

IN DEFENSE OF SUBSTANTIVE DUE PROCESS, OR THE PROMISE OF LAWFUL RULE

TIMOTHY SANDEFUR*

“The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. . . . If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.”

*Cummings v. Missouri*¹

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* Principal Attorney, Pacific Legal Foundation; J.D., 2002 Chapman University School of Law; B.A., 1998 Hillsdale College. Damien Schiff, Joshua Thompson, Deborah J. La Fetra, Daniel A. Himebaugh, Ilya Shapiro, David B. Kopel, and Trevor Burrus offered helpful feedback.

1. 71 U.S. (4 Wall.) 277, 325 (1866).

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INTRODUCTION

Perhaps no doctrine in constitutional law has produced so much calumny as the theory commonly known as substantive due process. Supreme Court Justices left and right have denounced the idea,² professors have ridiculed it,³ and for decades it has been a commonplace of law schools that substantive due process is an oxymoron⁴ or a trick by which judges enforce their own policy preferences into law.⁵ Indeed, there seems to be a sort of competition among detractors for the most colorful way of ridiculing the doctrine. On the face of it this seems odd; if substantive due process is such obvious folly, how is it that so many of the greatest minds of the Anglo-American legal tradition—from every ideological background—have subscribed to it? This Article is an effort to put away childish ridicule and to understand substantive due process on its own terms. Although there have been several excellent explanations and defenses of the doctrine—especially from a historical basis,

2. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 755–65 (1997) (Souter, J., concurring); *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

3. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“[S]ubstantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”).

4. See, e.g., Jeremy Waldron, *Review and Commentary*, 29 COLUM. HUM. RTS. L. REV. 765, 773 (1998) (reviewing CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997)).

5. See, e.g., *Gumz v. Morrissette*, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring) (“[S]ubstantive due process has always been so dependent on the personal feelings of the Justices . . . [I]t has no pedigree other than a trail of defunct, little-mourned, and sometimes (as in *Dred Scott*) pernicious doctrines . . . [and] is a shorthand for a judicial privilege to condemn things the judges do not like or cannot understand.”).

showing that the idea was well known when the Constitution was ratified and at the time the Fourteenth Amendment was enacted⁶—there remains a need for a conceptual explanation, and this Article seeks to fulfill that need. What exactly *is* due process of law? Why do substantive and procedural aspects of due process overlap in the way they do? How does the due process of law requirement fit within constitutional law and with broader political and philosophical considerations?

The due process of law guarantee is an effort—one with deep roots in the history of western civilization—to reduce the power of the state to a comprehensible, rational, and principled order, and to ensure that citizens are not deprived of life, liberty, or property except for *good reason*. What sorts of reasons are “good” is obviously a normative question, but notwithstanding the arguments of many critics of substantive due process, the Due Process Clause invites—indeed, requires—courts and legal scholars to take seriously the idea that there are real answers to such normative questions. Though contemporary discourse often treats normative matters as essentially irrational, subjective preferences,⁷ the Due Process Clause is based on the opposite premise: that law and arbitrary command, justice and mere force genuinely differ. And the idea of a lawful political order depends on recognizing that difference.

We cannot, in approaching the Due Process Clause, hope to avoid normative questions. The Constitution—from its opening commitment to the “Blessings of Liberty”⁸ to its closing reference to rights “other” than those specified in its text⁹—is a thoroughly normative document, one that binds the government to act lawfully, where lawfulness incorporates norms of generality, regularity, fairness, rationality, and public-orientation. The Constitution is not a morally neutral framework for mere majority-rules decisionmaking. The Due Process Clause was written to ensure that government does not act

6. See, e.g., 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); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (1990); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

7. See PHILIPPA FOOT, NATURAL GOODNESS 5 (2001) (“[S]ubjectivism . . . for the past sixty years or so has dominated moral philosophy . . .”).

8. U.S. Const. pmbl.

9. U.S. CONST. amend. IX.

without reasons, nor for insufficient, corrupt, or illusory reasons. When we reflect on the suffering of peoples who have been denied such a guarantee, and on the inestimable blessings it has given us (however imperfectly), we can see its value and how unworthy it is for lawyers to belittle, disregard, or mischaracterize the principle of due process of law.

I. DUE PROCESS OF LAW AS A PROMISE OF LAWFUL RULE

One cause of the controversy over the concept we now call substantive due process lies in the confusing terminology with which legal academics have approached the subject. The term “substantive due process” is a recent innovation. Nineteenth-century judges who employed this doctrine never used this phrase, which was devised in the 1940s by theorists trying to make sense of the application of the Bill of Rights to the States through the Fourteenth Amendment.¹⁰ The nineteenth-century judges best known for using the doctrine simply referred to it as “due process of law.”

So, too, the tendency to refer to “substantive due process” or “the Due Process Clause” perpetuates confusion by leaving out the Clause’s last two words, words that are crucial to understanding its importance: “due process of law.”¹¹ The Framers used these words in the Fifth and Fourteenth Amendments for a reason—just as they used the word “due” for a reason. To refer to the Clause as the “Due Process Clause” implicitly suggests that it guarantees the citizen only the right to an unspecified procedure or ritual, rather than to a catalogue of substantive protections. The Clause’s language actually guarantees that “[n]o person shall be deprived of life, liberty, or property without due process of law.”¹² Much of the controversy in such famous “substantive due process” cases as *Loan Association v.*

10. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 258–59 (2000) (“The term ‘substantive due process’ appeared in four cases between 1935 and 1946, once in an argument by counsel in a Supreme Court case and three times in lower federal court opinions. By the early 1950s the term ‘substantive due process’ had been employed twice in Supreme Court opinions . . . involv[ing] challenges based on incorporated Bill of Rights provisions.”).

11. U.S. CONST. amend. V (emphasis added); U.S. CONST. amend. XIV (emphasis added).

12. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

*Topeka*¹³ or *Lawrence v. Texas*¹⁴ centers on whether the process by which a citizen has been deprived of life, liberty, or property, is a process of *law* or merely a lawless assertion of power.¹⁵ One cannot resolve that question without consulting normative considerations or by systematizing some formalistic approach that only focuses on procedure.

A. *Law as the Opposite of Arbitrariness*

The Due Process Clause, as the Framers were well aware, originated in the Magna Carta's "law of the land" provision.¹⁶ The most famous early exposition of the idea of substantive due process in the U.S. Supreme Court came in Daniel Webster's oral argument in *Dartmouth College v. Woodward*,¹⁷ when he was discussing the "law of the land" clause of the New Hampshire Constitution. Sir Edward Coke explained in his *Institutes*—the textbook on which such founding-era lawyers as Jefferson,¹⁸ Ad-

13. 87 U.S. (20 Wall.) 655, 664–65 (1874).

14. 539 U.S. 558, 572 (2003).

15. Kermit Roosevelt III, *Forget The Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 985 (2006) ("What the due process jurisprudence of the late nineteenth and early twentieth century sought to do was to keep the government within its bounded powers—to bar it from acts that exceeded its authority and were therefore in a real sense, lawless. The bounds of governmental power were derived not from the Due Process Clause, but from more basic principles, starting with the idea that the government is the agent of the people and wields only those powers they have seen fit to give it.") (internal citations omitted).

16. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*.").

17. 17 U.S. (4 Wheat.) 250, 314 (1819). Webster's formulation was repeatedly quoted or cited throughout the century as the definition of due process of law. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68 (1932); *Hovey v. Elliott*, 167 U.S. 409, 418 (1897) ("Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College* case: 'By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.'"); *Hurtado v. California*, 110 U.S. 516, 535–36 (1884); *Ex parte Wall*, 107 U.S. 265, 289 (1883); *Beckwith v. Bean*, 98 U.S. 266, 295 (1878).

18. WILLARD STERNE RANDALL, *THOMAS JEFFERSON: A LIFE* 52 (1993).

ams,¹⁹ Marshall,²⁰ and Madison²¹ cut their teeth—that the terms “law of the land” and “due process of law” were synonymous.²²

Instead of absolutely prohibiting the king from depriving individuals of their rights, the Magna Carta’s “law of the land” clause guaranteed that when the crown acted against an individual, it would do so in accordance with certain general, regular, traditionally accepted principles: “No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.”²³ This language promised that the king would act according the rule of law and not his own mere will.

This distinction between willful government force and reasoned law echoes throughout the history of due process of law. Lord Coke built on the law of the land clause his belief that law is, in essence, reason itself: “a rational ordinance or directive judgment, commanding obedience to itself primarily because what it directs the citizens to do is reasonable and in that sense just,” as opposed to “an act of will that derives its binding force from the threat of sanction”²⁴ This was why Lord Coke believed that “the King hath no prerogative, but that which the law of the land allows him,”²⁵ and that the king is not under any man, but under God and the law.²⁶ On this principle, his contemporary and sometime rival Francis Bacon agreed: “In Civil Society, either law or force prevails,” he wrote. “But there is a

19. ANNE HUSTED BURLEIGH, JOHN ADAMS 24 (1969).

20. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 76–77 (1996).

21. Madison never actually joined the bar but studied law in depth, including Coke’s works. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 150 (1971).

22. See 2 EDWARD COKE, INSTITUTES, in 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 858 (Steve Sheppard ed., 2003) (“For the true sense and exposition of these words [‘law of the land’], see the Statute of 37. Edw. 3. cap. 8. where the words, by the law of the Land, are rendred, without due process of Law”).

23. Magna Carta § 39.

24. John Underwood Lewis, *Sir Edward Coke (1552–1634): His Theory of “Artificial Reason” as a Context for Modern Basic Legal Theory*, in LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE 107, 110 (Allen D. Boyer ed., 2004).

25. Proclamations, (1610) 77 Eng. Rep. 1352 (K.B.), 1354, 12 Co. Rep. 74, 75.

26. Prohibitions del Roy, (1607) 77 Eng. Rep. 1342 (K.B.), 1343, 12 Co. Rep. 63, 65 (quoting Bracton).

kind of force which pretends law, and a kind of law which savours of force rather than equity. Whence there are three fountains of injustice; namely, mere force, a malicious ensnarement under colour of law, and harshness of the law itself."²⁷

The law of the land clause is not easily categorized as either "procedural" or "substantive," or as only applicable to the judiciary, legislature, or executive. Originating at a time before the clear separation of powers, the law of the land provision allows the king to deprive people of rights only under certain circumstances, and thus appears procedural: it guarantees only that the king must follow certain procedures before depriving people of their freedom or property. Yet the presence of those circumstances is *constitutive of the lawfulness* of the king's act, which means that those circumstances are also *substantive*: It is the presence of those circumstances, not the king's royal authority—the what, not the how—that gives the king's acts their lawful character. In other words, the lawfulness guarantee presupposes that there can be a difference between the ruler's act and truly lawful acts. Certainly this guarantee would be meaningless if the king's mere assertion sufficed to make any of his acts "the law of the land." This would make all of his acts self-ratifying, and render the clause surplusage.

