Irresistible Force Meets Immovable Object: Hadley Arkes, Due Process, and Me

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ABSTRACT

Recent revisionist scholarship on the due process clause has suggested that a "substantive" reading of due process predates the Dred Scott case, and provides support for a natural-law jurisprudence in which judges invalidate statutes as unreasonable or unjust. Thus, historical scholarship appears to bolster the philosophical arguments of Professor Hadley Arkes, well-known for his view that judges should go "beyond the Constitution" in their decision-making. The present article, building on a previous reexamination of these purported antebellum precedents for substantive due process, revises the revisionists—including Professor Arkes—arguing that due process requires only conformity with basic rule-of-law principles of generality and prospectivity in the enactment of laws, and procedural regularity in their execution. As for the role properly played by natural-law reasoning, the widely divergent approaches of John Marshall and Stephen Field are contrasted, in order to illustrate how discernment of the Constitution's meaning differs from going beyond it.

Professor Hadley Arkes and I have been cordially but sharply disagreeing about constitutional interpretation, and about the range and function of judicial power under the Constitution, for about twenty years. When I published *Against the Imperial Judiciary* in 1996, I devoted several pages to criticizing the approach taken by Professor Arkes in his 1990 book *Beyond the Constitution*.[1] Over the years we have returned again and again to many of the same themes: Professor Arkes forcefully arguing that judges may—indeed must—decide cases on the basis of "principles of justification . . . nowhere adumbrated in the Constitution," and I just as strenuously denying that this is any proper business of judges who draw their authority from our Constitution.[2] So far neither of us has budged. He remains the irresistible force, counseling the vigorous use of judicial power "beyond the Constitution" for philosophically justifiable ends; I remain the

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1. MATTHEW J. FRANCK, AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE 172–75, 197, 211 (1996) (discussing HADLEY ARKES, BEYOND THE CONSTITUTION (1990)).

2. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 26 (2010). *Cf.* Matthew J. Franck, *The Lawful Truth*, FIRST THINGS, Oct. 2010, at 70–71; and our subsequent exchange in the letters column of the same magazine in January 2011, at 6–8.

immovable object, erecting a barrier of constitutional principle against such an understanding of the judicial function.

The latest round in our friendly combat was spurred, it seems, by my 2015 article on the origins of "substantive due process" in *American Political Thought*.[3] There I made the argument that the distinctively twentieth-century phrase "substantive due process," commonly used in contradistinction to "procedural due process," was a conceptually misleading term of art, "drawing the line in the wrong place between two different readings" of due process of law.[4] I further argued that the *practice* we now call substantive due process, though considerably older than the phrase we now use to describe it, has no pedigree in American law prior to the *Dred Scott* case of 1857. And even there, the putative first appearance of substantive due process was equivocal, transitional, and conceptually underdeveloped in a single, seemingly throwaway sentence by Chief Justice Roger Taney.

That substantive due process first appeared in *Dred Scott* was, once upon a time, conventional wisdom among scholars of constitutional law and history. But in recent years, revisionists have argued that there are even older precedents, and that a substantive reading of the liberty—or of the property rights—protected by the due process clause can be found in quite a few antebellum cases decided by the federal and state courts.[5] In these cases, the revisionists, judges relying on a due process clause (or "law of the land" clause understood to embody the same principles in a state constitution), invalidated legislation for being an unjust or unreasonable intrusion on the liberty of the individual. That is, it was not that the law in question pursued a legitimate object in regulating human conduct but failed to prescribe adequate procedural norms for executing such regulation of conduct. No, the claim was that in these cases the judges held that the law pursued no legitimate object whatever, or (to make the same claim in different form) that the law intruded on a freedom that cannot be lawfully trammeled by the state, regardless of how the law was carried out.

