEM 9: “DULY CONVICTED” IN THE THIRTEENTH AMENDMENT ALLOWS  
DISPROPORTIONATE SENTENCES

We come, then, to our quartet of problems for substantive due process related to Reconstruction. These arguments all trade on comparisons between the Due Process Clause’s text and other provisions: one its similarity to the Thirteenth Amendment and three its contrast with the Privileges or Immunities Clause.

The Thirteenth Amendment’s exception allows slavery or involuntary servitude only for those “duly convicted” of crime. In an earlier article in this journal, I dig into this phrase in some detail.<sup>72</sup> In addition to overlapping “due process” linguistically, several observers during Reconstruction treated the two phrases as synonymous; no one distinguished them.<sup>73</sup> Moreover, during the 1866 Congressional debates in the months just before the adoption of the Due Process Clause, several leading Republicans—John Farnsworth, Thaddeus Stevens, William Higby, Henry Deming, and Burton Cook—urged without contradiction that the Thirteenth Amendment allowed slavery to be imposed *even for minor crimes*, though of course, like Blackstone, they did not approve of disproportionate sentences morally.<sup>74</sup> These Republicans made clear that to be “duly

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71. A REVIEW OF THE DECISION OF THE SUPREME COURT IN THE DRED SCOTT CASE 26 (1857) (emphasis in original). Nicholas identified himself in 1857 simply as “A Kentucky Lawyer,” but then included the essay in his CONSERVATIVE ESSAYS: LEGAL AND POLITICAL 197 (1865).

72. Green, *supra* note 67, at 90–96.

73. *Id.* at 90–92. This synonymy is obviously limited to the criminal field; *in such a setting* to be duly convicted seems to be no more and no less than to be convicted by due process of law. Due process would, of course, cover civil deprivations of liberty or property too, despite the fact that in non-criminal spheres no one is “duly convicted.”

74. CONG. GLOBE, 39th Cong. 1st Sess. 332, 383, 427, 655, 1056, 1123 (1866).

convicted”—i.e., to be convicted by due process of law—was not necessarily to be convicted of a sufficiently-serious crime—i.e., to be deprived of liberty *reasonably*.

PROBLEM 10: “LAW” IN THE PRIVILEGES OR IMMUNITIES CLAUSE ENTAILS NEITHER JUSTICE NOR REASONABLENESS

Problem 7 above noted the existence of some historical support for strongly-justice-infused readings of the word “law” in certain contexts. Far more prominent, however, were the Republican-celebrated Northwest Ordinance, Missouri Compromise, Wilmot Proviso, which all refer to “lawfully claimed” and “lawfully reclaimed” slaves. “Lawful” to Republican ears did not entail either reasonableness or consistency with natural justice. “Law” in the Privileges or Immunities Clause is another such context: “No state shall make or enforce any *law* which shall abridge the privileges or immunities of citizens of the United States.”<sup>75</sup> Elsewhere I have explained at great length why the Privileges or Immunities Clause requires equality in the civil rights of all similarly-situated citizens of the United States.<sup>76</sup> The Clause took aim at the same deeply unjust Black Codes as had the Civil Rights Act of 1866, and obviously applied the term “law” to them.<sup>77</sup>

If “law” is always unambiguously a good thing, there is room to read it in a thickly normative way, as entailing justice or reasonableness. And indeed, the Due Process and Equal Protection Clauses treat “law” favorably—both “due process of law” and “equal protection of the laws” are requirements. The Privileges or Immunities Clause, however, treats “law” not as a requirement, but as the *object of its prohibition*. In the context where the Privileges or Immunities Clause has a tangible impact, a state may not enforce a “law” that abridges citizens’ rights. That sort of “law” is of course a *bad* thing from the perspective of the Clause. If an unjust law were really a full-fledged contradiction in terms, then unjust state actions would be *exempt* from the operation of the Clause. But obviously they were not.

75. U.S. CONST. amend. XIV, §1 (emphasis added).

76. See generally CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE (2015). Textually, the key move is the implicit comparison to similarly-situated fellow citizens, but this move was made in several textually-analogous settings. See, e.g., 4 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 1–2 (1829) (“in analogous situations” added to hypothetical proposed constitutionalization of “rights, advantages, and immunities of citizens of the United States” in Louisiana Cession); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1800, at 674–75 (1833) (“under the like circumstances” tacitly added to restatement of Article IV); CONG. GLOBE, 39th Cong. 1st Sess. 1836 (1866) (same restatement of Article IV by Rep. William Lawrence); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF INDIANA 1394 (1851) (“under the same circumstances and on similar terms” tacitly restricting state-constitutional ban on grant of “privileges or immunities, which, upon the same terms, shall not equally belong to all citizens”).