This gap between a ruler's act and truly lawful acts is bridged by certain principles whose presence gives the ruler's acts the character of law. These principles are both procedural and substantive because only the proper procedures—only procedures that are justified, that encompass and enforce the substantive principles—will make the ruler's act a law. In short, procedural guarantees are constructed out of substantive guarantees. This dual character of the lawfulness requirement bars the government from using any "kind of force which pretends law," whether it be an act of "mere force," or "a malicious ensnarement under colour of law," or if the arbitrariness resides in the "harshness of the law itself."²⁸

The law of the land clauses in American colonial charters and early constitutions adopted this dual character. The 1780 Massachusetts Constitution declared that:

27. FRANCIS BACON, *Aphorism 1*, in *THE PHILOSOPHICAL WORKS OF FRANCIS BACON* 613 (John M. Robertson ed., 1905).

28. *Id.*

No subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his [counsel], at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.²⁹

This text separates the law of the land clause from what we would call procedural rights, like discovery and the right to an attorney. Identical or nearly identical wording appeared in the constitutions of New Hampshire³⁰ and other states.³¹ Virginia's 1776 Constitution likewise separated specific criminal procedures from the law of the land clause, which simply declared that "no man [would] be deprived of his liberty, except by the law of the land, or the judgment of his peers."³² The Maryland Constitution of 1776 had three "law of the land" clauses, two of which ensured speedy remedy for injuries,³³ and one of which recited the Magna Carta formulation: "[N]o freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land."³⁴

The law of the land or due process of law provisions guarantee not just any process but a process *of law*. This obliges the government to act in a lawful manner. As we have noted, this promise necessarily implies that there are rules that bind the rulemaker; that the ruler's acts are not law ipso facto. The Magna Carta's language and that of its progeny rejects the idea that a ruler's commands are law simply because the ruler utters them. That rejection means there must be some basis for distin-

29. MASS. CONST. of 1780, pt. 1, art. XII.

30. N.H. CONST. pt. 1, art. XV (amended 1984).

31. DAVID N. MAYER, LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT 19–20 (2011).

32. VA. CONST. of 1776, art. I, § 8.

33. MD. CONST. of 1776, art. XVII.

34. *Id.* at art. XXI.

guishing between valid laws and invalid ones, which means there must be exogenous standards by which to differentiate the ruler's lawful acts from unlawful ones. Defining those standards with precision is the job of common law judges, among others, and the standards that they have developed include generality, regularity, fairness, rationality, and public-orientation.³⁵ In other words, a lawful act is a use of the state's coercive powers in the service of some general rule that realistically serves a public, and not a private end.

The promise that government's coercive powers will be used in a lawful manner is, at least, a prohibition against govern-

35. Whatever their other differences, philosophers of law also have converged on these as the general elements defining law. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 21–25 (1961) (listing elements of law); ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 25–47 (rev. ed. 1954) (same); ST. THOMAS AQUINAS, *SUMMA THEOLOGIAE* 995 (Fathers of the English Dominican Province trans., 1981) (1274) (Law is “an ordinance of reason for the common good, made by him who has care of the community, and promulgated”); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *44 (“[Law] is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal.”); 1 JOHN AUSTIN, *LECTURES ON JURISPRUDENCE* 95 (Robert Campbell ed., London, John Murray 3d ed. 1869) (1832) (“[W]here it obliges *generally* to acts or forbearances of a *class*, a command is a law or rule.”). The 2010 report of the World Justice Project, recognizing that “the rule of law must be more than merely a system of rules—that indeed, a system of positive law that fails to respect core human rights guaranteed under international law is at best ‘rule by law,’ and does not deserve to be called a rule of law system,” identified four “universal principles” recognized across all cultures they studied as inherent in the concept of the rule of law: First, the government was subject to, and not superior to, the law; second, the laws are clear, public, stable, fair, and protect fundamental rights such as persons and property; third, the procedures of enactment and enforcement are accessible, fair, and efficient; and fourth, the laws are enforced and operated by independent, competent, and ethical officials. MARK DAVID AGRAST ET AL., *WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2010*, at 8 (2010).

Ryan C. Williams lays out what he takes to be “various readings” of the Due Process Clauses of the Fifth and Fourteenth Amendment. Williams, *supra* note 6, at 419–27. My point here is to emphasize the connections or overlaps of these readings. In my view, each is a way of defining and preventing governmental arbitrariness. For example, as I explain *infra*, Section III, what Williams calls “‘fair procedures’ due process,” which “would not only require compliance with duly enacted law and the formality of an adjudication but would further require that the judicial procedures applied in connection with such an adjudication satisfy some normative conception of fairness,” *id.* at 421, arises out of a recognition that the Due Process Clause’s promise of government lawfulness applies to the judiciary as well as to the legislature. Further, the promise of fair procedures is only one aspect of the overall promise that government will not deprive a person of rights without due process of law. In other words, procedural due process is a *subset* of what is generally called substantive due process.

ment's acting in an *arbitrary* way.³⁶ Unfortunately, defining "arbitrary" is as difficult as defining "law," and many suggested definitions are interlocking. Mindful of Aristotle's injunction that we must only "look for precision in each class of things just so far as the nature of the subject admits,"³⁷ we can say that an arbitrary act is an act that does not accord with any rational rule or explanatory principle, an act that has no connection to a larger purpose or goal. In *Baker v. Carr*,³⁸ for example, the Supreme Court connected arbitrariness, capriciousness, and lack of a consistent policy in its definition of discrimination.³⁹

Yet these terms suggest another layer of complexity: The word arbitrary cannot be understood except within the context of a teleological, or end-directed, understanding of the actor's purposes. An act's arbitrariness becomes apparent only when contrasted with a goal-oriented act. Goal-oriented acts can be tested for their rationality, through means-end analysis, and an arbitrary action is not a means to any end. It exists of itself, with no (or with only an illusory) guiding standard or principle. Thus, arbitrariness is to law as mere will is to reason; an arbitrary act is one not susceptible of persuasion but only depends on force. It is essentially an *ipse dixit*—an assertion of authority that rests on no basis other than the fact that the authority has asserted it. An arbitrary act has either no reasons to explain it or only reasons that would with equal plausibility justify the opposite act. The law of the land and Due Process clauses guarantee that the government will not employ its coercive powers against the individual on the basis of "because I say so."

Modern legal theories tend to see the lawfulness of a ruler's pronouncement as a function of its sanction or compulsion, whereas the law of the land principle implies that lawfulness is

36. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331–32 (1986) ("[T]he Due Process Clause, like its forebear in the Magna Carta, was 'intended' to secure the individual from the arbitrary exercise of the powers of government.' By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being 'used for purposes of oppression.'" (internal citations omitted).

37. ARISTOTLE, *Nicomachean Ethics* 1094b, in *THE BASIC WORKS OF ARISTOTLE* 936 (Richard McKeon ed., 1941).

38. 369 U.S. 186 (1962).

39. *Id.* at 226 ("[I]t has been open to the courts . . . to determine . . . that a discrimination reflects *no* policy, but simply arbitrary and capricious action.").

a function of an action's underlying logic or correspondence to principle. The difference between these two perspectives calls to mind Plato's *Euthyphro* Dilemma: Do the gods value a good thing because it is in fact good, or is it only good because the gods value it?⁴⁰ If the latter, then goodness is essentially arbitrary because the gods might just as easily value any other thing. But if the gods consider something good because it actually *is* good, then its goodness depends on some deeper principle, which might also be comprehensible to us. If the ruler's act is lawful simply because the ruler has chosen to do it, then all law is essentially arbitrary: A thing and its opposite could both be law, and the law of the land guarantee would be nugatory. The promise that the ruler will act in a lawful manner makes sense only if the opposite is true: If the lawfulness *vel non* of the ruler's acts depends on deeper principles, so that it is possible to compare any specific government act to those underlying standards as a test of its lawfulness. And if those standards are accessible to our minds, then it is in principle possible to answer meaningfully *why* the ruler has acted in a certain way. By pledging that government will comply with deeper principles of lawfulness, the Due Process Clause guarantees that government will act in a manner for which it can give a rational account.⁴¹ Thomas Paine put this point succinctly in *The Rights of Man*. After observing that the only good government is one which is oriented toward the public good instead of the good of the ruler, Paine explains that ipse dixit assertions of power by the governing authority are not law:

In the representative system, the reason for every thing must publicly appear. Every man is a proprietor in government, and considers it a necessary part of his business to understand. . . . [H]e does not adopt the slavish custom of following what in other governments are called LEADERS. . . . The government of a free country, properly speaking, is not in the persons, but in the laws.⁴²

40. PLATO, *Euthyphro* 10a–11b, in *THE COLLECTED DIALOGUES OF PLATO* 178–179, (Edith Hamilton & Huntington Cairns eds., Lane Cooper et al. trans., Bollinger Found. 1961) (c. 399 B.C.).

41. It is important not to become confused here with the modern “rational basis” test, which in fact is quite irrational. See TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 123–40 (2010).

42. THOMAS PAINE, *THE RIGHTS OF MAN*, in *COLLECTED WRITINGS* 545, 571–72 (Eric Foner ed., Library of America 1995) (1792); see also THOMAS PAINE, *AGRAR-*

The question remains how this means-end rationality applies in the Constitution.

B. *Means-Ends Rationality and the Constitution*

If we cannot differentiate a rational act from an arbitrary one except within a broader, goal-oriented framework, then the Due Process Clause's promise of lawfulness cannot be understood unless we see the Constitution as an instrument for serving certain ends. Only because the Constitution itself has purposes do we have a standard by which to judge government's acts. And, in turn, if the difference between a rational and an arbitrary act can be understood only within the context of goal-oriented action, then we must engage in some sort of means-ends analysis when we are called upon to answer whether a government action is arbitrary or lawful. If, for example, the rule-making authority forbids the possession of matches, the rule would not be arbitrary if the purpose were to prevent fires. But this same rule *would* be arbitrary if the rulemaker intended the ordinance to abate noise in the neighborhood because possessing matches has no, or only an extremely attenuated, connection to noise reduction. Of course, the situation is even worse if there is no purpose at all behind the ban. Then the ordinance is simply not susceptible of rational analysis at all. Lon Fuller has explored this issue thoroughly,⁴³ but my point here is less grand than his: It is that a governmental act cannot be weighed as the Due Process Clause requires us to weigh it without some assessment of the fitness of the means chosen to the ends pursued. Nor can it be made without analyzing the end pursued to ensure that it is genuine and not illusory or pretextual.

Nonetheless, a government act is not arbitrary simply because it lacks a very precise justification. Any choice of one among equal rational alternatives might be called "arbitrary," but because it is a choice confined within a spectrum of reasonable alternatives, it is still according to a principle of rationality, and is therefore not arbitrary in the sense of lawlessness. For example, it is rational to establish *some* age of maturity, at which point society legally presumes a young person capable

IAN JUSTICE, *supra*, at 410 ("Despotic government[s] . . . consider man merely as an animal; that the exercise of intellectual faculty is not his privilege; that he has nothing to do with the laws, but to obey them . . .").

43. See LON L. FULLER, *THE MORALITY OF LAW* 146–51 (rev. ed. 1969).

of making contracts, driving, voting, or taking other responsibilities. Infants are not capable of making informed choices or understanding or discharging certain responsibilities, so some line must be drawn. Yet there is no particular reason to prefer eighteen years to seventeen or nineteen. That does not mean that when a state chooses eighteen instead of seventeen, it is acting arbitrarily, since it has still chosen among reasonable alternatives.⁴⁴ So long as each alternative is within the realm of reasonable choices, the choice of one over another is properly left to the rulemaker's discretion.

There are two categorical cases of lawless government action: rule according to the ruler's mere whim and rule according to the ruler's mere self-interest. We will consider each in turn.

C. *Arbitrariness and Government by Whim*

Rule according to the ruler's mere whim is clearly arbitrary since there is no guiding principle, and what the ruler merely feels like one day may be reversed the next day.⁴⁵ No overall principle then limits or regularizes the government's use of coercive power. But we would do well to consider what this arbitrariness really consists of.

The term arbitrary is often used as synonymous with "unstable" or "unpredictable." John Locke,⁴⁶ William Blackstone,⁴⁷ and others have blended the idea of arbitrariness and unpredictability in their discussions of lawful order. It is true, of course, that unpredictability is one of the hallmarks of arbitrary rule. But unpredictability is a consequence of arbitrariness, not synonymous with it. Arbitrary rule is rule according to no fixed standard, rule for no reason at all. The lack of a guiding principle for official acts means that the ruler's actions are literally unpredictable. Although this will typically lead to social instability, it also is possible for lawless rule to produce a silent, terrified, desolate stability. The North Korean dictatorship of Kim

44. One might say therefore that such a choice is arbitrary, but not *arbitrary and capricious*. I owe this observation to my colleague Damien Schiff.

45. This is among the first arguments Socrates makes against Thrasymachus. PLATO, *Republic* 339e–340e, in COLLECTED DIALOGUES, *supra* note 40, at 589–90.

