# SYMPOSIUM: WHO'S AFRAID OF SUBSTANTIVE DUE PROCESS PAPERS

## The Argument Renewed: Who's Afraid of Substantive Due Process?*

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* For an earlier version of this article, see Hadley Arkes, *Who's Afraid of "Substantive Due Process*"?, LAW & LIBERTY (Oct. 26, 2015), https://www.lawliberty.org/2015/10/26/whos-afraid-of-substantive-due-process/ [https://perma.cc/KY2U-L6ZT].

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## INTRODUCTION

In entering this debate on substantive due process yet again, I would draw on a line from Mrs. Malaprop, when she said that she will "have no delusions to the past," that from now on, "our retrospection will now be all to the future." I bring back that line now because it seems to me that a key to this problem might have been given us indirectly by a comment that the late Philip Kurland cast up during a seminar at the University of Chicago more than 50 years ago. Kurland asked with genuine puzzlement something along the lines of:

> How did the Supreme Court make its way from racial segregation in public schools, in *Brown v. Board*, to segregation in public swimming pools? Didn't *Brown* hinge on the claim that children suffered some notable harm to their motivation and learning in schools as a result of segregation? The wrong of that case was contingent upon *harms suffered by children in schools*—not that there was something wrong in principle with racial segregation (regardless of whether anyone happened to suffer a material harm). Was the contention now that barring children from swimming pools would impair their capacity or motivation to learn? Was there now a "constitutional right to swim"?

The mistake here is a basic logical or philosophic mistake: Kurland was confusing the "principle" with a particular *instance* in which the principle may be manifested. One may think here of the problem of the ball rolling down the inclined plane. The principle at work is that the angle of the plane controls or determines the speed by which the ball rolls down the plane. The steeper the angle, the faster the ball will roll. Once we are clear on the principle, it does not matter at all whether we are dealing with wooden planes or plastic balls, or blue planes and red balls. In the same way, once we are clear on the principle that establishes the wrong of racial discrimination, that principle can be manifested in a numberless variety of instances.

I have made the case over the years that the principle in these cases on racial discrimination involves the problem of a "determinism" based on race: it is the fallacy of assuming that we can draw moral inferences about persons, their goodness or badness, their moral deserts, as though race determined or controlled their conduct and character. Well, if we are clear that that is indeed the principle at the core of the problem, then we may find racial discrimination in barring access to public tennis courts and swimming pools, and there would be no need to start adding to a vast inventory of rights a new "constitutional right to play tennis" or the "right to swim."

We would simply have several of the many instances in which the principle on racial discrimination could be manifested. Kurland's pretended confusion here would be echoed even more notably just a couple of years later by Chief Justice Warren in his opening lines in *Loving v. Virginia*. The Chief began by announcing that the Court had never seen a case of this kind before:

> This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[1]

An entirely novel case? Had the Court never dealt with a case of racial discrimination? Or a case on marriage? But as I pointed out long ago, in *First Things*, this case could have been resolved without saying a word about marriage.[2] The decisive point, on which everything turned, was that matter of racial discrimination. I raised the hypothetical of a law that barred partnerships in business by people of different races. I imagined a case of two friends, one black, one white, who seek to enter a partnership in a delicatessen. (And we may call it *Zabar's v. Virginia*.) When a court came to strike down that kind of law, do we really think that the judges would have proclaimed to the world a "right to own a delicatessen"? Or would we think, rather, that this was simply another of the many varieties of instances in which that principle on racial discrimination could be manifested?

## I. CONFOUNDING PRINCIPLES WITH THE OBJECTS THEY REACH IN ANY CASE

With those points in place we may wonder then just how much of this vexing matter of "substantive due process" may be explained—and explained away—possibly losing that vexing edge we have encountered even among friends. The cases may involve marriage or schools; they may involve bakers (in *Lochner*[3]), or butchers (in the *Slaughter-house Cases*[4]), or people in the ice business (*New State Ice Co. v. Liebmann*[5]). They may involve Leo Nebbia trying to sell milk past the price controls in New York (*Nebbia v. New York*[6]). Or Mike Raich, an immigrant from Austria, trying to earn his living as a chef (*Truax v. Raich*[7]). But the rights being vindicated in these cases from arbitrary restrictions cannot be reduced to the matter of selling bread or ice or milk. The cases hinged, or should have hinged, for example, on the question of whether we have a principle that tells just what the "right" price should be for milk and bread (with Leo Nebbia), a price so just and true that it may be imposed with the force of law.

As we probe in this way, it turns out that we are relying on the same canons of reason, the same "principles," in testing the adequacy of the justifications offered for the law. Or, on the other hand, we engage the same principles of judgment in exposing the arbitrariness or emptiness of those justifications. My point is that

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1. Loving v. Virginia, 388 U.S. 1, 2 (1967).
2. *See* HADLEY ARKES, FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE 343–45 (1986).
3. Lochner v. New York, 198 U.S. 45 (1905).
4. Slaughter-House Cases, 83 U.S. 36 (1873).
5. New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).
6. Nebbia v. New York, 291 U.S. 502 (1934).
7. Truax v. Raich, 239 U.S. 33 (1915).

those judgments can be quite detached from the distinct, *substantive* things that people are doing with their freedom in these cases.