77. See Green, *supra* note 76, at 52, 71–72, 83, 87; Christopher R. Green, *Incorporation, Total Incorporation, and Nothing But Incorporation?*, 24 WM. & MARY BILL RTS. J. 93, 118–21 (2015).

PROBLEM 11: REVERDY JOHNSON THOUGHT THE PRIVILEGES OR IMMUNITIES CLAUSE,  
NOT THE DUE PROCESS CLAUSE, WAS DANGEROUSLY OPEN-ENDED

At the very end of the Fourteenth Amendment debates in Congress—on the same page on which the Senate approved it—appears a very important tidbit illuminating the bipartisan nature of due process. During the Civil War and Reconstruction, Democrats and Republicans alike energetically invoked due process. Lincoln’s suspension of habeas corpus,<sup>78</sup> the Confiscation Acts,<sup>79</sup> and the Freedmen’s Bureau<sup>80</sup> were all subject to vigorous due-process arguments from Democrats (and some Republicans), rebutted at length by Republicans (and some Democrats). The Habeas Corpus Act, introducing federal habeas review of state-court judgments, was passed unanimously in February 1867 despite energetic dispute over everything else in Reconstruction.<sup>81</sup> The lack of controversy over the most important Reconstruction due-process statute mirrored the lack of controversy over the importance of due process principles themselves. This consensus only makes sense given an understanding of due process as guaranteeing lawfulness in the states, rather than restricting the substantive content of state law. Partisan rancor over that substantive content had never been greater than during Reconstruction. As my earlier work canvassing this material makes clear in detail, dispute over the Equal Protection Clause preceding the Civil Rights Act of 1871<sup>82</sup> and over the Privileges or Immunities Clause preceding the Civil Rights Act of 1875<sup>83</sup> was quite hot indeed.

Reverdy Johnson was probably the most legally-informed Democrat in Congress in 1866: a member of the Joint Committee on Reconstruction, former Attorney General, and Supreme Court litigator extraordinaire. Like all other Democrats, he opposed the Civil Rights Act of 1866, but here is what he said just before the Senate passed the Fourteenth Amendment:

I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty, or property without due process of law, but I think it is quite objectionable to provide that “no State shall make

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78. See CONG. GLOBE, 37th Cong. 1st Sess. 40–43, 48–49, 59, 64, 66–69, 117, 128, 138–40, 142, 150, 155, 188, 196, 200, 202, 244, 289–90, 293–94, 333–41, 367, 372–73, 375–76, 379, 393, 395, 416, 420, 442, 451, app. 2, 12–19 (1861).

79. See CONG. GLOBE, 37th Cong. 2d Sess. 18, 41, 83 (1861); *id.* 241, 314, 320, 346, 354, 411, 501, 507–08, 516, 519, 598, 816, 942, 1050–51, 1158–59, 1336, 1449, 1497, 1502, 1523–25, 1558, 1572, 1574, 1617, 1635, 1638–40, 1644–45, 1650, 1668, 1719, 1758, 1761, 1768, 1783, 1803, 1809, 1811–12, 1857, 1859–60, 1872, 1875, 1886, 1894, 1902, 1962, 2044, 2066, 2073–75, 2130–31, 2166, 2190–91, 2193, 2205, 2235, 2239, 2324–25, 2356, 2410–11, 2902, 2923, 2963–64, 2991, 3006, 3349, 3382, app. 42, 49, 60, 94, 104–08, 110, 115, 140, 143, 151, 154, 167, 169–71, 184, 190–91, 200–02, 204, 208, 217, 237, 243, 260, 265, 273, 304–07 (1862). I canvass the 1862 debates in detail in *Our Bipartisan Due Process Clause*, 25 GEO. MASON L. REV. (forthcoming 2019).