The revisionists appeared to have given substantive due process a historical grounding that would permit its present-day enthusiasts to disassociate the practice from the taint of the *Dred Scott* case. But a fresh look at the historical evidence demonstrates that this time, the revisionists are wrong and the old conventional wisdom was almost altogether correct—the "almost" being justified

3. Matthew J. Franck, *What Happened to the Due Process Clause in the* Dred Scott *Case? The Continuing Confusion Over "Substance" versus "Process,"* 4 AM. POL. THOUGHT 120–48 (2015).

4. *Id*. at 124.

5. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006); Timothy Sandefur, *In Defense of Substantive Due Process; or, The Promise of Lawful Rule*, 35 HARV. J.L.& PUB. POL'Y 283 (2012); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

because the older view was incomplete in its understanding both of *Dred Scott* and of the meaning of due process.

The original meaning of the due process clause can be more readily grasped if we recall its historic relationship with that older expression of the same basic principle: that persons shall not be deprived of life, liberty, or property "but by the law of the land," which originally appears in Magna Carta.[6] The additional stress later placed on "*due process* of law" did nothing to detract from, and indeed underscored more formally, the rule-of-law principle that both turns of phrase are about. For the central principle of due-process-of-law-of-the-land is that individuals are to be ruled by law and not by decree. What's the difference? As I have previously explained:

> There are several key differences between a law and a decree. A law, properly speaking, is general, impersonal, neutral, and prospective, and it deprives persons of life, liberty, or property only after a fair process in which they can defend themselves. Law governs future conduct, and notifies persons of the legal strictures imposed on their conduct. Decrees, by contrast—even when enacted by legislatures under the appearance of a law—are particular, sometimes personal, targeting classes of persons or species of property for outright forfeiture. They are often retrospective, dictating changes in a pre-existing state of things rather than looking forward to future conduct. And they frequently short-circuit or eliminate a procedural opportunity to defend oneself.[7]

As I had said in my longer article in *American Political Thought*, another way to understand the rule of law as resting on the difference between law and decree is to see that it "comes to light as a principle of the separation of powers":

> Any legislative enactment taking property from A and giving it to B is a violation of due process because it invades the judicial function. Courts take from A and give to B all the time, in the adjudication of debts, contracts, torts, and so on, both under common-law principles and under the terms of statutes . . . . For a legislature to provide for such transfers, prospectively, in accord with findings of certain rights and wrongs as adjudicated in courts of law, is of the essence of lawmaking. But to effect the transfers themselves is to perform the judicial function, and so-called laws directly commanding them are not properly laws and provide none of the essentials of process (let alone a process that is "due").[8]

At the time I wrote these words, I was unaware of a lengthy treatment of many of the same sources, which likewise refuted the revisionists, by law professors

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6. MAGNA CARTA 1215, art. 39, *in* J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992).

7. Matthew J. Franck, *Due Process and the Logic of the Law: A Response to Hadley Arkes*, PUB. DISCOURSE (Nov. 10, 2015), http://www.thepublicdiscourse.com/2015/11/15980/ [https://perma.cc/2G6Z-7R9X].

8. Franck, *supra* note 3, at 129–30.

Nathan S. Chapman and Michael W. McConnell in their article *Due Process as Separation of Powers*.[9] As Chapman and McConnell put it, in the traditional understanding of due process that descends from Magna Carta through the writings of Coke, "[t]he 'substantive' side of due process was positive, standing law; the 'procedural' side was adjudication by a court. The former entailed the separation of the lawmaking function, and the latter the separation of the adjudicatory function, from the King's personal power."[10]

Chapman and McConnell comb through many of the same cases that I later reviewed myself, and they confirm my conclusion (or I confirm theirs) that none of the putative antebellum precedents for substantive due process "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."[11] They write, of a case that may typify them all: "This is not akin to modern substantive due process. This is an individual freedom against the deprivation of rights except by a court in accordance with the separation of powers."[12] Just so. This is the common thread of all the cases before *Dred Scott*.[13]