46. See, e.g., JOHN LOCKE, *Second Treatise of Civil Government*, in TWO TREATISES OF GOVERNMENT 405 (Peter Laslett ed., Cambridge Univ. Press rev. ed. 1963) (1690) (defining "Arbitrary Power" as "Governing without *settled standing Laws*").

47. See, e.g., BLACKSTONE, *supra* note 35, at *44 ("[Law] is a rule: not a transient sudden order from a superior . . .").

Jong Il is no less stable for being arbitrary. What is essential about such regimes is not that they are tumultuous, but that they are essentially lawless. It may seem paradoxical to call a totalitarian society lawless, but while a totalitarian dictatorship maintains its control by myriad rules, those rules are themselves basically lawless and unprincipled—often simply delegating unreviewable discretion to a particular local commander to act however he pleases.⁴⁸ Thus, as Paine observed, while the free state uses *explanations* to answer the question of why a citizen is required to do X or forbidden to do Y, the arbitrary regime cannot answer such a question.⁴⁹ For an answer to exist would imply that the state is bound by law—that the state is, in at least a theoretical sense, limited by the demands of logic and explanation. The lawless state is not bound to explain its acts because it sees itself as superior to any such boundaries.⁵⁰ But the acts of a lawful ruler are susceptible to reasoned explanation. John Milton made the same point:

[T]o say kings are accountable to none but God, is the overturning of all law and government. For if they may refuse to give account, then all covenants made with them at coronation, all oaths are in vain, and mere mockeries; all laws which they swear to keep, made to no purpose: for if the king fear not God (as how many of them do not,) we hold then our lives and estates by the tenure of his mere grace and mercy, as from a god, not a mortal magistrate; a position that none but court parasites or men besotted would maintain! Aristotle, therefore, whom we commonly allow for one of the best interpreters of nature and morality, writes in the fourth of his Politics, chap. x. that “monarchy unaccountable is the worst sort of tyranny; and least of all to be endured by free-born men.”

And surely no Christian prince . . . would arrogate so unreasonably above human condition, or derogate so basely from a whole nation of men, his brethren, as if for him only subsisting, and to serve his glory, valuing them in comparison of his own brute will and pleasure no more than so many

48. See, e.g., HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 395–400 (rev. ed. 1994) (describing the “shapelessness” of totalitarian constitutions).

49. PAINE, *THE RIGHTS OF MAN*, *supra* note 42.

50. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 236–49 (1960) (describing totalitarianism as a state that has extinguished law); cf. ARENDT, *supra* note 48, at 244–45 (similarly distinguishing between bureaucratic and lawful rule).

beasts, or vermin under his feet, not to be reasoned with, but to be trod on⁵¹

Note Milton's emphasis on accountability, on "reasoning with," as the element that distinguishes the lawful order fit for human beings from the sort of arbitrary self-interested rule appropriate for beasts of burden. "Monarchy unaccountable" is tyranny because it is rule according to no rational standard and degenerates into rule for the "brute will and pleasure" of the ruler.

Consider two very different literary depictions of arbitrary rule, both dealing with the ritual of stoning: Shirley Jackson's "The Lottery"⁵² and Freidoune Sahebjam's *The Stoning of Soraya M.*⁵³ Both depict radically arbitrary orders, but they do so from different directions. Jackson's story is set in an unnamed village, a pastoral hamlet in a timeless alternate universe, where, every year, the people assemble for the ritual of stoning a randomly picked citizen to death. The system is procedurally evenhanded—the victim is chosen by fathers drawing paper slips from an old wooden box—but what makes the story so chilling is precisely the fact that there is no reason for the execution at all—it has just always been that way, and the villagers go on, year after year, enforcing the fundamentally arbitrary, yet regular procedure, killing a villager for absolutely no reason. The horror of the story lies not in any formal error such as mistaken identity, but in the opposite, in the utter arbitrariness of this regular, orderly scheme. The village is haunted by the risk of inescapable, violent, regular death, for no reason whatsoever. Tessie Hutchinson's last words are, "It isn't fair, it isn't right."⁵⁴ Jackson hints that the ritual has roots in some ancient mystical harvest ceremony.⁵⁵ But we soon learn that, whatever its origin, the practice continues to exist simply because it is

51. JOHN MILTON, *The Tenure of Kings and Magistrates* in *THE STUDENT'S MILTON* 758 (Frank Allen Patterson ed., rev. ed. 1936) (1650).

52. SHIRLEY JACKSON, *The Lottery* (1949), reprinted in *SHIRLEY JACKSON: NOVELS AND STORIES* 227–35 (2010).

53. FREIDOUNE SAHEBJAM, *THE STONING OF SORAYA M.* (Richard Seaver trans., 2011) (1990). Sahebjam's book is based on a true story, told to him in Iran in 1986, by one of the witnesses. *Id.* at xii–xiii. However, his book tells a stylized version, in part to protect his sources, and I treat it here as literature without any intention of diminishing the horrific reality it depicts. The book was made into a feature film in 2008. *THE STONING OF SORAYA M.* (Roadside Attractions 2008).

54. JACKSON, *supra* note 52, at 235.

55. *Id.* at 232 ("Old Man Warner snorted. . . . 'Used to be a saying about 'Lottery in June, corn be heavy soon.'").

old: “‘There’s *always* been a lottery,’ he added petulantly.”⁵⁶ This arbitrary element of rule does not make life in the village unstable or impermanent, on the contrary, the people live otherwise peaceful and productive lives. Every year, and presumably every day, is basically the same.

A different kind of monotony dominates the village of Kupayeh in Sahebjam’s book, a village ruled by a perverted village mullah and a complaisant mayor, who willingly allow Soraya’s abusive and hypocritical husband to frame her for adultery and execute her so he can marry another.⁵⁷ In Kupayeh, unlike in Jackson’s village, the execution does serve a purpose, but that purpose is merely to satisfy the desires of the men in power. This is not a publicly oriented principle and is therefore arbitrary. Soraya and the other women cannot comprehend the patterns of rule because there are no patterns—and thus no safety. Whereas each day is basically the same in Jackson’s village, each day is different and unpredictable in Kupayeh—every minute might bring some new abuse. Yet here too there is no real hope of change. Every day brings the dreary sameness of fickle terror. Different as Jackson’s and Sahebjam’s villages are, they are twin images of arbitrary rule, in which power is wielded according to no true principle. In “The Lottery,” the senselessness is regular, evenhanded, and exists for no reason; in *The Stoning of Soraya M.*, it is random, absurdly biased, and aimed at satisfying the authorities’ lusts. But in both worlds, the state’s coercive power serves no rational purpose. If challenged, the authorities could not explain why their order should be obeyed—they can provide only ipse dixit non-answers like “there’s *always* been a lottery,”⁵⁸ or “[T]his is men’s business, not women’s. And besides, you wouldn’t understand if I told you.”⁵⁹ Authority here is, in Milton’s well-chosen word, “unaccountable.”⁶⁰ The villages in both stories are realms of arbitrariness, and though ruled with an iron fist, they are not ruled by *law*.

56. *Id.*

57. See SAHEBJAM, *supra* note 53.

58. JACKSON, *supra* note 52, at 232.

59. SAHEBJAM, *supra* note 53, at 56.

60. MILTON, *supra* note 51, at 758.

D. Rule by the Ruler's Self-Interest as an Illusory Principle

It is easy to see how being governed at the mere whim of the ruler is arbitrary. It is harder to see that government according to the ruler's self-interest is also basically arbitrary. A society governed only to serve the ruler's self-interest might be more stable and predictable than one operated purely on whim, but there is no reason why the ruler's self-interest, and not the self-interest of someone else, ought to be the guiding principle. A society ruled by the self-interest of the ruler is still basically ipse dixit rule, only with a change in emphasis: Whereas the whimsical ruler asserts power "because I *say so*," the ruler who governs for his own self-interest is governing "because *I say so*."

Such rule might be legitimized if there were a reason to privilege the ruler's self-interest over the self-interest of the ruled.⁶¹ Man rules the dog for the man's interest because the man is superior to the dog in an important way. If the rule of man over man is similar—if some are entitled to rule others for their own interest—it can only be because they are likewise superior to those who are ruled. But if that superiority is illusory, rule for the ruler's own sake is based only on arbitrary force.

In the *Politics*, Aristotle distinguished between governments aimed at the benefit of the ruled and those that aim at the ruler's benefit.⁶² States ruled for the benefit of all he classified as monarchies, aristocracies, and polities: Those ruled for the benefit of the ruling power he labeled tyrannies, oligarchies, and democracies. The former he analogized to families, which are governed "for the sake of the ruled"; the latter he likened to slavery, in which the master rules the slave "for the sake of the master's

61. The Continental Congress made this point in the Declaration of the Causes and Necessity of Taking Up Arms, 2 JOURNAL OF THE CONTINENTAL CONGRESS 1774–1789, at 140–41 (Worthington Chauncey Ford ed., 1905) ("If it was possible for men, who exercise their reason, to believe, that the Divine Author of our existence intended a part of the human race to hold an absolute property in, and an unbounded power over others, marked out by his infinite goodness and wisdom, as the objects of a legal domination never rightfully resistible, however severe and oppressive, the Inhabitants of these Colonies might at least require from the Parliament of Great Britain some evidence, that this dreadful authority over them, has been granted to that body. But a reverence for our great Creator, principles of humanity, and the dictates of common sense, must convince all those who reflect upon the subject, that government was instituted to promote the welfare of mankind, and ought to be administered for the attainment of that end.").

62. ARISTOTLE, POLITICS 1279a–b, 77–78 (C.D.C. Reeve trans., Hackett Publishing Company 1998) (c. 384 B.C.).

own benefit . . .”⁶³ Thus, governments “that look to the common benefit turn out, according to what is unqualifiedly just, to be correct, whereas those which look only to the benefit of the rulers are mistaken and are deviations from the correct constitutions. For they are like rule by a master, whereas a city-state is a community of free people.”⁶⁴ Note that Aristotle’s criterion of distinction depends on a basic theory of equality: The subject of a tyranny, like a slave, is ruled for the ruler’s own purposes since he is inferior to the ruler. A “correct constitution,” by contrast, is “a community of free people,” and therefore can admit no such ranks of inferiority among citizens. It is ruled under a theory of basic equality which makes it inappropriate to govern for the ruler’s own self-interest.⁶⁵

John Locke’s approach is slightly different, but he reaches a similar conclusion.⁶⁶ Beginning with a premise of equality, Locke imagines the state along the lines of a voluntary, contractual agreement. Each person’s equal standing in the state of nature entitles him to an equal say in the formation of the state and to equal treatment by the state. This equality is not a mere preference but a presumption from which deviations are permitted only when justified by convincing rational argument.⁶⁷

63. *Id.* at 76.

64. *Id.* at 77.

65. Aristotle does, of course, defend the institution of slavery as natural, but his argument that slaves are naturally inferior to citizens, and therefore legitimately ruled for the master’s own benefit, is consistent with his overall argument for equality among the citizens of the *polis*. Also, although it is sometimes argued that Aristotle envisions the *polis* as a product of natural necessity and not of deliberation, Aristotle actually does recognize that the state is the product of deliberation and design. See Harry V. Jaffa, *Aristotle, in HISTORY OF POLITICAL PHILOSOPHY* 74 (Leo Strauss & Joseph Cropsey eds., 1963).