80. See CONG. GLOBE, 39th Cong. 1st Sess. 394, 429, 625, 648, 657, 916–17, 935, 940–41 (1866).

81. CONG. GLOBE, 39th Cong. 2d Sess. 790 (1867).

82. See Green, *supra* note 14, at 224–54.

83. See Green, *supra* note 76, at 164–206.

or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” simply because, I do not understand what will be the effect of that.<sup>84</sup>

Like many of today’s critics of substantive due process, then, Reverdy Johnson feared putting a broad, fuzzy-at-the-edges substantive requirement on states. Like those doctrine’s fans, however, he thought that such a requirement was actually in the Fourteenth Amendment. But he identified that requirement with the Privileges or Immunities Clause. His enthusiasm for due process makes sense only given that it did not express an open-ended requirement that laws be reasonable.<sup>85</sup>

Matthew Carpenter’s January 1872 argument on behalf of Myra Bradwell’s right to practice law made the same point from an extremely well-informed,<sup>86</sup> Republican perspective. The Fourteenth Amendment guaranteed the right of the freedmen to enter professions—“all the pursuits and avocations of life,” as Carpenter put it in Congress a few weeks later<sup>87</sup>—without racial discrimination. But which clause did this? Not the Due Process or Equal Protection Clauses, said Carpenter:

[T]he *only provision* in the Constitution of the United States which secures to colored male citizens the privilege of admission to the bar, or the pursuit of the other ordinary avocations of life, is the provision that “no State shall make or enforce any law which shall abridge the privileges or immunities of a citizen.” And if this provision does protect the colored citizen, then it protects every citizen, black or white, male or female.<sup>88</sup>

The best-informed Republicans and Democrats alike, then, associated a ban on racial discrimination in occupational freedom with the Privileges or Immunities Clause alone.

PROBLEM 12: DUE PROCESS COVERS ALL PERSONS, BUT FREEDMEN RECEIVED THE SPECIAL PRIVILEGES OF CITIZENS

Finally, I note a basic problem with seeing the Due Process Clause as a general limit on unreasonable discriminatory classifications: it applies to *persons*, not just

84. CONG. GLOBE, 39th Cong. 1st Sess. 3041 (1866).

85. A considerably-less-informed Johnson—President Andrew—likewise included a due-process clause in his February 1867 counter-proposal drafted in consultation with southern governors, even while he turned the Privileges or Immunities Clause into a restatement of Article IV and left out congressional enforcement power. 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 240 (1906); see *McDonald v. Chicago*, 561 U.S. 742, 840 (2010) (Thomas, J., dissenting) (discussing details of proposal). Both Andrew and Reverdy were, of course, quite hostile to the Civil Rights Act’s prohibition on racial limits on contractual freedom.

86. “[A]fter the departure of Reverdy Johnson [Carpenter] was probably the preeminent lawyer in the Senate.” John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1426 (1992).

87. CONG. GLOBE, 42nd Cong. 2nd Sess. 762 (1872).

88. *Bradwell v. Illinois*, 83 U.S. 130, 136 (argument of counsel).

*citizens*. But non-citizens were subject to arbitrary racial discrimination from the Founding up to and including Reconstruction (and beyond). Aliens were traditionally denied the right to own land, for instance, and Congress summarily reaffirmed racial restrictions on naturalization—which had existed continuously since the first naturalization law of 1790—less than two weeks before the passage of the Civil Rights Act of 1875.<sup>89</sup> Elsewhere I have explained how this tradition supports reading the Equal Protection Clause as a guarantee of “protection of the laws,” rather than a more general freedom from discrimination.<sup>90</sup> The same consideration undermines general antidiscrimination readings of the Due Process Clause. The Due Process Clause cannot serve as a ban on unreasonable, protectionist, rent-seeking legislation, because it equally covers those disadvantaged by traditional protectionism that aims to put America—and Americans—first. Even those who deem protectionism unreasonable and unjust have generally seen it as uncontroversially consistent with the Fifth Amendment. If citizens may receive special privileges relative to non-citizens, then only the citizens-limited Privileges or Immunities Clause can serve as a generic ban on unreasonable discrimination (though, alas, not one generic enough to include aliens).

The distinction between persons and citizens is also central to understanding *Dred Scott*. The *personhood* of enslaved people was never a serious constitutional issue. The original Constitution refers to the enslaved as “other persons,”<sup>91</sup> speaks of “importation of persons,”<sup>92</sup> and calls the fugitive a “Person held to service or labor.”<sup>93</sup> All three of these provisions, moreover—the three-fifths representation bonus, 20-year slave-trade immunity, and Fugitive Slave Clause—were pro-slavery; all three would have been undermined by the suggestion that enslaved persons were not persons. The meaty status question in *Dred Scott* thus concerned African-Americans’ citizenship, not their personhood, which was conceded all round. While, as noted above, the Court’s reasoning on the Due Process Clause of the Fifth Amendment contained a simple mistake that Lincoln and others immediately pointed out at the time, much of its view of citizenship was actually embraced by the Fourteenth Amendment’s framers in a *modus-ponens-for-modus-tollens* switch.