Lately I have also become aware of the argument of Andrew T. Hyman (also predating my own but similarly concluding) that revisionist authors have misunderstood the references to due process in the 1856 and 1860 platforms of the Republican Party.[14] And more recently, Christopher R. Green has shown that the debates over the Thirteenth Amendment demonstrate the consistent understanding, running through the adoption of the Reconstruction Amendments, that due process required only that legislative enactments be general and prospective, and that they provide some procedural protection for life, liberty, and property prior to their deprivation.[15]

In short, the initial appearance of substantive due process in *Dred Scott*, however equivocal or transitional it may have been, was an utter novelty in Anglo-

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9. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

10. *Id*. at 1688.

11. Franck, *supra* note 3, at 130.

12. Chapman & McConnell, *supra* note 9, at 1757 (referring to Tr. of the Univ. of North Carolina v. Foy, 5 N.C. (1 Mur.) 58 (1805)).

13. Chapman's and McConnell's conclusions regarding antebellum cases in this field differ from my own only in the case of *Wynehamer v. People*, 13 N.Y. 378 (1856), which they regard as a genuine example of modern-style substantive due process. They conclude that "*Dred Scott* and *Wynehamer* . . . are the faulty exceptions that prove the rule" they observe in all other antebellum cases. Chapman & McConnell, *supra* note 9, at 1772. But they fail to notice that the New York court in *Wynehamer* only considered the statutory alcohol ban's retrospective effect, and never called its prospective effect into question. *Compare* Chapman & McConnell, *supra* note 9, 1768–70, *with* Franck, *supra* note 3, at 131–33.

14. Andrew T. Hyman, *The Due Process Plank*, 43 SETON HALL L. REV. 229, 229–71 (2013). My thanks to Christopher Green for this reference. *Cf*. Franck, *supra* note 3, at 136–39.

15. Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73, 73–113 (2017).

American law. If due process of law is understood to require duly enacted positive, standing laws of general application and prospective effect before any deprivation of life, liberty, or property may occur, then the Missouri Compromise of 1820 (the Act held unconstitutional in *Dred Scott*)[16] entirely satisfied the requirements of due process. If due process further required a fair adjudication of such a general and prospective law's effect, that requirement was satisfied by Scott's employment of a common law cause of action in suing for his freedom.[17] Yet Chief Justice Taney managed to write, with evident seriousness, that

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.[18]

It is clear that Taney was desperately trying to assimilate the *Scott* case to the solid body of precedents on due process as a rule-of-law principle—that is, he was trying to cast the Missouri Compromise as an arbitrary decree of either a particularistic or a retrospective effect. But of course it was neither: it was general and prospective, putting slaveowners on notice that they were not to carry slaves into the relevant territory if they did not want to risk losing their property. Major Emerson, Scott's owner at the time of his sojourn in the federal Wisconsin Territory, *had* committed an offense against the laws, and thus Scott deserved his freedom. Taney's ruling that the federal statute was an unconstitutional enactment failing the test of due process rested squarely on a factual falsehood as one of its necessary premises. But the falsehood must have seemed vitally important to Taney, for he needed something to shore up his shaky proposition that a *substantive* "right of property in a slave is distinctly and expressly affirmed in the Constitution."[19]

But it was after the Reconstruction Amendments were added that substantive due process came into its own as the doctrinal development we know today. Dropping the subterfuges that Taney had felt compelled to employ, justices such as Noah Swayne and Stephen Field went all in for the innovative and ahistorical notion that the Due Process Clause supplies judges with the authority to rule authoritatively on the reasonableness or justice of general, prospective statutes that chafe certain litigants.

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16. An Act to Authorize the People of the Missouri Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States, and to Prohibit Slavery in Certain Territories, 3 Stat. 545, 548, § 8 (1820).

17. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 393 (1857) (describing Scott's lawsuit as "an action in trespass *vi et armis*").