66. The bridge between Locke’s approach and Aristotle’s is provided by John Milton, who writes in *Tenure of Kings And Magistrates*, *supra* note 51, at 757, that:

[It is] manifest, that the power of kings and magistrates is nothing else but what is only derivative, transferred, and committed to them in trust from the people to the common good of them all, in whom the power yet remains fundamentally, and cannot be taken from them, without a violation of their natural birthright; and seeing that from hence Aristotle, and the best of political writers, have defined a king, ‘him who governs to the good and profit of his people, and not for his own ends’

67. On the role of presumptions, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 259–69 (2004); ANTHONY DE JASAY, JUSTICE AND ITS SURROUNDINGS 150–51 (2002); RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 25–38 (1993). Epstein and de Jasay argue that a presumption of liberty is a necessary premise for understanding political philosophy; any other

The presumption against deviations means the ruler cannot simply demand privileged standing—such as the power to rule for his own self-interest—merely by ipse dixit. By starting with a baseline of equality, and placing the burden of proof on the party who seeks to rule, Locke limits the ruler’s ability to exploit government’s coercive power for his own benefit.⁶⁸ If no good reason justifies unequal treatment, then it is arbitrary—not lawful—for the state to treat them unequally.

Having established that the ruler can lay claim to legitimacy only insofar as he can give good reasons for rule, Locke next provides the criteria for determining what constitutes a good

type of presumption would result in logical contradictions. Thus “opting for the presumption of liberty is hardly a matter of ethics, of a liberal temperament or even of efficient social and economic organization. It is a matter of epistemology . . . [an] automatic consequence[] of where the burden of proof falls—a matter about which sensible thought leaves little choice.” DE JASAY, *supra*, at 150–51. Or, as the Eleventh Circuit has explained:

A presumption is generally employed to benefit a party who does not have control of the evidence on an issue. . . . It would be unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that element of the claim.

Sikes v. Teleline, Inc., 281 F.3d 1350, 1362 (11th Cir. 2002).

Barnett’s “presumption of liberty” is basically a textual argument about the proper interpretation of the Constitution, and thus differs from the Lockean presumption of equality, but the two are related because Locke’s presumption is an analytical argument from first principles of political philosophy. For Locke, it is our fundamental equality that explains and justifies liberty, and that requires a presumption that all people are free unless good reason exists to deviate from that presumptive liberty. See HARRY V. JAFFA, *Equality As A Conservative Principle*, in HOW TO THINK ABOUT THE AMERICAN REVOLUTION: A BICENTENNIAL CELEBRATION 13, 41–42 (1978) (“[T]he people’s right to give their consent is itself derived from the equality of *all* men and therefore limits and directs what it is to which they may rightfully consent.”). For Barnett, constitutional structure and language is simply incoherent when combined with anything other than a presumption of liberty. Since the Constitution was written from a Lockean basis, this parallel is unsurprising.

68. Hobbes argued in *Leviathan* that a self-interested absolute monarch would implement stable, lawful, and orderly rule because he would naturally want to enrich and protect his subjects. THOMAS HOBBS, *LEVIATHAN* 120 (Edwin Curley ed., 1994) (1651) (“[I]n monarchy the private interest is the same with the public. . . . For no king can be rich, nor glorious, nor secure, whose subjects are either poor, or contemptible, or too weak . . . to maintain a war against their enemies.”). The reason this argument is so unconvincing is that it conflicts with Hobbes’ basic pessimism toward human nature. If the people themselves are violent, self-interested, frequently irrational creatures, we have no reason to believe the ruler will be otherwise. Hobbes essentially admits this but concludes that there is nothing for the subject to do but obey and suffer anyway. See *id.* at 410 (the people “ought to expect their reward in heaven, and not complain of their lawful sovereign, much less make war upon him”).

reason. He does this in the form of a “reasonable person” argument: Since it would be unreasonable for people to agree to subject themselves to arbitrary rules or to rule for the self-interest of the king or legislative majority, such purposes cannot be considered good reasons justifying rule. The people enter into civil society to protect their equal individual rights under general, reasonable principles. Reasonable people would not “give to any one, or more, an *absolute Arbitrary Power* over their Persons and Estates, and put a force into the Magistrates hand to execute his unlimited Will arbitrarily upon them,” because doing so would put the people “into a worse condition than the state of Nature, wherein they had a Liberty to defend their Right against the Injuries of others.”⁶⁹ Madison echoed this point in *Federalist* 51, when he wrote that in a society in which people are just as vulnerable to being plundered or oppressed by a self-interested legislative majority “anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger”⁷⁰ A society in which the ruling power can prey upon citizens at will, violating their rights with impunity and for no genuine public reason, is at least as bad as the ungoverned tumult of the state of nature—even if it operates according to rituals or is rigidly controlled by the ruling authorities. The minimum conditions of legitimate rule, therefore, are that the state’s coercive powers be used according to general principles and rationally promote the public good, respecting the equal rights of all. In short, the conditions are that all men are created equal, with certain inalienable rights, and that government, deriving its just powers from the consent of the governed, is instituted to secure those rights.⁷¹

Locke’s and Madison’s observation that an arbitrary or self-interested regime is no better than a state of nature is not a rhetorical flourish. It is an observation about the rational mechanics of lawful rule, which might be rephrased in economic terms: If no enforceable rule defines or enforces private rights (a state of nature), individual actors will strive to gain as much control over

69. LOCKE, *supra* note 46, at 359.

70. FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

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

resources—say, a fish pond⁷²—as they can.⁷³ Each will try to hoard access to it, investing heavily in fencing it off and otherwise defending it against rivals, or in discovering ways to confiscate their rivals' gains. Such investments divert attention away from more productive undertakings and are thus economically wasteful.⁷⁴ The actors also will tend to over-exploit the resource, taking as many fish as possible because they cannot trust that their rivals will not grab the remaining fish. In the absence of any authority to police each actor's claims, the race will go to the swift and the battle to the strong. If the actors agree, however, to a system of rules to govern legitimate claims—a contract, a set of mores, or a police system that protects each person's right to fish in the pond—each gains because each can reduce his inefficient investments (in predation or defending against predation) and can instead focus his attention on productive activity. Each actor is also less likely to over-exploit the resource since the police will enforce the claims of rivals who are too poor or too weak or otherwise unable to enforce their own claims. Thus, in theory, a common system of rational rules improves economic efficiency by reducing inefficient expenditures in obtaining and defending resources. This system is what makes the social compact rational.⁷⁵

Imagine, however, that the rules regulating the fishing pond eventually become so complicated and obscure that they cannot be understood without expensive legal representation, or at all, so that fishing rights can be obtained only by bribing the officials who guard the fishing hole. In such a circumstance, those who are too poor or too weak to enforce their claims are once more barred from access or are made vulnerable again to predation. The complicated regulations essentially transform the fishing hole back into a common resource, to which access is gained not by arbitrary force, but by arbitrary political influ-

72. See, e.g., R. Quentin Grafton et al., *Private Property and Economic Efficiency: A Study of a Common-Pool Resource*, 43 J.L. & ECON. 679 (2000) (using real-life fishing example).

73. Or, more precisely, individual actors according to their own marginal utility. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

74. See, e.g., Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569, 571 (2010) ("[T]he sea contains a wealth of valuable resources, including food, minerals, energy, and materials for bioresearch. When such resources are unowned or found in a 'common pool,' they may be exploited inefficiently because of some familiar externality problems associated with the creation of property rights.").

75. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 11–12 (1974) (describing rationality of state as rules for protecting resources).

ence, cleverness, or corruption.⁷⁶ The rules encourage prospective fishermen to engage in rent-seeking—that is, over-exploiting the resource due to uncertainty, finding ways to confiscate it from others, and fencing off one’s own gains from possible predation. Although these inefficiencies take the form of lobbying, payoffs, and complicated paperwork instead of turf-wars with weapons, they are substantively the same: inefficiency abounds, rightful claims go unenforced, each actor wastes resources in non-productive jostling with rivals,⁷⁷ and the “the weaker individual is not secured against the violence of the stronger”⁷⁸

If fishing ponds seem a sterile example, we observe the same phenomenon in *The Stoning of Soraya M.* The laws of Kupayeh do not allow Soraya to protect herself from the violence of her husband, Ghorban-Ali, who, after making a fortune in blackmail by exploiting his job as a prison guard,⁷⁹ becomes dissatisfied with his dutiful but unexciting wife. Ghorban-Ali makes a pact with Sheik Hassan: Hassan will see to it that Soraya agrees to a divorce, allowing Ghorban-Ali to marry the girl with whom he has become infatuated, and in exchange Hassan will have Soraya for his own wife.⁸⁰ When Soraya refuses, the two frame her for having an affair with another man, and execute her.⁸¹

76. This is why a society governed by a network of complicated rules can still be lawless. A system of rules riddled with unprincipled exemptions can rise to a level of arbitrariness which would be equivalent to no meaningful rule at all. In Madison’s words:

“The internal effects of a mutable policy are . . . calamitous. . . . It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?”

FEDERALIST NO. 62 (James Madison), *supra* note 70, at 381.

77. See James M. Buchanan, *Rent Seeking And Profit Seeking* (1980), reprinted in JAMES M. BUCHANAN, 1 *THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY* 108 (1999) (“Rent seeking on the part of potential entrants in a setting where entry is either blocked or can at best reflect one-for-one substitution must generate social waste.”).

78. FEDERALIST NO. 51 (James Madison), *supra* note 70, at 324.

79. SAHEBJAM, *supra* note 53 at 25–26.

80. *Id.* at 16–17.

81. *Id.* at 31.

Sheik Hassan is a murderer and thief whose “master[y] at the art of obsequiousness and the art of scheming”⁸² has given him a “visible ascendancy over the mayor,”⁸³ so that his pronouncements have the effect of law. Unchecked by the town’s cowardly mayor, Hassan becomes the ruling power in the village, whose house becomes:

[A] kind of law court where the mullah played all the roles, those of both prosecutor and public defender. And since any service rendered had its price, it was not long before the sheik had managed to acquire a few acres of land, half a dozen head of cattle, some poultry All this was done by perfectly legal means, with the full accord of the mayor and his deputies.⁸⁴

Soraya, with only truth on her side, cannot hope to resist the power of these men; she retreats into silence and, robbed of the opportunity to defend herself against the lies circulated at Ghorban-Ali’s behest,⁸⁵ dies for no good reason at the hands of the brutal villagers, all “according to the rules of law.”⁸⁶

Madison writes that in a society under the laws of which factions are empowered to pillage or oppress one another, the people are no better off than they were in a state of nature. He means precisely this: That in a society like Kupayeh, where coercive power is arbitrary, and not governed by principles of generality, regularity, fairness, rationality, and public-orientation, people like Soraya have gained none of the efficiencies that are supposed to redound from the establishment of a common political rule. Indeed, in some ways, the people are worse off, paralyzed by the emblems of apparent legitimacy and disarmed by the state’s official powers. This is why no reasonable person would choose arbitrary rule—why, in Locke’s words, people “would not quit the freedom of the state of Nature for, and tie themselves up under” such a regime.⁸⁷ To assume otherwise is to imagine “that Men are so foolish that they take care to avoid what Mischiefs may be done them by

82. *Id.* at 39.

83. *Id.* at 51.

84. *Id.* at 52.

85. An accused woman bears the burden of proving her innocence, a logically impossible task. *See id.* at 73.

86. *Id.* at 96.

87. Locke, *supra* note 46, at 405.

Pole-Cats, or *Foxes*, but are content, nay think it Safety, to be devoured by *Lions*.”⁸⁸ Thus, the promise that government will treat its citizens in a lawful manner is not merely a promise that government will abide by formal rules; it is a broader promise that government’s coercive powers will be used for genuine public reasons and not simply to suit the whim or self-interest of the ruling party. Form and substance overlap in this most essential element of due process of law.

In *The Stoning of Soraya M.*, it is Zahra, Soraya’s aunt and the village’s female elder, who serves as the symbol of substantive lawfulness. It was she who once chose the town’s mayor, Ebrahim,⁸⁹ but now it is she who confronts him, charging that his willingness to allow Hassan and Ghorban-Ali to exploit his authority for their own ends renders him unfit for that charge.⁹⁰ “[Y]ou’ve lost everything,” she cries, “everything that gave you the right to be the head of our community: authority, honesty, courage, independence, goodness.”⁹¹ In other words, Ebrahim’s acts are not true law because they are arbitrary; they lack the elements that would give his decisions the quality of lawfulness.⁹² Zahra and Ebrahim stand for opposites: respectively, the substantive and the procedural elements of lawful order. Ebrahim, as mayor, “enjoyed an indisputable authority in the community, and the official seals he affixed to any and all documents legalized . . . the illicit commerce that Sheik Hassan was

88. *Id.* at 346.