What is involved here is precisely the mistake, I think, that the engaging Judge Harvie Wilkinson made in the Rosenkranz debate at the Federalist Society a few years ago with Randy Barnett. Wilkinson expressed the traditional view, settled over many years, that the famous *Slaughter-House Cases* had been decided in the right way.[8] And the jarring core of Judge Wilkinson's judgment here was that it was utterly implausible to think that the Constitution and the Fourteenth Amendment established a "constitutional right to be a butcher." But once again, it takes a serious philosophic mistake to reduce, in that way, the meaning of Justice Stephen Field's summoning dissent in the *Slaughter-House Cases*. Field understood he was vindicating the right of ordinary people to make their livings at a legitimate occupation without the kinds of arbitrary regulations that barred entrance into the trade.[9] What was engaged here, as he said, was the simple "right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor."[10] And his concern here for a monopoly conferred by law—the only tenable meaning of "monopoly"—was the concern for confining this mode of earning a living to a favored few with political connections. What was said in this respect about butchers could be said as aptly in our own day about people in our cities seeking to make a living by shining shoes, braiding hair, or driving "gypsy cabs" to take people from the subways to their homes.

If the regulation were aimed at the public safety, Stephen Field had shown himself quite willing to respect that concern as a "justification" for many laws. But the monopoly conferred in Louisiana bore no necessary connection to the concern for safety. As Field pointed out, the law covered an area of 1,154 square miles.[11] He was no less supportive than his colleagues of local measures directed to the health and safety of the community.[12] But the concerns for safety here were satisfied by the requirements of landing the animals below New Orleans and inspecting the animals before they were slaughtered. Field observed, though, that "it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals."[13]

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8. *See generally Sixth Annual Rosenkranz Debate: Courts Are Too Deferential to the Legislature*, YOUTUBE (Nov. 16, 2013), https://www.youtube.com/watch?v=evp84_XcSwY.

9. 83 U.S. at 83.

10. *Id.* at 90.

11. *Id.*

12. *See, e.g.*, Barbier v. Connolly, 113 U.S. 27 (1885); Hing v. Crowley, 113 U.S. 703 (1885). This part of the record of the so-called laissez faire judges of the late 19th and early 20th centuries still seems to come as a surprise to many commentators on law. *See* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 51–82 (1994).

13. 83 U.S. at 87.

It seems to me that my friend Matthew Franck backs into the same groove, or the same misconception that Wilkinson had, when he says that the right at issue in the *Slaughter-House Cases* was "that of butchering where one will."[14] That rendition seems another version of Wilkinson's line that what was being claimed here was a "constitutional right to be a butcher."

If we unpacked the problem, the opening point would be the matter of confusing principles with the instances in which they happened to be manifested. But in the further trick of the eye, people may not see that the rights are bound up with the principles, and not with the peculiar "goods" that are being allocated or barred by the law in any case. For the reasons I have sketched already, we could say that there is a deep right not to suffer penalties or disabilities based on race, as though race determined or controlled moral conduct, and we could draw inferences about the goodness or badness of persons, and of the benefits or penalties they deserved, simply by knowing their race. That same principle would be engaged regardless of whether we are dealing with black people barred on the basis of race from schools or trains or tennis courts. *But it is not a right to a portion of time on the tennis courts or in the trains*. It would mistake the logic of the right by confounding it with a franchise to possess or hold certain material or *substantive* things. Yes, there is a certain order of the gravity of injuries that might be done, or things of which we might be dispossessed, and there is the form an axial order: Life, liberty, property. One needs life before one can exercise liberty, and one needs liberty before one can acquire property. But the "natural right to life" never meant, of course, that we had a right to life everlasting. Nor did it mean that the law may never take our lives in the form of capital punishment or put us in harm's way in the defense of the country. Virtually any law will impose restrictions on "liberty," if nothing more than stopping us at a traffic light. And any legal form of taxation will take a portion of our "property." The question, at every turn, though, is whether our lives are taken, our liberty restricted, our property drawn from us, *with or without justification*. The fire department blocks me from walking down the street to my apartment building because it is fighting a fire. My liberty is being impeded, but I have suffered no violation of my rights, for my freedom was evidently restricted here for the purpose of protecting life, including my own. The restriction, we would say, is patently "justified." Again, the question points beyond walking or apartments or the material goods—we are drawn repeatedly to the *principles* we use in gauging whether the restrictions are *justified or unjustified*.

## II. MOVING TO THE PRINCIPLES OF JUDGMENT: DISTINGUISHING BETWEEN THE "JUSTIFIED" AND THE "UNJUSTIFIED" GROUNDS FOR RESTRICTING FREEDOM

There is nothing esoteric here; these are judgments that ordinary folk make every day. And for judges, the exercise is inescapable. How else is a judge to weigh

14. Matthew J. Franck, *What Happened to the Due Process Clause in the Dred Scott Case?: The Continuing Confusion over "Substance" versus "Process,"* AM. POL. THOUGHT 120, 143(2015).

whether the restrictions of the law are directed to rightful or wrongful ends, or directed to legitimate ends with wrongful means? The question in testing any law is whether it offers a "justified" or "unjustified" taking of life or restriction of freedom. The Constitution does not bar all "searches and seizures," but only those that are "unreasonable," or unjustified. But as I have pointed out elsewhere—and at length—this much could be said about any right mentioned in the Constitution or the Bill of Rights.[15] Is the right to "assemble" a right that attaches to just any group that manages to assemble? Even for criminal projects? As Congressman Page said during that First Congress, the question is whether people are assembling "on lawful occasions," for legitimate ends.[16] Even Justice Black, that supposed absolutist on the First Amendment, did not think that the right to assemble offered a right to assemble a crowd outside a courtroom with the object of intimidating a judge or jury,[17] nor did he think that the First Amendment protected the speech of people protesting outside the private home of Mayor Daley in Chicago.[18] As he stylishly wavered here, "The First and Fourteenth Amendments . . . take away from the government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes*."[19]

My point is that any notion of rights must point beyond the text of the Constitution to the grounds on which judges need to weigh the question of whether the freedom engaged at any point is directed to a legitimate end, and whether it may be justly restricted. The deep truth here, which seems so unsettling for so many people, is that the standards of judgment—the standards so decisive in any case—*are not contained in the text of the Constitution itself*. They are the principles that come into play as judges, along with ordinary folk, are compelled to distinguish between ends that are legitimate or illegitimate: Do I go to school or go to work, and if I go to work, do I work at a legitimate job (say, repairing autos) or an illegitimate job (say, the selling of illegal drugs)?