18. *Id*. at 450.

19. *Id*. at 451.

Like Taney in *Dred Scott*, these justices, whose lineal descendant today is Justice Anthony Kennedy, distorted beyond recognition the separation-of-powers principle of due process, and in so doing, *they* violated separation of powers. They harbored, as Justice Samuel Miller said of counsel pressing this newfangled view, a "strange misconception of the scope of this provision," believing it "a means of bringing to the test . . . the merits of the legislation" challenged in a case, as a just or reasonable public policy choice.[20] Justice Miller's exasperation was understandable. From Blackstone[21] to Hamilton[22] to Lincoln,[23] as well as in the steady and universal practice of the courts, "due process of law" had been understood to require only this much minimum "substance" from legislative enactments potentially depriving anyone of life, liberty, or property: that they be general and prospective, and that their effectuation be referred to regular processes in courts of law, not carried out summarily or arbitrarily by executives.

Professor Arkes aligns himself not with this original public meaning of due process, but with those who rejected it in the decades after the Civil War. He wrote, over a quarter-century ago, that "the logic of the Due Process Clause goes beyond the provision of ample process or procedure," and "must encompass the question of whether the restrictions or the penalties imposed by the legislation can be substantively justified."[24] This, I am afraid, is counseling judges to behave unconstitutionally.

Allow me to say a few words on matters where Professor Arkes and I do not disagree. We do not disagree about the existence of natural law; that is, I am not a positivist, though I have read him as describing me that way in the heat of debate.[25] For his part, Professor Arkes is not an acolyte of judicial supremacy, though he has read me as intimating as much in similarly heated moments.[26] But there is a very real difference between us on the matter of the judicial function under the U.S. Constitution, and on the proper role of natural-law reasoning in carrying out that function.

In my view, the natural law itself, properly understood, curtails the uses of natural-law reasoning by judges in the American constitutional context. The essence of the argument is this: When the Declaration of Independence affirms the

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20. Davidson v. New Orleans, 96 U.S. 97, 104 (1878).

21. 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

22. Alexander Hamilton, Remarks in the New York Assembly on an Act for Regulating Elections (Feb. 6, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON, JAN. 1787–MAY 1788, 34–37 (Harold C. Syrett & Columbia Univ. Press eds., 1962), http://founders.archives.gov/documents/Hamilton/01-04-02-0017 [https://perma.cc/B47C-YXAM].

23. Address at the Third Lincoln-Douglas Debate in Jonesboro, Illinois (Sept. 15, 1858), *in* 3 COLLECTED WORKS OF ABRAHAM LINCOLN 97–101 (Roy P. Basler ed., 1953).

24. ARKES, *supra* note 1, at 97.

25. Matthew J. Franck, *Hadley Arkes, the Constitution—and Johnny Rocco*, NAT'L REV. (November 16, 2015, 4:39 PM), http://www.nationalreview.com/bench-memos/427137/hadley-arkes-constitution-and-johnny-rocco-matthew-j-franck [https://perma.cc/J33B-2TAX].

26. Hadley Arkes, *Once More Unto the Breach*, NAT'L REV. (November 19, 2015, 2:30 PM), http://www.nationalreview.com/bench-memos/427297/jurisprudence-moral-reasoning [https://perma.cc/L2QE-3U9C].

equality of human beings and their equal possession, as human beings, of the natural rights to life, liberty, and the pursuit of happiness, it tells us nothing of the particular means that will be brought to bear by this or that government to achieve the protection of these rights. It certainly says nothing about entrusting our natural rights to judges. The very next thing it does say is "that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[27] It is in instituting governments—in constitution-making—that the people establish the means of which the Declaration says practically nothing.