89. SAHEBJAM, *supra* note 53, at 62.

90. *Id.* at 57. The film adds a subtle but important element by making Ebrahim call to Allah to give him a sign if He disapproves of the execution of Soraya. One almost immediately appears when a group of traveling circus performers appear unexpectedly in the village—an incident that does occur in the book. *See id.* at 107. But Ebrahim lacks the courage to understand the sign for what it is, and allows the execution to proceed. Due to his moral weakness, the man-made procedural “law” eclipses even the most obvious indicia that his acts are contrary to truly lawful order. Meanwhile, the clowns, in their “grotesque costumes,” watch what they consider “a grotesque caricature of daily life”—that is, a grotesque caricature of justice in the forms of law. *Id.* at 115.

91. *Id.* at 57.

92. Zahra, in fact, represents substantive lawfulness precisely because, as a woman, she lacks any of the trappings of power and cannot claim the authority of promulgation. What authority she has is based solely on the substantive rightness of her speech. Thus, she approves plans to construct bridges or dig wells just as she approves marriages or funeral plans—not because she is vested with any formal authority, but simply because what she says has substantive truth. *See id.* at 62.

carrying on in league with Ghorban-Ali.”⁹³ But Ebrahim’s seals and signatures cannot make that commerce any less illicit in reality, and “the vocabulary of officialdom” cannot make Soraya’s killing any less arbitrary.⁹⁴ Zahra is an impotent symbol of lawful rule, who must stand and watch the formal procedures of political order become a “diabolical machine.”⁹⁵ It is “the law of men, the law that men make and say it is the law of God,” she explains to Soraya. “They have found you guilty, whereas you are not.”⁹⁶ This is not an act of reason or sense but an act of will and thoughtless lust, “the ‘law,’ such as men had willed it”⁹⁷ But like Antigone before her,⁹⁸ Zahra does not mistake the fiction of men’s will for a real lawful order. When, after the execution, Sheik Hassan decrees that Soraya shall not be buried,⁹⁹ it is Zahra who in silent resistance to authority obeys the demands of true law and buries Soraya anyway.¹⁰⁰

E. Generality, Regularity, and Fairness

Lawfulness requires that the state’s coercive powers be used in accordance with general and regular principles that advance the public good rather than the ruler’s private interest and that accord basic fairness and equality to the people subject to those powers. Whatever else a regime might be without these elements, it cannot be called a *lawful* regime.

True, terms like “basic fairness,” “generality,” and “equality” describe broad principles that might be difficult to apply in a specific case, and they must accord a degree of discretion to the lawmaker. For example, an absolute generality requirement would bar the legislature from passing a statute that applied

93. *Id.* at 59.

94. *See id.*

95. *See id.* at 79.

96. *Id.* at 91.

97. *Id.* at 125.

98. *See* SOPHOCLES, *Antigone*, in *THE THREE THEBAN PLAYS* 71 (Robert Fagles ed. & trans., 1984). Antigone, forbidden by king Creon to bury her brother Polynices, as punishment for her brother’s treason to the city of Thebes, does so anyway. *Antigone* arguably has for centuries been *the* classic literary meditation on resistance to arbitrary authority.

99. SAHEBJAM, *supra* note 53, at 132.

100. *Id.* at 138. Zahra covers Soraya with only branches and dead leaves, and later buries only some of her bones, *id.*, just as Antigone sprinkles only a handful of dry dust on her brother’s body to give him appropriate rites, SOPHOCLES, *supra* note 98, at 71.

only to a particular individual or group—yet the legislature cannot be held to such an extreme degree of generality if it is to address particular incidents where finer distinctions are often necessary and proper. A statute that treats some people, groups, or businesses differently from others might be appropriate if that difference is based on some relevant and legitimate distinction—for example, if a fire-prevention statute applies only to businesses that deal in flammable materials. Legislation that singles out a particular business or a particular person for no legitimate reason¹⁰¹ or uses irrelevant distinctions as an excuse for treating people differently,¹⁰² intrudes on the principles of lawfulness because it exercises government power in an arbitrary way.¹⁰³ A lawmaker who frequently resorts to specific commands rather than general rules is more likely to be ruling arbitrarily, or pursuant to no fixed principle or standard, or to be abusing its power to serve private interests instead of the public interest. Elastic as the concept of generality might be, it serves as a barometer of the basic rationality or arbitrariness in the ruler's acts.¹⁰⁴

101. See, e.g., *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 532–33 (1973) (invalidating legislation singling out class of persons to be denied government funding); *United States v. Lovett*, 328 U.S. 303, 315–16 (1946) (legislation singling out individual for termination from employment could violate due process even if it does not qualify as a bill of attainder).

102. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (government “may not draw distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective”).

103. See, e.g., James W. Ely Jr., *The Oxymoron Reconsidered: Myth And Reality in The Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 335–38 (1999) (describing how mid-nineteenth century courts developed the principle that generality is an inherent component of due process of law). Some state constitutions include specific prohibitions on special legislation, but as is often the case, such specific restrictions overlap with the due process of law requirement, without depriving it of meaning.

104. See, e.g., *Giozza v. Tiernan*, 148 U.S. 657, 662 (1893) (“[D]ue process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.”); *Leeper v. Texas*, 139 U.S. 462, 468 (1891) (“[D]ue process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”); *Caldwell v. Texas*, 137 U.S. 692, 697–98 (1891) (“Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive

Regularity is also an elastic concept. In some cases, a special rule for a special case is appropriate, and it is not easy to draw a line that excludes inappropriate special rules that also allows lawmakers sufficient discretion to react to unusual circumstances. Courts have created formulae for determining when legislation is too specific or irregular, and the point here is not to evaluate those tests but to defend the principle that some such tests are necessary to prevent arbitrary rule and thus to enforce the Due Process Clause's promise that government will act in a lawful manner. Many state constitutions have adopted secondary defenses against arbitrarily irregular or non-general rules, especially the prohibition on "special legislation." Special legislation is a violation of the lawfulness principle, and therefore of the due process guarantee, because it represents government based on specific commands for particular instances, rather than pursuant to comprehensible reasons. As one court explained:

The inherent vice of special laws is that they create preferences and establish irregularities. . . . [They thus replace] a symmetrical body of statutory law on subjects of general and common interest to the whole people . . . [with] a wilderness of special provisions, whose operation extends no further than the boundaries of the particular school district or township or county to which they were made to apply. . . . A public law is a measure that affects the welfare of the state as a unit; a private law is one that provides an exception to the public rule. The one is an answer to a public need, the other an answer to a private prayer. When it acts upon a public bill, a legislature legislates; when it acts upon a private bill, it adjudicates. It passes from the function of a lawmaker to that of a judge. It is transformed from a tribune of the people into a justice shop for the seeker after special privilege.¹⁰⁵

Special legislation violates the principles of lawfulness from, as it were, both the internal and external point of view. By providing special, localized benefits to specific persons, it employs state power in an irregular manner not justified by an overarching public purpose. But it also does violence to the democratic process of deliberation and public decisionmaking, thus encour-

justice. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary.") (internal citations omitted).

105. *Anderson v. Bd. of Comm'rs of Cloud Cnty.*, 95 P. 583, 586 (Kan. 1908) (quoting Samuel P. Orth, *Special Legislation*, ATLANTIC MONTHLY, Jan. 1906, at 69).

aging “improvident and ill-considered legislation.”¹⁰⁶ A law that concentrates benefits or burdens on constituents in one county will not be weighed or considered by legislators who represent different counties. And the legislature, which ought to be considering “measures of public importance” will instead “fritter[] away” its time “in the granting of special favors to private or corporate interests or to local communities.”¹⁰⁷ Thus, the use of special legislation appears less like a rule of law than a rule of specific commands for particular purposes, and particular favors granted at the ruler’s mere whim.

Generality and regularity are connected in a profound way to the principle of equal treatment. James Madison explained that connection in one of his most philosophically astute essays: “[T]hat alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”¹⁰⁸ Characterizing all rights as property, Madison argued that a government is not just, and property is not secure under it, “where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most compleat despotism.”¹⁰⁹ Madison’s analogy here is apt. Legislation that arbitrarily seizes property—whether that property be tangible goods or the freedom of conscience or speech—for the benefit of a ruler or a class of citizens who simply exert raw political power is not characteristic of lawful rule. It is instead the distinguishing trait of the “compleat despotism” represented by an official who simply issues particular orders for particular cases. Like such specific commands, legislation of this sort lacks the elements of generality, regularity, fairness, rationality, and public-orientation, and therefore cannot qualify as law.

The relationship between the regularity, generality, and equal treatment elements within the concept of lawful rule is probably most familiar from *Bolling v. Sharpe*,¹¹⁰ in which the

106. *Id.*

107. *Id.*

108. JAMES MADISON, *Property*, in JAMES MADISON: WRITINGS 515 (Jack Rakove ed., 1999) (1792).

109. *Id.* at 516.

110. 347 U.S. 497 (1954).

Supreme Court held that the Due Process Clause included an equal protection component. “[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive,” wrote Chief Justice Warren. “[D]iscrimination may be so unjustifiable as to be violative of due process.”¹¹¹ This was correct because for a government act to qualify as law, it must be consistent with the sort of basic equal treatment that is required by the principles of generality and regularity, unless some good reason exists for deviating from that norm. To deviate from equal treatment for no reason, or for the ruler’s self-interest, is an arbitrary act—so that unjustified unequal treatment by the state violates the equal protection guarantee only insofar as it is unlawful: only as a function of the due process guarantee against arbitrariness.¹¹² Determining whether a government act is arbitrary is a crucial part of the due process of law analysis, and a statute that treats different groups or individuals differently for irrational reasons, or draws irrelevant and haphazard distinctions, will itself be irrational and arbitrary. The *Bolling* Court was thus on solid theoretical ground.

111. *Id.* at 499.

112. The *Bolling* Court cited three cases as examples, none of which involved racial discrimination: *Detroit Bank v. United States*, 317 U.S. 329 (1943), *Currin v. Wallace*, 306 U.S. 1 (1939), and *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). *Bolling*, 347 U.S. at 499 n.2. In *Detroit Bank*, the Supreme Court upheld a rule regarding tax liens that applied one way to property innocently purchased at the time of the previous owner’s death and a different way to property conveyed in anticipation of death. *Detroit Bank*, 317 U.S. at 338. The Court found that although some statutes might be “so arbitrary and injurious in character as to violate the due process clause,” Congress had valid reason for this difference in treatment, and therefore the distinction was not arbitrary. *Id.* at 338. In *Currin*, the Court upheld the Tobacco Inspection Act, which treated different tobacco markets differently. *Currin*, 306 U.S. 1. Congress’ power to regulate interstate commerce contains “no requirement of uniformity,” yet the Court acknowledged that the due process requirement prohibits unwarranted discrimination. *Id.* at 14. In *Steward Machine Co.*, the Court upheld the Social Security Act against a challenge on the grounds that it accorded different treatment to business that employed fewer than eight workers and those that employed more. *Steward Mach. Co.*, 301 U.S. at 584. No “formula of rigid uniformity” had ever been found to apply to taxes even under the Equal Protection Clause, which allowed states to treat some types of property differently from other types. *Id.* So long as “[t]he classifications and exemptions directed by the statute . . . have support in considerations of policy and practical convenience that cannot be condemned as arbitrary,” the government may treat different persons differently. *Id.*

F. The Redundancy Argument

Critics of substantive due process such as Robert Bork¹¹³ and John Hart Ely¹¹⁴ have characterized *Bolling* as “gibberish,”¹¹⁵ because interpreting the Due Process Clause to require equal treatment would make it duplicative of the Equal Protection Clause, in violation of rules of interpretation.¹¹⁶ This is part of a broader critique of substantive due process as a redundancy: If the due process of law requirement of its own accord forbids certain legislative actions, such as special legislation or unequal treatment, it would seem strange that constitutions also would include other clauses more specifically prohibiting those same actions. And since lawyers should avoid an interpretation that renders a written provision redundant, giving a substantive meaning to the Due Process Clause that would repeat these protections must be wrong. Or, alternatively, the authors of these constitutions cannot have understood due process of law as prohibiting things like special legislation or equal treatment, else they would not have enacted the more specific safeguards.