## III. ARE THE GROUNDS OF JUDGMENT REALLY UNKNOWABLE OR ARBITRARY? OR UNKNOWABLE ONLY BY JUDGES?

And yet Matthew Franck's complaint, as though it were indeed a condition that deserved complaint, is that nineteenth-century judges fell more deeply into the vice of "substantive due process":

> It was as though the words "due process of law" had vanished from the constitutional text, the clause now being read to say that no one shall be deprived

15. See HADLEY ARKES, BEYOND THE CONSTITUTION 58–80 (1990).
16. 1 ANNALS OF CONG. 732 (1789) (Joseph Gales ed., 1834).
17. Cox v. Louisiana, 379 U.S. 536 (1965).
18. Gregory v. Chicago, 394 U.S. 111, 113 (1969).
19. *Cox*, 379 U.S. at 578 (emphasis in original).

> of life, liberty, or property except by a reasonable act of legislation—*with the justices being the arbiters of what is "reasonable."*[20]

There was a tinge of the illegitimate conveyed in his remark on "the justices being the arbiter of what is 'reasonable.'" Was there a hint of something inescapably arbitrary, something hopelessly subjective and personal, in the standards that judges apply whenever they test the reasons that may supply a "justification" for a law? But that is the work of judges; it is what judges are called upon to do every day. Of course, judges will make mistakes in reasoning along with everyone else, or they may even reason in a tendentious way. Nothing new there. But why would we leap to the conclusion that there are no truths, no axioms, no canons of reason, no grounds for judging reasons that may be better or worse, true or false? Is there an assumption at work that something in the education or miseducation of judges over the years has lured them away from the understandings that are available to ordinary people with common sense?

The concern here is bound up with the deeper recoil from substantive due process—the reaction to judges who have gone beyond the text of the Constitution, with soaring rhetoric, to invent new rights, not mentioned in the text. And yet, if judges have gone beyond the text in their escapades in moral reasoning, one would think that the apt, measured response would be to show why that reasoning was spurious, wrong. Instead the conservative response has been to argue that the deep fault comes with the willingness to engage in that reasoning outside the text, and that moral reasoning is simply an excuse for the judges to impose their own personal enthusiasms. Both Robert Bork and Antonin Scalia, in different ways, used to say that when a judge is appealing to moral reasoning outside the text he is simply looking inside himself—that the standards of judgment are hopelessly subjective. In the curious turns that always take place in these arguments, Bork and Scalia persistently belied their own stance here as they marshaled reasons powerfully of their own to show what was empty and untenable in those arguments made by the liberal judges. What might have been revealed there, on the part of my two old friends, was a deep suspicion of moral reasoning altogether. Both men were strongly disinclined to rely on moral truths accessible to reason, either because they harbored doubts about the existence of those truths, or because they were persuaded that moral convictions found their truer origin and support in religious belief. In that respect, they were both probably closer to David Hume than to Thomas Reid and James Wilson, or to John Marshall and Alexander Hamilton.

## IV. BEYOND THE TEXT OF THE CONSTITUTION: THE DEFINING LOGIC OF THE LAW

But that first generation of lawyers—men like Hamilton, Wilson, Marshall—did not suffer existential doubts that they were adrift in the universe without anchoring moral truths that could be known. They showed a remarkable knack of

20. Franck, *supra* note 14, at 145 (emphasis added).

persistently tracing their judgments back to those "axioms" of practical judgment, which were grasped by ordinary men as a matter of common sense.[21] And so, if the proverbial Man on the Street were told that Jones, accused of serious crime, was undergoing surgery at the time the crime was committed, we would expect that ordinary man to wonder why Jones was being prosecuted. Which is to say, the ordinary man would take as a matter of common sense that first principle of moral judgment as understood by James Wilson as well as Kant: that we may cast moral judgments on people only when they have the active powers to cause their own acts to happen. And so, we may take as an anchoring axiom of the law that we do not hold people responsible or blameworthy for acts they were powerless to affect. That axiom forms the ground of the insanity defense; it may also mark the wrong of racial discrimination, but it underlies so many other cases in which people, for various reasons, may not be in full control of themselves.

Hamilton, Wilson, Marshall were quite aware that their judgments ultimately had to hinge on propositions of this kind, which could not be set down in their entirety in the text of the Constitution. And when they made their way to these anchoring points, they touched a ground of our rights that would be there *even if there were no Constitution*. In the first day of oral argument over Obamacare in 2012, Gregory Katsas invoked Justice Bushrod Washington' argument from the old Dartmouth College case: that it may be quite as bad to impose upon people a contract they did not wish to make as impairing the obligation of a contract they had willingly and self-consciously made.[22]

Justice Story would later remark in his commentaries that that principle would be true even if there were no Constitution. Just as John Quincy Adams would argue that the right to petition the government was simply implicit in the very idea of a republican government and *that right had to be there even if it were not in the First Amendment—and even if there were no Constitution*.