*Dred Scott* pointed to marriage-segregation laws as proof that even free blacks were not treated as equals, and therefore not treated as citizens: “[I]t is hardly consistent with the respect due to these States to suppose that they regarded at that time as fellow citizens . . . a class of beings whom they had thus stigmatized.”<sup>94</sup> That is, *Dred Scott* assessed the social meaning of segregation the way

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89. See Green, *supra* note 76, at 164–206.

90. Green, *supra* note 14, at 266–70.

91. U.S. CONST. art. I, § 2, cl. 3.

92. U.S. CONST. art. I, § 9, cl. 1.

93. U.S. CONST. art. IV, § 2, cl. 3.

94. 60 U.S. 393, 416 (1857).

that Charles Sumner,<sup>95</sup> Justice Harlan,<sup>96</sup> *Brown*,<sup>97</sup> and *Loving*<sup>98</sup> interpreted it, not the way the *Plessy* majority interpreted it.<sup>99</sup> The Court then inferred free blacks' lack of citizenship from such brands of inferiority. So, according to *Dred Scott*, inferiority entails lack of the rights of citizenship, or in logically equivalent form, possessing the rights of citizenship entails treatment as an equal. And while it is true that some critics of *Dred Scott* contested this principle,<sup>100</sup> the Privileges or Immunities Clause, used as a basis for the Civil Rights Act of 1866, represents its embrace, turned upside down. President Johnson's veto message posed the same sort of modus tollens argument against free-African-American citizenship as did the Court: "Four millions of them have just emerged from slavery into freedom. Can it be reasonably supposed that they possess the requisite qualifications to entitle them to all the privileges and immunities of citizens of the United States?"<sup>101</sup> Johnson's rhetorical question looked for a "no." Republicans' "yes" to the Privileges or Immunities Clause, however, turned tollens to ponens.

Finally, consideration of the Privileges or Immunities Clause will help us distinguish *Roe*'s fixable problems from more fundamental errors. The Court's completely unreasoned, unsupported *ipse dixit* to explain why the Fourteenth Amendment covered abortion at all—"This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"<sup>102</sup>—is of course easily mocked. To the extent *Roe* relies on a reasonableness-based reading of the Due Process Clause (even were the Court to show that abortion restrictions are unreasonable) that reading has at least twelve problems. These are all surface flaws, however: the initial why-scrutinize-abortion-restrictions part of the opinion could be patched up by shifting to the Privileges or Immunities Clause.

95. CONG. GLOBE, 42d Cong., 2d Sess. 383 (1872) (summarizing the message of segregation: "I am better than thou, because I am white. Get away!").

96. *Plessy v. Ferguson*, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) ("Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.").

97. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (quoting trial court: "[T]he policy of separating the races is usually interpreted as denoting the inferiority of the negro group").

98. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("[T]he racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

99. *Plessy*, 163 U.S. at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

100. See, e.g., *Dred Scott*, 60 U.S. at 583 (Curtis, J., dissenting) ("citizenship . . . is not dependent on the possession . . . even of all civil rights"); *Citizenship*, 10 Op. Att'y Gen. 382, 398 (1862) (Attorney General Edward Bates) ("I can hardly comprehend the thought of the absolute incompatibility of degradation and citizenship.").

101. CONG. GLOBE, 39th Cong. 1st Sess. 1679 (1866).

102. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

How would this work? On my view of the Privileges or Immunities Clause, distinctions between the civil rights of pregnant citizens of the United States and other citizens must be justified. I explain elsewhere why using the Privileges or Immunities Clause instead of the Equal Protection Clause as a ground for equality doctrine would support the Marshall/Scalia/Stevens/Burger plan to abandon tiers of scrutiny.<sup>103</sup> The tiers should be melted down into a single question: whether a distinction between citizens of the United States is arbitrary because those citizens are in fact similarly situated. The comparison between race, sex, and age presents a crisp contrast between 1866 history and current doctrine. Racial, sex, and age classifications get strict, intermediate, and rational-basis scrutiny under the Supreme Court's current view of the law,<sup>104</sup> and all three sorts of classifications were discussed repeatedly by Republicans in 1866 responding to Democratic charges that the Privileges or Immunities Clause would give freedmen the vote. No, it will not, said Republicans, many times over; women and children are citizens of the United States, but *not* voters.<sup>105</sup> This response makes no sense if age and sex discrimination are subject to categorically different treatment from racial discrimination under the Privileges or Immunities Clause. Women and children receive the rights of citizens of the United States, but those rights (as such) do not include voting—for anyone.