Yet as Frederick Gedicks observed, the redundancy critique “is a weak (and ironic) interpretive argument,”¹¹⁷ given that “lawyers say everything at least twice.”¹¹⁸ In the 1780s, many, including James Madison¹¹⁹ and Alexander Hamilton,¹²⁰ argued persuasively that the Bill of Rights itself would be redundant.

113. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 83 (1990).

114. ELY, *supra* note 3, at 32–33.

115. *Id.* at 32.

116. Bork and Ely also argue that *Bolling* was wrong because at the time of the Amendment’s ratification, segregated schools were common, and many proponents of the Amendment claimed it would not prohibit segregation. That dispute is beyond the scope of this paper. *But see* Edward J. Erler, *Sowing The Wind: Judicial Oligarchy And The Legacy of Brown v. Board of Education*, 8 HARV. J.L. & PUB. POL’Y 399, 420–23 (1985) (arguing for an anti-segregation originalist interpretation of the equal protection clause); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing for a similar anti-segregation originalist interpretation of the equal protection clause); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937 (1995) (same).

117. Gedicks, *supra* note 6, at 667.

118. *Id.* (quoting MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 183 (1986)).

119. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* MADISON, *supra* note 108, at 420 (arguing that a Bill of Rights would be redundant).

120. *See* THE FEDERALIST NO. 84 (Alexander Hamilton).

That hardly renders its protections unnecessary or improper. Indeed, there are separate, specific constitutional provisions that protect such archetypical due process rights as the right to a jury, or to a trial, or freedom from bills of attainder. The redundancy argument would require one to conclude that the Due Process Clause does not itself protect these basic elements of due process of law, which is an inadmissible conclusion.¹²¹

A better reading of the Clause would see it as a partial reiteration of the more basic constitutional pledge to ensure lawful, regular, non-arbitrary treatment of citizens. The due process of law guarantee is also intended as a general catch-all provision. More precisely worded clauses might prohibit specific abuses, but the Due Process Clause prohibits activities of the *whole class* of arbitrary or lawless action. Also, the due process guarantee is far older than many of the more specific guarantees that bar specific instances of arbitrary government action. It is not surprising that, upon adopting, say, a prohibition on special legislation, the people did not choose to repeal their older due process provision; nor does that fact retroactively alter the meaning of the due process guarantee.

History shows that constitutional protections often overlap, particularly when the drafters are seeking to prevent a category of acts that are hard to describe in specific terms—such as the whole class of arbitrary acts. Arbitrariness is itself difficult to define with precision. It is unsurprising that a constitutional guarantee with some seven centuries of history behind it would be difficult to reduce to mathematically precise parameters. Nor should it come as a surprise that the due process of law requirement works as a general background prohibition against unjustified state action, with more precise constitutional provisions standing out in relief to provide additional protection against the specific abuses experienced throughout history. A constitutional provision might very sensibly prohibit all acts within category *X*, and another especially prohibiting *X*₁ or *X*₂. As the junior Justice Harlan wrote, “the full scope” of the due process of law guarantee “cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution,” but must be sought in legal

121. Gedicks, *supra* note 6, at 667.

principle and historical experience.¹²² Due process of law should be seen as “a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.”¹²³

II. THE LOGIC OF SUBSTANTIVE DUE PROCESS OF LAW

Given these philosophical foundations, we can proceed to examine the relatively simple logic of substantive due process. In short, a lawful act is one the ruler is authorized to adopt or enforce. One must therefore inquire into the lawmaker’s authority and the limits on that authority, both procedural and substantive, to determine whether an act satisfies the due process of law guarantee. When a government act exceeds the government’s authority—due to a procedural shortcoming, a substantive violation, a logical contradiction, or any other flaw—that act cannot qualify as law, and thus any attempt to enforce it constitutes arbitrary or lawless action. All *ultra vires* action is a violation of the due process of law guarantee, and the Constitution determines, both explicitly and implicitly, what sorts of action are *ultra vires*.

A. *Procedural and Substantive Lawlessness*

The due process of law commitment prohibits arbitrary state action. There are both formal and substantive criteria for distinguishing lawful state action—the use of government’s coercive power for lawful, principled reasons—from those that cannot be rightly called law. For a government’s actions to qualify as lawful, they must be issued according to formal, procedural rules of promulgation, and include such substantive elements as regularity, generality, and fairness. This overlap of procedure and substance in the determination of lawfulness can be demonstrated by some hypotheticals.

Imagine, first, that Congress were to pass a bill, which the President vetoes. Having been vetoed, the bill is not a law, and

122. *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

123. *Id.* at 543 (internal citations omitted).

this is for procedural reasons: The shortcoming that makes it not law is entirely formal, not substantive. It does not depend on the content of the bill, but on the rules of promulgation. If, for some reason, a town sheriff were to try to enforce this vetoed bill by arresting a person who fails to abide by its provisions, that arrest would be unlawful; it would lack the necessary authorization. The sheriff would be enforcing something that is not law and thus depriving the arrestee of liberty without due process of law.

The same approach holds where a purported law fails for substantive, instead of procedural, reasons. Thus, imagine Congress were to pass a bill, and the President were to sign it, establishing an official religion for the United States. Since the First Amendment denies Congress power to make such a law, no matter what procedural steps Congress takes, the resulting statute would have no claim to status as law. And if the sheriff were to arrest a dissenter for violating it, he would be depriving that person of liberty without due process of law, just as in the first hypothetical. Here, the sheriff's purported authority for arresting the citizen fails not because of any formal shortcomings, but because the substance of the purported law is such that it cannot claim the character of law.

These two examples are relatively easy to follow since they rest on explicit constitutional limitations on government power. But the same logic holds with regard to implicit or inherent limits on government power. It is over these implicit limits that the major battles over due process have been waged in American legal history. But one can recognize the logical validity of this approach even if one disagrees as to what those limits might be. The argument follows the routine logical form of *ultra vires* arguments: If the legislature passes a statute that it lacks authority to make, that statute has no standing as law, and enforcing it would violate a citizen's right not to be deprived of life, liberty, or property except by due process of law.

Implicit limits on lawmaking authority are commonplace, at least insofar as procedural or formal limits on the lawmaker are concerned. For example, in *Clinton v. City of New York*,¹²⁴ the Supreme Court found that the Constitution did not allow Congress to give the president a line-item veto power. The Constitution

124. 524 U.S. 417 (1998).

does not explicitly prohibit the line-item veto, but the logic of the Court's opinion is irresistible: First, the Constitution sets forth the procedure for making a bill into a law, and "is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes."¹²⁵ Second, this "constitutional silence" is "equivalent to an express prohibition"¹²⁶ on alternative methods of lawmaking, meaning that the Constitution implicitly bars Congress from establishing other methods for making or vetoing laws. Finally, the statute purporting to give the President the line-item veto power exceeded those limits, and therefore could not be regarded as a law, because it exceeded Congress' authority. Even if one does not agree with this conclusion, it is logically valid: If the Constitution establishes the sole mechanism for vetoing laws, any alternative is implicitly prohibited and cannot be considered a lawful act.

If there are, as *Clinton v. City of New York* demonstrates, inherent restrictions on the procedural requirements of lawmaking, then there are, by the same logic, inherent restrictions on the content of laws that can be made. The prohibition on arbitrariness forbids the lawmaker from doing certain things, not only where the Constitution explicitly forbids it but also where the logic of constitutionalism inherently bars such acts. If the government's authority is analogous to a contract—that is, the social compact¹²⁷—then its authority is limited both explicitly and implicitly by that agreement. Government is an agent, "hired" pursuant to the constitutional "contract," for the purpose of protecting individual rights.¹²⁸ And inherent in that "contract" is the principle that government has no legitimate power to violate those rights or act beyond the implicit limits on its authority or in the service of its own self-interest. The state's power is limited in principle by the purposes for which the state was formed, and acts that contradict those purposes exceed government's legitimate authority, and are therefore arbitrary, in violation of the due process of law guarantee.

125. *Id.* at 439.

126. *Id.*

127. See JAMES MADISON, *Sovereignty* (1835), reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 390, 391–95 (Philadelphia, J.B. Lippincott & Co., 1865) ("[A]ll power in just and free government is derived from compact Of all free governments compact is the basis and essence.").

128. See THE FEDERALIST NO. 78, *supra* note 70, at 467 (Alexander Hamilton) (describing the government as the "deputy" and "agent[]" of the people).

This argument is familiar from the realm of arbitration law. An arbitrator derives his authority entirely from the agreement between the parties, an agreement that limits the arbitrator's authority both explicitly and implicitly. As the Seventh Circuit has observed:

A suit to throw out a labor arbitrator's award is . . . a suit to enforce the labor contract that contained the clause authorizing the arbitration of disputes arising out of the contract. . . . [T]he plaintiff normally will be pointing to *implicit or explicit limits* that the contract places on the arbitrator's authority—principally that he was to interpret the contract and not go off on a frolic of his own—and arguing that the arbitrator exceeded those limits.¹²⁹

The analogy to government, which acts as an arbitrator of interests and disputes, is clear. Where the arbitrator exceeds its contractual authority, its determinations are unauthorized by the contract and have no validity. One might even say that such an arbitrator has deprived the parties of their right to the “due process of their contract.”

Classical liberals like the Framers envisioned government not only as analogous to an arbitrator but also as analogous to a security guard.¹³⁰ The people in society, anxious to protect their resources and freedoms, “hire” the government to protect them, just as the owner of a bank, worried his bank might be robbed, would hire an armed guard. But while this solves the problem of robbery, the bank owner now has a new problem: He has allowed the guard to enter his bank with a gun, and the guard might very well give in to temptation and rob the bank himself. If this were to happen, the guard's action would exceed the terms of his employment—even if the employment contract itself contained no explicit prohibition against robbery—and therefore would not rightly be considered the act of an employee within the scope of his duties.

Something very like this happened in *Sunshine Security & Detective Agency v. Wells Fargo Armored Services Corp.*¹³¹ A bank

129. *Chi. Typographical Union v. Chi. Sun-Times*, 935 F.2d 1501, 1503 (7th Cir. 1991) (emphasis added) (citations omitted).

130. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 70, at 82–83 (James Madison) (one role of government is to arbitrate between interests in society.); LOCKE, *supra* note 46, at 371–74 (one role of government is to arbitrate disputes.).

131. 496 So. 2d 246 (Fla. Dist. Ct. App. 1986).

contracted with a detective agency to provide a guard, who conspired with third parties to help rob the bank. The bank sued the detective agency on respondeat superior grounds, but the Florida Court rejected this argument because the guard's actions were:

[a] classic case of an employee acting outside the scope of his employment. The subject employee was hired by the defendant Sunshine to guard the bank which he, in fact, conspired to rob. In this endeavor, we think the employee was plainly off on a frolic of his own, [and] was in no way furthering the interests of his employer¹³²

But the guard's authority as an employee existed only within the boundaries of the employment contract, so when he stepped beyond those boundaries, his acts lacked legitimate authority. This conclusion is obvious *even though the contract contained no explicit prohibition against the guard robbing the bank*. The whole point of the owner hiring the guard was to ensure against bank robbery. The owner need not add a clause to the contract to explicitly prohibit the guard from robbing the bank; the employment contract contains both implicit and explicit provisions regarding the guard's employment, and acts that go beyond those implicit limits are *ultra vires* and deprive him of his status as an employee just as surely as do acts that exceed the contract's explicit limits.