But one of those inconvenient truths of our time is that even those who proclaim their aversion to natural law find themselves moving persistently beyond the text as they seek to explain their own position. My late friend Antonin Scalia would persistently appeal to principles outside the text precisely for sake of showing just how the text could be understood in the most plausible way. And so, in one of his last cases, he declared that the "first axiom of the First Amendment is this: As a general rule, the state has no power to ban speech on the basis of its content."[23] Quite apart from the claim that this proposition stands as an axiom or necessary truth—a claim I have spent years myself contesting—the "axiom" he mentioned is nowhere contained in the text of the First Amendment. How then

21. *See, e.g.*, THE FEDERALIST NO. 31, at 151 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("In disquisition of every kind there are certain primary truths, or first principles, upon which all subsequent reasoning must depend. These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind.").

22. Dartmouth College v. Woodward, 17 U.S. 518, 662–63 (1819). The argument had been presented to the Court also by Daniel Webster in his argument before the Court on behalf of the College.

23. See Williams-Yulee v. Florida Bar, 135 S. Ct. 1656, 1676 (2015).

did he claim to know it? To take a line from Alexander Hamilton, the Justice very likely regarded his explanation as something sensible in itself, a point "which, antecedent to all reflection or combination, commands the assent of the mind."[24] Which is to say, it would be one of those anchoring axioms that will always be there, as the ground of the law that would always be there. Or what some us call the Natural Law.

Hamilton touched in that passage those deep axioms that underlie our practicable judgments, including judgments on matters of right and wrong. [25] But he touched at the same time the ground of those principles that marked, for Matthew Franck, the defining character of law as rightly understood. In Franck's understanding, those features provided the clear, major tests for the legitimacy or plausibility of a law. And as long as those tests were satisfied, they would relieve the judge of the need to plunge into the substance of those things, concrete and material things, that were being distributed and barred by the law. Franck put it in this way in conveying his sense of the fuller scheme:

> A procedural right is one that requires the government to enforce its policies—it matters not what they are—in such a way and by such processes that we are treated fairly under the rules laid down. [And by contrast:] A substantive right is a right against the imposition of certain kinds of policies on us under any circumstances—in this instance it mattering a great deal what the policies are, therefore, and there being no 'right way,' no rules laid down, that can render the policy itself legitimate.[26]
>
> . . . For the essence of a law is that it differs from a decree in two ways: in being impersonal, general, or neutral in character, and in being known (or knowable) before we are affected by it, and before we can take those actions that it governs.[27]

Those criteria have been mentioned often over the years: that the law is impersonal, general, neutral, and as much as practicable, known well in advance. Is there not a telling point to be made, then, by noting that most of these requirements of law, properly understood, *are not contained in the text of the Constitution*? The provision of ex post facto laws was the only one of these things mentioned in the text, and there was a serious objection at the time to putting it in. James Wilson and Oliver Ellsworth thought that the principle on ex post facto laws was so obvious that every civilian, every lawyer, and even any citizen, would know it.[28] And there was a risk, they thought, in mentioning this first principle of the law, while not mentioning others. There was a risk of treating this principle as authoritative while implicitly calling into question the standing of

24. THE FEDERALIST NO. 31, *supra* note 21, at 151.
25. *See also* Gibbons v. Ogden, 22 U.S. 1, 221–22 (echoing Hamilton's understanding of "axioms.").
26. Franck, *supra* note 14, at 122.
27. *Id*. at 126.
28. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., 1966).

other first principles that were quite as true, and so obvious, that there was no felt need to write them down.[29]

How then would we know these principles if they were not in the text? Alexander Hamilton offered a lesson, without strain, in *Federalist No. 78*, and showed us that, for the tutored lawyers of his generation, the question was not at all vexing. He noted that we draw on this rule of construction: that any later statute supersedes an earlier one. But he pointed out that this is not the rule of construction we draw upon for the Constitution, for the Constitution, coming earlier, must be able to override a statute coming later, or else it loses its function as a control on the legislative power. But how do we know this? After all, this was a "rule of construction, not derived from any positive law."[30] It was not set down anywhere in the Constitution. It was derived rather, Hamilton said, "from the nature and reason of the thing."[31] It was taken up readily by courts "as consonant to truth and propriety." [32] It sprang, we might say, from the very logic of law. Some would say: These axioms are simply part of the common law and they have become familiar "since the memory of man runneth not to the contrary." But we have here the old problem: Is the tradition good because it is old and familiar, or has it become old and familiar because there is something about these principles that make them enduringly valid and good? As James Wilson noted, there were writs of the common law that somehow did not survive to become staples of the American law: There was that venerable writ *de heretico comburendo*, the writ that enjoined the burning of heretics.[33] Now why did that part of the common law not survive in the American law?

The deeper truth is that the features marked off by Franck were drawn from the deep axioms of the law, because they were drawn from the very "logic of morals" itself. When we say in a moral voice that it is "wrong" for some men to hold others as slaves, we move beyond statements of mere personal preference or private taste; we speak about things that are more generally or universally right or wrong, just or unjust. And so, when we pronounce it wrong to hold slaves, we say that it is wrong *for anyone*, *for everyone*. The law is indeed then general and impersonal and neutral, because it bars, in its sweep, the holding of slaves quite regardless of the personal qualities, both sterling or nefarious, of those people who happen to hold slaves as property.

These attributes of law, then, are not dependent on the Constitution. They were there before the Constitution, and they are the enduring source of rights—and prohibitions—that would be there *even if there were no Constitution*. They involve the precepts of moral reasoning so embedded in common sense that they

29. See ARKES, *supra* note 2, at 61.

30. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 21, at 394.