In our own case, the people elected to establish a complex set of institutions—of governing powers first divided between the federal and state governments, and then further separated in each of them into legislative, executive, and judicial powers. In the federal Constitution, the judicial power is accorded a jurisdiction in all "cases . . . arising under this Constitution"—a category that does not include all *questions* that may arise about the meaning of the Constitution.[28] As John Marshall said in the first great case decided by his Court, there are "[q]uestions, in their nature political"—constitutional questions, that is—that are not fit material for adjudication by a court of law, because the power and duty of answering them belong elsewhere, in one of the other branches of government.[29] And this he said in the case to which we commonly attribute the emergence of the power of "judicial review." For Marshall, judicial review was not judicial supremacy.[30]

But then it could hardly be said that the Constitution makes judges into the moral censors of legislation in cases in which parties complain of the injustice of a law—perhaps even altogether rightly—but can identify nothing in the text, context, or original meaning of the Constitution that provides a ground for judges to treat the law as invalid or nonbinding. Cases arising under this Constitution are to be decided by the judges of the United States—but surely judges are *not* to decide cases arising under principles that can be discovered only in some place "beyond the Constitution."

Perhaps a claim could be made that whereas certain institutional functions and powers established by the Constitution are not amenable to judicial authority, the rights of individuals are another matter. As Marshall also said in the *Marbury*

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27. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

28. U.S. CONST. art. III, § 2. *See* John Marshall, Remarks in United States House of Representatives (Mar. 7, 1800), *in* 12 THE PAPERS OF JOHN MARSHALL 94–104 (Herbert A. Johnson, Charles T. Cullen & Charles F. Hobson, eds., 2006).

29. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

30. Professor Arkes, I hasten to say again, explicitly rejects a judicial supremacist reading of *Marbury v. Madison*. *See* HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 235–37 (1994) [hereinafter THE RETURN OF GEORGE SUTHERLAND]; HADLEY ARKES, NATURAL RIGHTS AND THE RIGHT TO CHOOSE 216–18 (2002). But he seems to be more of a "Jeffersonian" departmentalist than a "Madisonian" one, holding that interpretive questions are not so much functionally assigned with finality to the various branches as they are contested across the board by all of them. This permits him to be simultaneously an exponent of a less-than-omnipotent judiciary and of an omnicompetent one, with jurisdiction "beyond the Constitution" as well as under it.

case, "[t]he province of the Court is solely to decide on the rights of individuals," and what's more, "[t]he question whether a right has vested or not is, in its nature, judicial, and must be tried by the judicial authority."[31] And if questions regarding rights explicitly identified by the Constitution "must be tried" by the courts, why not questions regarding natural rights as well?

A short and not altogether satisfactory answer is that if they are not somehow identified in the text, or demonstrably inferred from it, such natural rights do not come properly within the notice of a court of law charged with deciding cases under the Constitution. A longer answer, by way of illustration, would be to compare two examples of natural-law judging: one in which a jurist probes the foundational logic of a constitutional provision protecting rights, and the other in which he uses a constitutional case as an occasion to vindicate a vision of liberty that is not to be found in any constitutional provision, but that in the opinion of the judge does not require such a provision to be judicially defensible.

My first example is John Marshall's only dissent in a constitutional ruling, in the 1827 case of *Ogden v. Saunders*, in which the majority upheld a New York "insolvency" law that permitted, under some circumstances, the cancellation of debts incurred after the passage of the law.[32] The Court had previously held unconstitutional a law that operated retrospectively, on contracts made before the statute, saying such a law "impair[ed] the obligations of contracts," contrary to Article I, § 10.[33] Now the question was whether a law operating only prospectively caused a similar impairment, or whether the statute itself should be considered somehow incorporated into contracts subsequently made—so that the contract's original obligations were modified by the possibility of an insolvent's default cancelling the debt.