This analogy helps to clarify *The Federalist's* dense, brilliant explanation of the danger of factions and the role of the judiciary. Human beings are not angels and are therefore prone, when in office, to the temptation to exploit government power for their own private interests or the private interests of their friends. Thus the authors of a constitution must create a government both strong enough to protect the people against harm and balanced in such a way as to resist the efforts of the rulers to use the government's power to exploit, plunder, or oppress in their own private interest.¹³³ There are three principal ways

132. *Id.* at 246–47.

133. THE FEDERALIST NO. 51, *supra* note 70, at 322 (James Madison) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”).

to prevent this abuse, and the Constitution employs all three. First, it should be democratic, which entails not only dependence on the people but also “auxiliary precautions,”¹³⁴ such as balancing interest groups against each other to prevent their uniting,¹³⁵ and separating states from the federal government for the same reason.¹³⁶ Second, the Bill of Rights takes certain matters out of government hands entirely. Third, the Constitution creates, within limits, “a will in the community independent of the majority,” which will lack the self-interested motives of the majority.¹³⁷ This is a dangerous device because while an institution independent of the people’s will can help check that will, it might also “espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties.”¹³⁸ The federal judiciary is an attempt to harness the benefits of this independence while avoiding its liabilities. The courts are responsible to the people, but only indirectly, and although they might protect the rightful interests of the minor party, they are subjected to congressional controls that prevent them from being turned against both parties. Courts thus will be constrained yet independent enough to serve as an “excellent barrier” against “the encroachments and oppressions of the representative body,”¹³⁹ because they will have the power to “declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations

134. *Id.*

135. *Id.* (“This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.”).

136. *Id.* at 323 (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.”).

137. *Id.* at 323–24.

138. *Id.* at 324.

139. THE FEDERALIST NO. 78, *supra* note 70, 465 (Alexander Hamilton) (“The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.”).

of particular rights or privileges would amount to nothing.”¹⁴⁰ The judiciary thus ensures that the lawmakers keep “within the limits assigned to their authority.”¹⁴¹ The Constitution “is in fact, and must be, regarded by the judges as a fundamental law,” and where the legislature exceeds that fundamental law, courts must enforce the Constitution and not the statute, because the Constitution is “the intention of the people,” while a statute is only “the intention of their agents.”¹⁴² In this way, the courts that ensure that the people’s “bank guard” does not fall prey to the temptation to rob the bank for himself or the arbitrator to exceed the limits of his delegated authority.

B. *How Implicit Limits Apply in Due Process Cases*

That the Constitution imposes implicit limits on government—both inherent procedural limits¹⁴³ and inherent substantive limits—seems unobjectionable and requires few normative commitments so far.¹⁴⁴ Yet the next question that arises is whether the Constitution is itself a goal-oriented device, the purposes of which will dictate the content of those implicit substantive limits. More simply, by knowing what the nature of the thing is, we will understand the principles of its excellence and how its components ought to work.¹⁴⁵ This is an inherently philosophical undertaking and, unsurprisingly, has been the source of much dispute. The classic case about this dispute is *Calder v. Bull*,¹⁴⁶ with Justices James Iredell and Samuel Chase standing at opposite poles of the American tradition of judicial review. In that case, the trial court ruled against one party claiming inheritance under a will, but the state legislature passed a statute granting that party a new hearing—changing the rules of litigation in the middle of the case.¹⁴⁷ The question

140. *Id.* at 466.

141. *Id.* at 467.

142. *Id.*

143. See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998).

144. “Few,” not none, because the commitment to think in a principled and logical manner is itself a normative commitment. See generally J. BRONOWSKI, *SCIENCE AND HUMAN VALUES*, at xiii (1956) (expounding upon “one central proposition: that the practice of science compels the practitioner to form for himself a fundamental set of universal values”).

145. See ARISTOTLE, *Nicomachean Ethics*, *supra* note 37, 1096a–1097b, at 939–41.

146. 3 U.S. (3 Dall.) 386, 388 (1798).

147. *Id.* at 386–87.

before the Supreme Court was whether this violated the Constitution's prohibition on ex post facto laws, and although Justices Chase and Iredell agreed in the end that it did not, their reasons differed. For Chase, the Constitution imposed certain implicit restrictions on legislatures barring them from "revis[ing] and correct[ing] . . . a decision of any of its Courts of Justice . . ." ¹⁴⁸ Even where there was no "express[] restrain[t]" on the lawmakers, "[t]he nature, and ends of legislative power will limit the exercise of [that power]." ¹⁴⁹ In other words, the Constitution imposes implicit limits on the laws the legislature can enact, and the content of those implicit limits can be understood only by considering what the Constitution was written to accomplish and what government may not justly do:

The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, [i.e., the purposes] will decide what are the proper objects of [government authority]. . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority. *The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.* ¹⁵⁰

Justice Iredell disagreed, arguing that courts should not be in the business of interpreting the implicit limitations on legislative authority. "The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject . . ." ¹⁵¹ In the absence of explicit constitutional prohibitions, courts must acquiesce even in legislation they think "inconsistent with the abstract principles of natural justice." ¹⁵² Justice Iredell's position is certainly sympathetic: It would be easy

148. *Id.* at 387.

149. *Id.* at 388.

150. *Id.* (emphasis added).

151. *Id.* at 399 (Iredell, J., concurring).

152. *Id.*

for courts to exploit the concept of implicit constitutional limitations to strike down legislation with which they simply disagree as a policy matter, and, of course, that has often been the allegation of those urging judicial restraint. But Iredell's concern sounds in prudence and not in principle. His warning about the danger of abuse is a wise one, but it does not refute Chase's logical position that governments formed for certain purposes and based on the consent of the governed must contain at least some implicit restrictions on legislative power.

It seems beyond doubt that the Constitution exists for certain purposes and is not a morally neutral framework for empowering the rulemaking authority.¹⁵³ The Preamble, to name only one source, declares one of the purposes for which the Constitution exists: to preserve the blessings of liberty.¹⁵⁴ The legal boundaries that the Constitution creates around the legislature exist to promote the purposes identified, among other places, in the Preamble.¹⁵⁵ In addition, as Justice Chase's wording indi-

153. Of course, Oliver Wendell Holmes and his followers hold that the Constitution has no particular normative aim but is "made for people of fundamentally differing views . . ." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). On that premise, of course—along with Holmes' view that all normative opinions are of equal validity or invalidity—it is impossible to distinguish a lawful from an arbitrary act, because *all* law is basically arbitrary; law is nothing more than the enforced will of the stronger party. See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 25 (2002) ("Holmes apparently could not envision any basis for political, social, or personal action other than self-interest or devotion to an arbitrary, uncomprehended goal."). Holmes consciously and gleefully accepted this conclusion. See, e.g., DAVID ROSENBERG, *THE HIDDEN HOLMES* 33 (1995) ("Rather than deny . . . that the law developed 'by the arbitrary will of the law-giver,' Holmes affirmed that the law did and would continue to develop precisely through judges exercising discretion, including decrees of 'arbitrary' external standards to cut 'through the region of uncertainty.'" (internal citations omitted). That is why he made war on the concept of substantive due process.

154. The Preamble, of course, does not vest powers in the federal government, see *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905), but it does indicate the purposes for which the federal powers were created, and to read those powers in isolation would render the Preamble surplusage, in violation of basic interpretive rules. Cf. *District of Columbia v. Heller*, 554 U.S. 570, 643 (2008) (Stevens, J., dissenting) ("The preamble thus both sets forth the object of the [Second] Amendment and informs the meaning of the remainder of its text. Such text should not be treated as mere surplusage, for '[i]t cannot be presumed that any clause in the constitution is intended to be without effect.'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803))).

155. During the debates surrounding the drafting of the Fourteenth Amendment, Senator John Sherman explained that courts interpreting the limits that the Amendment imposed on states would look "first at the Constitution," but also to "the unenumerated powers [*sic*] to the Declaration of American Independence, to

cates, a form of reasonable person standard applies. Just as a court interpreting an arbitration agreement to determine whether the arbitrator exceeded the implicit limits in the contract would look to what a reasonable person would have expected the wording to mean, so Chase and others working in the Substantive Due Process tradition often looked to whether a reasonable person would have wanted the Constitution to allow the legislature the discretion to act as it did.¹⁵⁶

If a court is called upon to determine whether a challenged statute is lawful or arbitrary, then the court must be prepared to look behind the statute's form and examine its substance. It must determine whether the principle the ruler purports to be advancing in its legislation is genuine or only illusory. This means that it is not in principle possible for courts to avoid addressing the question of whether a challenged law advances a legitimate government interest—or deciding which government interests are or are not “legitimate.” These are inherently normative questions, but as long as judges are in the business of determining *what* the law is, they will be called upon to make value-laden determinations of what is a general principle of lawfulness and what is merely an arbitrary assertion of power. To put this in modern parlance: So long as courts must decide whether a law is rationally related to a legitimate government interest, they cannot hope to avoid determining what is and is not a legitimate government interest.¹⁵⁷ “Is” and “ought” cling together in this undertaking.

The value-laden determination of lawfulness is found at the core of historical precedents regarding economic legislation and contemporary lawsuits over morals legislation. In *Loan Association v. Topeka*,¹⁵⁸ the Supreme Court invalidated a law which invested taxpayer money in a privately-owned railroad.

every scrap of American history, to the history of England, to the common law of England . . . There they will find the fountain and reservoir of the rights of American as well as of English citizens.” CONG. GLOBE, 42d Cong., 2d Sess. 844 (1872). I have argued elsewhere that the Declaration of Independence is a relevant guidepost for Constitutional interpretation. See Timothy Sandefur, *Liberal Originalism: A Past For The Future*, 27 HARV. J.L. & PUB. POL’Y 489 (2004).

156. We have seen that John Locke and James Madison used a reasonable person approach. See *supra* text accompanying notes 67–69.

157. *But see* Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 834 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’ . . .”).

158. 87 U.S. (20 Wall.) 655 (1875).

In *Lawrence v. Texas*,¹⁵⁹ the Court invalidated a Texas law prohibiting private, consensual, adult sexual activity. In both cases, judges were called upon to determine whether the challenged legislation qualified as law—that is, whether the acts in question served a general public purpose or were mere exertions of power by the ruling authority for no other reason than that it held political power.

Loan Association, an archetypical “take from *A* to give to *B*” case, makes explicit the argument that legislative actions taking property from a politically disfavored minority and giving it to a more popular group, for no genuine public purpose, are not law. Just as a “law” is by definition public-oriented, a “tax” is by definition the use of the state’s coercive power to take money from citizens for public purposes.¹⁶⁰ Such a power is liable to abuse, because the government might fall into the hands of a self-interested faction that would arbitrarily exploit its power to take wealth from politically less powerful groups for the private benefit of those with more power.¹⁶¹ Although it might be difficult to draw the line in some cases, a direct use of state power to seize some people’s wealth for the benefit of others would not be a genuine tax, since it would not be for a public purpose.¹⁶² Thus it would be unlawful.¹⁶³

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law . . . This is not legislation. It is a decree under legislative forms.¹⁶⁴

Such an act is not law because it lacks the generality and public-orientation elements, and is therefore only an arbitrary assertion of force by those with greater political influence.¹⁶⁵

159. 539 U.S. 558 (2003).

160. *Loan Ass’n*, 87 U.S. (20 Wall) at 664.

161. *Id.* at 663.

162. *Id.* at 664 (“Nor is it taxation.”).

163. *Id.* (“[T]here can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.”).