31. *Id.*

32. *Id.*

33. James Wilson, *Of Crimes Against the Right of Individuals to Liberty and to Reputation*, *in* 2 COLLECTED WORKS OF JAMES WILSON, 1131–32 (Kermit Hall & Mark David Hall eds., 2007).

involve, as J. Budziszewski says, the things "we cannot not know."[34] And therefore there should be no surprise that ordinary folk weave these axioms into their judgments every day. Now I find it interesting, to put it mildly, that when I invoke these principles outside the text—for example, that we may not hold people blameworthy for acts they were powerless to affect—Franck gently calls their truth into question by asking what the prospects are that these principles will seem "rationally as right and just—to five Justices of the Supreme Court."[35] But that skepticism about judges does not seem to extend to their capacity to understand the principles that he puts forth for their guidance. He is persuaded that his own position is anchored in truths bound up with the logic of law (as I too think they are). He does not seem to fret over whether they will be recognized by every judge happening down the street and coming into brief authority. He expects them to be recognized as the truths they are. As Hamilton said, they are truths that reveal their own internal evidence commanding the assent of the mind. I would simply make the same claim for other truths of comparable force that the Framers had neglected to make explicit—for example, that we presume someone innocent until proven guilty, and we do not hold people blameworthy for acts they were powerless to affect.

These strands of moral reasoning are so woven, say, into our practical judgments that it becomes artificial—and quite distorting—to think that they should not come into play as judges face concrete wrongs done to real people in real cases. We can take here that case that still elicits a ritualistic sense of outrage even among conservative judges, *Lochner v. New York*.[36] Chief Justice John Roberts took a whack at *Lochner* yet again, even as he wrote in dissent in the *Obergefell v. Hodges*.[37] Franck joined the tradition of slamming *Lochner* as one of the premier examples of the corruption of our constitutional law with the vice of "substantive due process." But in judging that legislation in New York, on the maximum hours for bakers, the briefs on behalf of Lochner raised this question: If the concern of the law is with "safety," then why did the law leave out all of those people who baked in restaurants and private clubs? Why did it leave out the people employed in small bakeries staffed by members of the owner's family? These categories formed more than half of the bakers in New York. Why was their safety a matter of deliberate unconcern in a statute supposedly justified as a measure of for "safety"?[38] With these kinds of arguments, Justice Rufus Peckham was testing the rationale of the legislation on its own terms. What, in any of these arguments, could be dismissed as subjective or arbitrary, or reducible merely to the prejudices of the judge? In fact, why were these kinds of reasons not cut from

34. J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW (2003).
35. Franck, *supra* note 14.
36. 198 U.S. 45 (1905).
37. *See* 135 S. Ct. 2584, 2611(2015) (Roberts, C.J., dissenting).
38. *See* 14 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 654, 661–62 (Philip B. Kurland & Gerhard Casper eds., 1975).

precisely the same cloth as the kinds of arguments that are conventionally used to test simply the fairness of the "process" under "procedural due process"?

## V. THE ARTFUL EVASION: CONVERTING "SUBSTANCE" INTO ISSUES OF "PROCESS"

At times judges may be so skittish about speaking on the substance of the issues before them that they cast their opinions in the form of procedural faults, even though they are drawn by the sense that there is something deeply wrong with the substance of the policy. The most elegant example on that point was supplied by Chief Justice Harlan Stone in his concurring opinion in that the notable case of *Skinner v. Oklahoma*.[39] That case has been cited so often, and so inaptly, over the years by the Court to stand for a "right to procreation," and it was taken to furnish one of the building blocks leading to *Roe v. Wade*.[40] The case involved the "sterilization" of habitual criminals. Justice Douglas found a want of equity or equal treatment here: that a chicken-thief could be sterilized, while embezzlers, who would steal property of far more value, were left free to perpetuate their kind.[41] But the Chief Justice did not think that the problems in this case would be dissolved if the legislature, with a proper sense of symmetry, had gone on to sterilize the embezzlers *as well as* the chicken thieves.[42] Stone evidently doubted that the legislature of Oklahoma knew enough to know that the inclination to steal chickens was genetically transmissible. But he was content to recast his objection in terms of process: The problem, he said, was that Skinner was not given the chance to show that his criminal acts were not genetically transmissible—that "his is not the type of case that would justify" these restrictions or punishments.[43] In order to test that matter, the legislature would have been compelled to show, in true scientific fashion, the criteria by which we would assess whether Skinner's conduct was genetically determined. And yet, the ability to do just that would test the question of whether the legislature knew enough about the substance of the matter to justify this harsh policy. But that is to say, Harlan was willing to strike down the policy because he bore the most serious reservations about the evidence and reasoning that would have made the law in Oklahoma reasonable. He was recoiling from the *substance* of the law. But he was casting his complaint as an objection to the *procedures*.

## VI. ARE WE REALLY CLEAR ON DISTINGUISHING SUBSTANCE FROM PROCESS IN OUR CASES?

John Adams, writing to Jefferson, pondered the serious philosophic quandaries in distinguishing mind and matter, and he remarked: "Where one left off and the other began, even the best minds of the ages had not yet been able to settle, as

39. 316 U.S. 535 (1942).
40. 410 U.S. 113 (1973).
41. *Skinner*, 316 U.S. at 543.
42. *Id.* at 543.
43. *Id.* at 545.

they have not been able to settle it in our own day."[44] In the same way, we may entertain some serious questions as to whether we are entirely clear on the differences between substance and process in our cases. And perhaps we should start harboring serious doubts that we can ever bring forth a coherent jurisprudence from a mode of judging that would confine us to matters of procedure, while barring us from the need to look at the substance of what is done—and the serious injuries at stake—in these cases.