Marshall reasoned that the text of the contract clause did not limit its reach to those laws that operated only retrospectively, and that the New York law did much more than legislate on the remedies available to creditors. But the most powerful argument he was concerned with rebutting was that every contract between individuals is a "creature of society," so that obligations between man and man would not exist at all but for the positive laws of the state. To the contrary, Marshall argues, the right of men to contract with each other—and thus freely to enter into binding obligations—is a natural right anterior to civil society. Thus, a law that first permitted certain obligations to be incurred, and then permitted them to be cancelled without recourse for the injured party, was plainly a law impairing the obligations of contract, and no prospective notice that this was the local state of the law could obviate this legal conclusion.[34]

Marshall might have been wrong in his reading of the contract clause in *Ogden*. But throughout his opinion, Marshall was concerned with plumbing the

31. *Marbury*, 5 U.S. (1 Cranch) at 167, 170.
32. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827).
33. *See* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819).
34. *Ogden*, 25 U.S. (12 Wheat.) at 344–45 (Marshall, C.J., dissenting).

meaning of textual provisions: what actions and conditions produced the obligations of contract, and what sorts of laws went beyond varying the available remedies and instead impaired those obligations? And he did not for a moment entertain the proposition that there was an indefeasible right to *make* any particular species of contracts in the face of legislative regulation or prohibition. On the contrary, Marshall wrote that "[t]he right [of the state] to regulate contracts, . . . [and] to prohibit such as may be deemed mischievous, is unquestionable."[35]

Now for contrast, consider the dissent of Justice Stephen Field in the *Slaughter-House Cases* of 1873.[36] The majority of the Court upheld a Louisiana statute that forbade all butchers in the greater New Orleans area to practice their trade anywhere but in a newly built slaughterhouse facility at the mouth of the Mississippi, which was owned by a small, closely held corporation to which all the butchers had to pay rent in cash and in kind. Whatever might be said of it as a public health measure, the law was attacked as a monopoly, advantaging some well-connected businessmen while others long in the trade either had to "pay to play" or go out of business. Yet the Court upheld the legislation.[37]

Justice Field's *Slaughter-House* dissent could not be more different from Marshall's *Ogden* dissent. Monopolies, he said, "encroach upon the liberty of citizens to acquire property and pursue happiness," and his allusion to the Declaration of Independence was no accident.[38] The Fourteenth Amendment, he said, "was intended to give practical effect to the declaration of 1776 of inalienable rights," a category in which Field included the right "to be free from disparaging and unequal enactments, in the pursuit of the ordinary avocations of life."[39] He insisted on every man's "natural right" to pursue "any lawful trade or employment,"[40] without stopping to consider that his description of a trade as "lawful" might just be begging the question. And he concluded by saying that the Louisiana law fell into a category of enactments

> opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.[41]

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35. *Id*. at 347. See discussion of this case in FRANCK, *supra* note 1, at 135–40.

36. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

37. *See generally* RONALD M. LABBÉ & JONATHAN M. LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT (2003).

38. *Slaughter-House*, 83 U.S. (16 Wallace) at 101 (Field, J., dissenting).

39. *Id*. at 105–06.

40. *Id*. at 104.

41. *Id*. at 111. In the first sentence quoted here, Field is closely paraphrasing a Connecticut decision to which he had referred earlier in his opinion, *id*. at 108, namely *Norwich Gas Light Co. v. Norwich City Gas Co*., 25 Conn. 19 (1856). But his paraphrase is misleading. Justice Joel Hinman of the Supreme Court of Errors of Connecticut, writing for a unanimous three-judge court, had remarked that one of the parties in the case claimed what amounted to a monopoly, and continued: "although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it

There at last was Field's true operative principle as a judge: "it require[d] no aid from any bill of rights" for him to reach out and strike down those unjust and partial laws that gave some people unfair advantages, or that otherwise offended Justice Field's finely tuned sense of justice. But this was not the form of the judicial power to which the American people consented when they ratified the Constitution. Field was not concerned with cases arising under the Constitution, in which he might have to resort to natural-law reasoning to discern what the Constitution is telling a judge to do. He was interested in advancing a certain moral vision of freedom, and mere constitutional provisions were just fuel to be burned up in the course of an argument about the morality of the law. His arguments were logically fallacious, historically careless, and intellectually haphazard, whereas Marshall's were rigorous, firmly grounded in history, and precisely careful about the reach of their implications. But these differences, I suggest, ultimately sprang from the different practices in which they were engaged.