If the Fourteenth Amendment includes a rule that all similarly-situated citizens of the United States get the same civil rights, what about pregnant citizens versus others? Melting down tiers of scrutiny makes the question from *Geduldig*<sup>106</sup>—whether pregnancy discrimination is or is not sex discrimination—not so important. The material question is whether pregnant mothers are differently situated from those who are not pregnant in a way that justifies limiting their rights. The answer, of course, depends what we think of bodily integrity and fetal personhood. I heartily commend Professor Arkes's attacks on the *Roe* Court's failure to consider the facts of embryology.<sup>107</sup> But the Court was no better in its consideration of arguments in *favor* of abortion rights.

We can divide the policy issue of abortion between Judith Thomson's piece in volume 1 of *Philosophy and Public Affairs* in 1971, arguing for abortion based on

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103. Green, *supra* note 76, at 136–37.

104. See, e.g., *City of Richmond v. Croson*, 488 U.S. 469 (1989) (strict scrutiny for all racial classifications); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976) (rational-basis scrutiny for age classifications); *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny for gender classifications).

105. See Green, *supra* note 77, at 122–24; Green, *supra* note 76, at 53, 71–72.

106. *Geduldig v. Aiello*, 417 U.S. 484 (1974); see also *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 54–57 (2012) (Ginsburg, J., for 4 justices, arguing that *Geduldig* should be overruled).

107. See Arkes, *supra* note \*. While in my rejoinder, I criticize Arkes's failure to engage with Fourteenth Amendment history, see Green, *supra* note \*, his views on fetal personhood could be knit together with the Equal Protection Clause as the proper home of a governmental duty of protection. See Green, *supra* note 14, at 299–300. For historical analysis of the personhood issue, see Michael Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13 (2012).

the mother's bodily integrity, even assuming fetal personhood,<sup>108</sup> and Michael Tooley's in volume 2 in 1972, attacking fetal personhood itself.<sup>109</sup> Thomson said that even assuming fetal personhood, a woman is entitled to evict a fetus from inside her. But the Court in *Roe* plainly does not acknowledge the existence of this sort of argument. The Court says fetal personhood, if duly established, would destroy constitutional abortion rights.<sup>110</sup> What about Tooley's argument against fetal personhood? The Court is agnostic. "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."<sup>111</sup> But if the Court is agnostic on whether the fetus has rights—the very issue it says resolves the issue in ignoring Thomson-style arguments—then it should be agnostic about the Fourteenth Amendment's requirements. And those without *knowledge* of the law, or its relevant constituents, cannot properly *say* what the law is.<sup>112</sup> Of course, a Court with more confidence—and the willingness to engage with both the issues of bodily integrity and fetal personhood—could avoid this pitfall too. But, as complicated as it might be to perform transplant surgery on the Supreme Court's use of different Fourteenth Amendment clauses, patching up this part of *Roe* is far more difficult than is swapping out substantive due process for the Privileges or Immunities Clause.

This is not, then, your father's criticism of substantive due process, which makes cases like *Roe* (and *Lochner*<sup>113</sup> and *Obergefell*<sup>114</sup>) easy cases, on the theory that the Fourteenth Amendment simply does not require any engagement with the reasonableness of legislative restrictions of liberty, either regarding abortion, economic liberty, or same-sex marriage. They are, indeed, easy *due-process* cases, but the Privileges or Immunities Clause makes them far more difficult. That Clause requires courts to scrutinize legislative restrictions on civil rights relative to similarly-situated fellow citizens of the United States, and that assessment will embroil interpreters in difficult, tangled issues of which citizens are similar to which others. Even when judicial review is limited, as it should be, to cases where unconstitutionality can be rendered clear,<sup>115</sup> such scrutiny will prevent any of the three cases from being open-and-shut.

108. *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971); *see id.* at 48 (introducing famous "violinist" hypothetical).

109. *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37 (1972); *see id.* at 60 (introducing not-as-famous hypothetical of chemical that would give kitten the developmental capacities of a human infant).

110. *Roe*, 410 U.S. at 156–57 ("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.")

111. *Id.* at 159.

112. *See generally* Green, *supra* note 44, at 437.

113. *Lochner v. New York*, 198 U.S. 45 (1905); Green, *supra* note 42, at 134–35.

114. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Green, *supra* note 42, at 139–40.

115. *See* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169 (2015).