That sense of things may spring out from Franck's own account of the features that mark the most salutary regimen of judicial modesty. And I think he sets it down as clearly as it could be stated:

> By its terms, the [Due Process] clause has nothing to say about the validity of any legislative acts of general application, prospectively prohibiting or regulating any species of conduct so long as there is no outright forfeiture or taking of life, physical liberty or tangible property.[45]

Again, Matthew Franck says, no "outright forfeiture" of life, liberty, or property. By its very terms, this jurisprudence seems to be barred from piercing beneath the surface to inquire into the way in which the very labels of "life," "liberty," and "property" may be attached to a wide variety of things—or *detached*. To take the most notable example, would this jurisprudence be the source of no serious questions posed by judges when a whole class of human beings—say, infants in the womb—are simply read out of the circle of "human persons," so that no one of them counts as a "life" that the law protects? Or would a judge be warranted simply in pressing to hear the substantive reasons that are offered to justify that move to place these "lives" beyond the protection of the law?

## VII. DOING WHAT COMES "NATURALLY": HOW THE LAWYERS IN TEXAS SOUGHT TO SHOW WHY THEIR LAW ON ABORTION WAS *JUSTIFIED*

*Roe v. Wade* has been offered, along with *Dred Scott*, as the most notorious examples of judges falling into the vice of substantive due process. Justin Dyer has treated that question in a penetrating and compelling way in his book, *Slavery, Abortion, and the Politics of Constitutional Meaning*, and I don't want to tread on his own presentation here. He noted in his book that the lawyers for Texas, defending the laws on abortion in that State, drew deeply on the facts of embryology as they traced the development of a child in the womb. And what they argued quite persuasively was that the offspring in the womb was never a mere potential human being—it had been nothing less than a human being from its first moments. And of course, the laws on homicide are indifferent to the question of the age and size of the victim. The killing of an older, heavier man is not more of a murder than the murder of a small child.

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44. 2 THE ADAMS-JEFFERSON LETTERS 564 (Lester J. Cappon ed., 1959). *See also id*. at 517, 562.
45. Franck, *supra* note 14, at 144.

I have had the occasion recently to go back to that brief offered by the lawyers from Texas, in the seminar on Natural Law that we have been doing under our James Wilson Institute, bringing together some gifted teachers of Philosophy and Law, along with some notable figures on the federal bench. The judges were originally hesitant and uncertain about Natural Law. But we turned a corner when we looked back at the brief in *Roe v. Wade*, and set it against the dissents written at the time, in *Roe* and *Doe v. Bolton*, by Justices Byron White and William Rehnquist.[46] We returned to those documents as we came away from the critique of the conservative jurisprudence that we have seen at work during the litigation over same-sex marriage.[47] That trend of litigation found its culmination in the *Obergefell* case, a decision as jolting as it was implausible. Chief Justice John Roberts was moved at last to break away, in part, from the pattern of conservative argument and actually offer substantive arguments on the character of marriage. But that move came late, and the outcome found the conservative justices in disbelief and anger, still clinging to the complaint that marriage is nowhere mentioned in the Constitution. As the arguments were played out in the Supreme Court over same-sex marriage, the main reflex of my own friends among the conservative judges was to make the point that the Constitution says nothing about marriage. And therefore, as the argument ran, the judges are not in a position to proclaim any rights of marriage arising out of the Constitution. But the Constitution had said nothing about "marriage" when the Court decided *Loving v. Virginia* in 1967 and struck down the laws that barred marriage across racial lines. Nor is there anyone among the conservative justices who would argue now that the Court should not have taken that case.

What had to be done in the *Loving* case was to argue that race was quite irrelevant to the capacity of any person to understand the kind of commitment entailed in a marriage. And still less did it bear on the capacity to engage in the "sexual act" that was taken as one of the defining marks of a marriage "consummated." But now the argument was being made that the refusal to accept the marriage of two men or two women offers instances of the same wrong in principle that marked the laws that forbade interracial marriage. There exactly is where the argument had to be met in showing why marriage may rightly be confined to a man and woman. That meant drawing, for example, on the kinds of arguments assembled by Robert George, Sherif Girgis and Ryan Anderson in their book *What is Marriage*?[48]—and the arguments drawn by others of us as well.[49] And the point there was to show that the understanding of marriage as the legal union of one man and one woman was not merely "traditional"—not to be respected

46. *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting); *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting); *id.* at 207 (Rehnquist, J., dissenting).

47. *See* Hadley Arkes, *The Moral Turn*, *in* FIRST THINGS 29–36 (2017).

48. *See* ROBERT GEORGE ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2013).

49. I don't shy here from citing the argument I came to shape in response to this problem. *See* Hadley Arkes, *The Family and the Laws*, *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 116–41 (Robert P. George & Jean Bethke Elshtain eds., 2013).

merely because it was familiar, universal, and old—but because it was indeed the most defensible form of marriage. Or at least sufficiently defensible and plausible that the laws preserving that understanding of marriage were amply justified. And there was no clear warrant then for overturning those laws. But that was not the path of argument that was regarded as necessary, wise, or smart by the conservative lawyers, young or old. It was not until *Obergefell* that Chief Justice John Roberts, in dissent, started making the substantive argument in defending marriage as the union of one man and one woman with the commitment of law.[50]

It was against the background of that critique of conservative jurisprudence that we came to look with a new lens at the brief for Texas in *Roe v Wade*—and at the dissenting opinions. Over forty years ago, before *Roe v. Wade*, I had been deeply affected by a fine essay by Paul Ramsey on *Reference Points in Deciding on Abortion*.[51] Ramsey traced the fetus and embryo back, stage by stage, month by month, week by week, until he reached a point that proved, for me, telling and decisive: that there is nothing we have now, genetically, that we did not have when we were that zygote, no larger than the period at the end of this sentence. And we ought to know that, if any one of us had been destroyed at that stage, we would not have been the next pregnancy. That zygote alone was you or I.[52]

But now, coming back years later to the brief written by the lawyers for Texas, the jolt was to find that the brief offered an even richer version of the essay done by Paul Ramsey. It contained even more up-to-date material drawn from the textbooks on embryology, and even more citations from courts, recent or past, taking account of that evidence.[53] The brief was quite powerful in showing that the offspring in the womb was human from its first moments, that it never underwent a change in species; that the laws on homicide have never depended on the size and

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50. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting) ("This universal definition of marriage as the union of a man and a woman is no historical coincidence. Marriage did not come about as a result of a political movement, discovery, disease, war, religious doctrine, or any other moving force of world history—and certainly not as a result of a prehistoric decision to exclude gays and lesbians. It arose in the nature of things to meet a vital need: ensuring that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. ¶ The premises supporting this concept of marriage are so fundamental that they rarely require articulation. The human race must procreate to survive. Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child's prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond." (citations omitted)).