Whereas Marshall disciplined himself to a probing understanding of a text to which he was responsible as a judge, Field was self-liberated to go beyond the Constitution, feeling his responsibilities to be transcendent of the consent of the governed. Field's approach bespoke a tacit belief in the deficiency of the Constitution made by the people, a deficiency he could supply by the application of judicial wisdom. Marshall's approach was bent on getting every iota of legal principle *out of* the Constitution in order to resolve a case, leaving the people to repair any defects in the document that might come to be discovered. With his heedlessness regarding the consent of the people, Field was a violator of the natural law, whereas Marshall was its true defender.

Professor Arkes, a great admirer of Chief Justice John Marshall, has also declared Stephen Field to be "one of [his] favorite jurists of the nineteenth century,"[42] and has particularly praised Field's "magisterial dissent in the *Slaughter-House Cases*."[43] But as I explained in the pages of *American Political Thought*,[44]

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does not require even the aid which may be derived from the Bill of rights, the first section of which declares 'that no man or set of men, are entitled to exclusive public emoluments, or privileges from the community,' to render them void." *Id.* at 38. Hinman's equivocation here is eliminated by Field's truncated paraphrase in *Slaughter-House*. Hinman says (a) Connecticut has no "direct constitutional provision against a monopoly," and (b) that the "whole theory of free governments" suggests monopolies of no benefit to the public are void, even without the "aid" of a bill of rights, but in between (c) he cites Section 1 of the bill of rights that serves as a preamble of the Connecticut constitution, which bars anyone from receiving "exclusive public emoluments or privileges." What is the true ground of the decision? Arguably, amid the rhetoric about free constitutions, it is that provision of the state constitution—a text that in fact bears directly on the case at hand, in which a company claimed an exclusive public privilege of considerable value. Justice Field's near-quotation of the *Norwich Gas Light* decision stops and restarts at just the right places to eliminate from view Justice Hinman's citation and quotation of the constitutional text on which an ordinary reader could surmise the Supreme Court of Errors had relied. But the truncation served Field's purpose of liberating judges from constitutional texts.

42. ARKES, *supra* note 2, at 3.

43. ARKES, THE RETURN OF GEORGE SUTHERLAND, *supra* note 30, at 62. *See also* ARKES, *supra* note 1, at 108.

44. Franck, *What Happened to the Due Process Clause*, *supra* note 3, at 142–45.

Field and his fellow dissenters in *Slaughter-House* were the justices who took the nascent concept of substantive due process that Taney had incompletely fashioned in *Dred Scott*, and created from it the ahistorical and anti-constitutional doctrine responsible for *Allgeyer v. Louisiana* (Stephen Field's long-awaited triumph),[45] *Lochner v. New York*,[46] *Roe v. Wade*,[47] and *Obergefell v. Hodges*.[48] This was a departure from the original meaning of due process of law, a departure that finds no warrant in any precedents prior to *Dred Scott*, nor in any of the opinions of John Marshall and his contemporaries. I will let Chapman and McConnell have the last word here:

> Due process both undergirded and gained its definition from the emerging separation of powers first in Britain and then in America. It is ironic that the courts, starting in the late nineteenth century, seized upon this principle to subvert the separation of powers by giving themselves a super-legislative power to change rather than interpret and enforce the law.[49]

45. 165 U.S. 578 (1897).
46. 198 U.S. 45 (1905).
47. 410 U.S. 113 (1973).
48. 135 S. Ct. 2584 (2015).
49. Chapman & McConnell, *supra* note 9, at 1807.