51. THE MORALITY OF ABORTION 60–100 (John T. Noonan ed., 1970); in particular, *see id*. at 71–79.

52. *Id*. at 66–67 ("In all respects the individual is whoever he is going to become from the moment of impregnation. . . . Thereafter, his subsequent development cannot be described as his becoming someone he now is not. . . . Genetics teaches us that we were from the very beginning what we essentially still are in every cell and in every generally human attribute and in every individual attribute. . . . For that reason any unique sanctity or dignity we have cannot be because we are any larger than the period at the end of a sentence.").

53. For an earlier and fuller treatment of this material may be found in my recent essay, see Arkes, *supra* note 48.

age of the victim; and that the child in the womb had never been a part of the mother's body. The brief put it this way, leaning on a case decided years earlier in New York:

> We ought to be safe . . . in saying that legal separability should begin where there is biological separability. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that separability begins at conception.
>
> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe the conditions under which life will not continue.[54]

The brief was all that one might wish a brief to be, and yet it may stir discomfort in certain quarters of my friends because the brief invited the judges to understand the substance of the issues that the law was treating as the judges set about the task of judging whether that the law was defensible. But even more striking than the rereading of the brief was the discovery that none of the material from this powerful brief—none of this material—made it into the dissents written by Justices Rehnquist and White in *Roe*, and in the companion case of *Doe v. Bolton*.[55] Those two worthies were content to fall back upon the usual laments that there was nothing in the Constitution on abortion. It was, again, a mechanistic appeal to the text of the Constitution, while screening out anything of substance that bore with force on the case before them.

In the case of Justice Byron White, the argument was made worse. White saw that abortion involved the taking of a human life for what is often the most selfish, private interests. As he put it, abortions could be ordered for reasons merely of "convenience, family planning, . . . dislike of children, [or] the embarrassment of illegitimacy."[56] But he quickly transmuted the nature of the wrong here: He argued that, by taking this matter out of the hands of legislatures and voters, the Court had deprived the voters of their freedom to weigh the contending interests

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54. Brief of Appellee at 31, Roe v. Wade, 410 U.S. 113 (1973) (No. 44-070) (quoting Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953)).

55. 410 U.S. 179 (1973).

56. *Id.* at 221 (White, J., dissenting). *See also id.* ("The common claim before us is that, for any one of such reasons, or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure. ¶ The Court, for the most part, sustains this position: during the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus; the Constitution, therefore, guarantees the right to an abortion as against any state law or policy seeking to protect the fetus from an abortion not prompted by more compelling reasons of the mother.").

and "values" at stake in deciding whether to protect human life. And in this curious way, the problem of the case was inverted: The killing of the child—the gravest concern that had brought forth the law—was now displaced, as the main question of harm and justice in the case. The harm done to the fetus was replaced now with the harm visited upon the people and legislatures in the separate states, as they were barred from "balancing" the question of how much they "valued" the life of a child when set against the interests and convenience of a pregnant woman.[57]

One of the most embarrassing parts of this case is that Justice Blackmun, writing for the majority did note that the State of Texas, in its brief, had set forth "at length and in detail the well-known facts of fetal development."[58] But Blackmun could simply assert, without a trace of sheepishness, that those medical "facts," now "well known," would have no decisive bearing. Blackmun would insist that the unborn child or fetus did not count, as Dyer says, as a "constitutional person."[59] Dyer recalls that observation of John Noonan, piercing to the root: that in Blackmun's positivist jurisprudence, the human "person" refers to "no natural reality but a construction of juristic thinking."[60]

But my point is that the Court could not deal even in a faintly adequate way with this case while putting out of the mind the action that formed the case and the substantive concern that brought forth the law. The dissenting judges could not give a plausible judgment on this case simply by invoking the empty, mechanistic claim that nothing on abortion could be found in the text of the Constitution. They could not offer a coherent dissent on this case without the willingness to look precisely at the substance of what we knew, say, about the state of that offspring in the womb, and how that child was being poisoned or dismembered in these surgeries.

## VIII. THE AFTERMATH AND DENOUEMENT

And then, the aftermath: There was a kind of *denouement* here, a scene that illuminated an even larger part of the story and conveyed a larger lesson. The story was relayed by a friend, who was in turn a close friend of one of figures in the story and heard the account directly from him. The story was of a dinner party in Washington only weeks after *Roe v. Wade* was announced. Senator James Buckley was at that dinner along with Justice Potter Stewart. The two had known

57. *Id*. at 221–22 ("The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.").

58. Roe v. Wade, *supra* note 21, at 157

59. *See* JUSTIN BUCKLEY DYER, SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING 76 (2013).

60. *Id*. at 79.

each other since their days as students at Yale. But now Stewart had helped form the majority in *Roe v. Wade*. During the dinner, the conversation turned almost naturally to the dramatic news marked by the decision in *Roe*. Buckley expressed his deep incredulity with the decision: It seemed to betray, he thought, a flippant disregard for the facts known well to embryology about the development of the child in the womb. He then rolled off, in a series of steps, the emerging features of the embryo turning into a fetus, resembling more and more the *child* we could come to know. From the accounts I have heard, Senator Buckley's review of the facts ran along the same lines that I would find so riveting as they were unfolded by Paul Ramsey and by the lawyers for Texas. But as Buckley unfolded the sequence, with the meaning inescapable, Stewart was apparently jarred. As the story goes, Stewart recoiled. He responded with a heated disbelief that this account could be true. But the points Buckley had recited happened to be quite undeniably true: they were confirmed in the textbooks on embryology and obstetric gynecology—and as he pointed out, they were contained quite amply in the brief. Had Stewart not read that careful, extended brief?

Whether he had read the brief or not, or whether he had read it and not paid close attention, his surprise virtually makes my case: For could we not readily imagine the effect on Stewart if the dissenting opinions had simply unfolded that string of evidence that had been so carefully arranged in the brief for Texas? It was nothing other than the short rehearsal of that evidence that produced such a jarring effect on Stewart when it was sprung upon him by James Buckley. At the very least, we would have to suppose that Stewart would have been given pause. His doubts would no doubt have encouraged the doubts, or undermined the glib certainty, of his other colleagues. The result may well have been a closely divided Court, too divided perhaps to offer to the public such a momentous decision. The judicial politicians on the Court, doing their calculations, might have decided to hold back. Or a majority might even have been assembled to sustain the laws on abortion, as a majority on the Court had been assembled, just two years earlier, in *U.S. v. Vuitch*, to sustain a law on abortion in the District of Columbia.[61]

Whether reasons might have carried the day here, in *Roe*, as in any other case, would hinge on many contingent things, including the temper of the judges. But at least we could say this much: A style of judging that insists on focusing, in a demanding way, on whether the law, in its defining substance, was "justified," is a style of judging that will keep us focused honestly on what the case was truly about. If the dissenting judges in *Roe* and Doe had done the work and put down on the record the evidence and principled arguments that bore so forcefully on the *substance* of that case, that serious argument would have been part of the enduring record of the case. From that point forward, conservative lawyers and judges, taking their stance on that case—mulling over again the reasoning in the case—would have had the central questions at the core of their critique. And with

61. 402 U.S. 62 (1971).

that ordering of things, we would have had a better chance of producing a far more morally coherent jurisprudence.

Looking back at *Roe v. Wade* and the brief written by the lawyers for Texas, we could say that the lawyers had acted "naturally." Or rather, we could say that only if we recovered the sense of the logic of the law and its connection to the logic of a moral judgment. One might say that with the passage of the law in Texas, the lawyers were facing a binary situation: On the one hand, they could simply take Justice Holmes's understanding that the ruling majority claims its authority to rule from the brute fact that the majority has the power to overcome the minority. Hence, Holmes's famous observation that the role of the judge was to be "the supple tool of power," to help assure that the ruling majority gets its way, but in a civilized manner.[62] The veneer of civility would cover the unlovely fact that, for Holmes, the Rule of the Majority was at bottom simply the Rule of the Strong. In that case, the laws in Texas needed no defense, for the exercise of power virtually justified itself.

But the lawyers from Texas were engaging an older reflex, which even in the Age of Holmes had not been extinguished. They recognized that the logic of law was that it closed down personal choice and private judgment, and replaced them with a uniform rule imposed on all. If we respect human beings as creatures of reason who can reason about their own well-being, that state of affairs calls out for "justification." That is, it poses the question of whether the law could plausibly claim to rest on a principle, or on reasons, that can establish what is indeed rightful and just for anyone who comes under the law. Which is to say, it brings out the connection that was understood at the very beginning, the connection between the logic of law and the logic of morals.[63] As Aristotle understood, there was only one kind of creature that had the competence to frame propositions that could be understood as rightful and binding for all, and only one kind of creature who could reason, in that way, about the things that were more generally or universally right or wrong, good or bad, for others as well as himself. As Aristotle saw, only one kind of creature was destined by nature for political life, the life marked by the presence of law, for law sprang from the nature of only one kind of creature. When the lawyers for Texas sought to summon their wit in explaining the "justification" for the laws on abortion in that State, they were acting then in the most "natural" sense as lawyers. And when the judges focus their genius on that same, irreducible moral question—the question of whether the law was "justified," rightful, for anyone who came under the law—they may discover a simple truth running deep: that they are doing all that needs to be done in doing a jurisprudence of Natural Law.

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62. Letter from Oliver Wendell Holmes to Harold Laski, Professor (March 4, 1920), *in* 1 HOLMES LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953).

63. For the fuller exposition of this understanding, running back to the opening pages of Aristotle's *Politics*, see HADLEY ARKES, FIRST THINGS: ON THE CAPACITY FOR MORALS AND THE ORIGINS OF LAW § 2, 11–30 (1986).

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Seven years ago, when we launched our project on Natural Law, I raised the question to our friends who seek safety in contriving formulas of the positive law while cautioning us again not to ask the questions that run beneath the surface to the core of things. But in that path, I argued, there had been no safety, and therefore no prudence, and beyond that, no coherence, for we could not give our best reasons, our fullest reasons, the reasons that give the most coherent account of the decisions we are making, the law we are shaping. And as I posed the question at the end, I asked, "Why should you—why should we?—settle for anything so diminished, when measured against the moral seriousness of the questions brought before us?"

Whether we win or lose in these cases, why would it not be better that we come to an understanding ourselves of the issues that really form the moral substance of what we are addressing—and what we are deciding? Whether we happen to get it right or wrong in any case, we may accomplish a result modest and yet, with it all, astounding enough for our day: a jurisprudence that can give a coherent account of itself. And in this remnant of a moral world left to us these days, that is no small thing to be savored.