164. *Id.*

165. *See also* *Varner v. Martin*, 21 W.Va. 534, 548–49 (1883) (“It is true there is neither in our Constitution nor in the Constitution of the other States any express provision forbidding, that private property should be taken for the private use of

Lawrence v. Texas makes the same basic argument: The government proscribed private, consensual, homosexual conduct not to protect the general public from actual harm but simply to impose a burden on a disfavored minority. The law at issue did not involve public conduct, prostitution, or government benefits; it did not protect minors, or “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused.”¹⁶⁶ Because the statute did not realistically advance any genuine public good, it was simply an arbitrary attempt to “demean” adults “who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.”¹⁶⁷ Thus the statute was an arbitrary act, violating the lawfulness requirement. “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”¹⁶⁸

Obviously the losing sides in both of these cases believed the determinations wrong: Those favoring the investment in the Topeka railroad believed that a new railroad would benefit the general public through economic improvement and greater prosperity and that the cost to taxpayers was no different in principle than a tax to support a police department that protected the general public. The moral majority behind Texas’s prohibition on private, consensual, sexual conduct was likewise concerned with the moral effect that tolerance of homosexuality would have on the general public. Whether these ar-

another, or any constitutional provision forbidding the Legislature to pass laws, whereby the private property of one citizen may be taken and transferred to another for his private use, without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the Constitution or bill of rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive nor judicial department can possess unlimited power. Such a power as that of taking the private property of one and transferring to another for his own use, is not in its nature legislative, and it is only legislative power, which by the Constitution is conferred on the Legislature. Such an act if passed by the Legislature would not in its nature be a law, but would really be an act of robbery; the exercise of an arbitrary power not conferred on the Legislature.”).

166. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

167. *Id.*

168. *Id.*

guments are persuasive or not is not my point here¹⁶⁹—my point is, rather, that the judiciary cannot avoid such arguments if it is to enforce the constitutional promise that government treat individuals in a lawful, and not an arbitrary, manner. We must give up any search for a morally neutral or wholly procedural approach to the Due Process Clause.

C. Incorporation as a Due Process Requirement

The “incorporation” doctrine is often misunderstood as a mechanism whereby the Bill of Rights is simply applied to the States in the same way that it applies to the federal government—what Professor Akhil Reed Amar has called “mechanical incorporation.”¹⁷⁰ But examining the incorporation cases reveals that they do something more subtle: They require that certain basic principles of lawfulness—principles that distinguish between lawful and arbitrary rule and which are found articulated in the Bill of Rights—are required of states under the Due Process Clause. Thus what happens is not that courts simply transfer safeguards found in the federal Constitution to the state level; they instead inquire whether the limit being imposed on state government is one that is implicit in the concept of ordered liberty—that is, whether it is required by the guarantee of lawfulness that the Fourteenth Amendment imposes on the States.¹⁷¹

Consider *Chicago, B. & Q. Railroad Co. v. Chicago*,¹⁷² the 1897 decision frequently cited as the first incorporation case. The Court did not simply require states to obey the Takings Clause of the Fifth Amendment—the case does not even cite the Fifth Amend-

169. I have argued that both cases were rightly decided. See Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 SW. U. L. REV. 569, 624–32 (2003) (discussing *Loan Ass’n*); Timothy Sandefur, *Privileges, Immunities, And Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 166–67 (2010) (discussing *Lawrence*). A particularly good explanation of the arbitrariness of laws like that involved in *Lawrence* is Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 178 (1998) (“[B]are public morality arguments support the legal enforcement of private bias, casting lawmaking as a kind of Nietzschean struggle of will, with various moral interest groups trying to gain legal enforcement of their beliefs without having to give reasons for those beliefs other than saying, ‘we believe it.’”).

170. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 174 (1998).

171. See *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

172. 166 U.S. 226 (1897).

ment's Takings Clause at all. Rather, the Court held that for a state to take property without paying the owner would be an arbitrary act, an unprincipled assertion of power, in violation of the rule that states may not deprive people of property without due process of law. For the state to "subject[] the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice" would impose arbitrary rule.¹⁷³ Because "compensation for private property taken for public use is an essential element of due process of law," it would violate the Due Process Clause for the state to take property without compensation¹⁷⁴:

The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.¹⁷⁵

Taking property for public use without compensation is generally arbitrary and unlawful because it does not serve general principles of fairness and orderly rule. To take property without compensation is a mere act of will on the part of the legislature.¹⁷⁶ There is no principled reason why the legislature should take a person's property without paying for it; such an act rests simply on the fact that the legislature happens to wield greater political power. The *Chicago, B. & Q. Railroad* decision relies solely on the sort of arbitrariness versus lawfulness analysis explained here and summarized by the Court in 1908: "some of the personal rights safeguarded by the first eight Amendments against National ac-

173. *Id.* at 234.

174. *Id.* at 235.

175. *Id.* at 236–37.

176. *See id.* at 240.

tion may also be safeguarded against state action, because a denial of them would be a denial of due process of law."¹⁷⁷

III. PROBLEMS WITH A PROCEDURE-ONLY APPROACH TO DUE PROCESS LAW

This Article cannot hope to defend the doctrine of substantive due process from all the critiques made against it, but a few comments are in order regarding some of the more common arguments. Modern, skeptical ethical theories often see normative positions as essentially subjective, emotional commitments.¹⁷⁸ Starting from this premise, contemporary legal academics tend both to look for a way around what they consider unanswerable questions and to confine themselves to an allegedly more rational, procedure-oriented approach to law, hoping for a kind of objectivity in the rejection of anything normative. In the context of the Due Process Clause, this effort gives rise to a formalistic interpretation of the due process of law requirement. But such an approach is doomed. Rules against procedural arbitrariness make sense only within the context of a broader normative commitment to lawful rule—that is, to the values of generality, regularity, fairness, rationality, and public-orientation. In the absence of a commitment to these values, procedural rules that guarantee them are themselves arbitrary.

A. *Procedural Lawfulness Makes Sense Only Within a Broader Normative Commitment to Substantive Lawfulness*

The formal criteria for lawfulness—whether they be judicial procedures or the rules of legislative promulgation—only make sense within a broader normative understanding of what law is. A purely formal approach to the law is impoverished not only because a ruler can so easily subvert it by formalistic tricks, but because one can only recognize a trick *as* a trick if one begins with a substantive understanding of a proper lawful order. A lynch mob is the prototypical example of a use of coercion with no formal or procedural guarantees. Yet a lynch mob differs

177. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (citing *Chicago, B. & Q. R.R.*, 166 U.S. at 226).

178. This is usually done under the aegis of Oliver Wendell Holmes, leader of the early twentieth century attempt to separate law from morality. See generally ALSCHULER, *supra* note 153.

from a system of just rules not so much because it fails to abide by rituals, but because its actions are inconsistent with underlying principles like fairness, generality, and reason, which characterize a lawful system of justice. It is not the procedures per se but the principles they implement that make the difference. A lynch mob is no less a lynch mob if it adopts formal rituals, such as holding a sham trial with a predetermined verdict. On the other hand, a hearing that gives real effect to the substantive elements of lawfulness is still a valid procedure even if it fails to abide by some typical procedural formality.¹⁷⁹ This explains the harmless error rule, which “focus[es] on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.”¹⁸⁰ Procedures themselves are not sufficient criteria for lawfulness; the distinction between a lynch mob and a lawful criminal process turns not on the outward forms of procedure but on the inner principles of lawfulness.

To put the point in a different way, procedures are themselves composed of substantive steps or rules, so that what from a distance appear to be procedural guarantees are revealed on close examination to be a group of substantive guarantees. One can call an element of due process “substantive” or “procedural” depending solely on the scope within which one chooses to examine the right. A trial, for example, might be characterized as a procedural right, yet a trial is composed of certain substantive rights—the right to cross-examine witnesses, the right to be represented by an attorney, the right not to be compelled to testify against oneself. Taking another step back, the right to a trial can be seen as a substantive component of the broader procedural right not to be dealt with arbitrarily.

What we today call procedural due process is itself only one subset within the due process of law requirement. It is only because the Constitution guarantees that government will treat us

179. Probably the most extreme example involves a litigant who argued that a court lacked jurisdiction over his family law dispute because the court flew a “maritime flag of war” that allegedly restricted the court to admiralty jurisdiction only. *McCann v. Greenway*, 952 F. Supp. 648, 651 (W.D. Mo. 1997) (Rejecting the plaintiff’s claims because “[j]urisdiction is a matter of law, statute, and constitution, not a child’s game wherein one’s power is magnified or diminished by the display of some magic talisman”).

180. *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). The “harmless error” rule makes no sense if one adopts an entirely formal interpretation of the lawfulness requirement.

in a lawful manner that we are entitled to procedural protections in the first place. Consider what might at first seem a silly question: Why are only the accused entitled to a trial? A Martian knowing nothing of our system might wonder why the government does not require every citizen to undergo a trial; after all, the Constitution guarantees everyone the equal protection of the laws. Yet only people charged with a crime are put on trial. The answer is that those who are not threatened with a deprivation of life, liberty, or property have already been accorded the substantive fairness they deserve, simply by being left alone to enjoy their rights. It is only those who are threatened with a deprivation of life, liberty, or property who are entitled to the procedural protections designed to ensure that they, too, are treated in a lawful manner. In other words, by respecting pre-political rights, the government provides citizens their due process of law by leaving them unmolested. But when it threatens to deprive them of life, liberty, or property, it must do so in a lawful—that is, non-arbitrary—manner and thus must give them a trial.

This also explains the role of the word “due” in the Due Process Clause. The Constitution does not require just any process of law but *due* process of law—and this term is echoed in the Thirteenth Amendment, which holds that no person shall be subjected to involuntary servitude except if he has been “duly convicted” of a crime¹⁸¹—not merely convicted but *duly* convicted. If this term means anything, it means that not all convictions are due, and those convictions that are not due are ones that are arbitrary, baseless, or flawed in some deeper sense. This restriction, too, has both a procedural and a substantive dimension. A person convicted on the basis of prejudice or insufficient evidence is not *duly* convicted. One might categorize improper convictions into those that are *invalid* and those that are *false*—that is, those that are logically flawed and thus procedurally unlawful, and those that, though logically valid, fail because the evidentiary premises are false, rendering the conviction substantively unlawful. Either would make the conviction “undue” and thus a failure of the commitment to treat citizens lawfully. A procedure-only approach to due process cannot account for the meaning of the word “due.”

181. U.S. CONST. amend. XIII, § 1.

Second, a purely process-oriented approach to law cannot account for the processes themselves; it can only accept them as arbitrary givens. A process-based approach holds that a law is justified simply because it is promulgated according to rules of promulgation. But rules of promulgation are themselves laws, so what justifies them? The Framers did not regard them as arbitrary postulates; they drafted those rules for specific purposes, in accordance with certain pre-political standards. For example, the Constitution limits military appropriations to two year increments,¹⁸² out of fear that an independent, standing army would be a threat to freedom. Keeping the military on a tight financial leash served the greater purpose of protecting the public safety. A purely formalistic approach to the law can offer no such holistic understanding of the Constitutional structure—it instead sees the rules of promulgation as mere arbitrary assumptions of the system, hanging like skyhooks without justification.

So, too, from a purely formalistic standpoint, loyalty to one set of promulgation rules as opposed to another would be fallacious: To hold that a law is a law simply because it has been duly promulgated begs the question of what makes that promulgation “due” or proper. Suppose a legislature passes a bill in a way not permitted by the Constitution—say, enacts a statute by a bare majority where the Constitution requires a two-thirds supermajority. Does this violate the rules of promulgation, and therefore render the measure invalid—or is the legislature merely establishing a new rule of promulgation? We would, of course, expect a court to disregard the legislature’s purported new rule of promulgation and abide by the Constitution’s rule. But why should the court prioritize the Constitution’s rule over that of the wayward legislature, unless the court is committed to broader substantive ends? If all rules of promulgation are basically arbitrary postulates, then the court has no reason to prefer the constitutional route over the new promulgation rules the legislature sees fit to announce.¹⁸³

Procedural due process is only one aspect of the Due Process Clause’s overall commitment that the state deal with everyone

182. U.S. CONST. art. I, § 8, cl. 12.

183. True, the Constitution commands that its rules be followed—but the legislature has also commanded that its rules be followed. It is not possible to choose between these two without some broader normative standard by which to rank the alternatives.

in a non-arbitrary manner—based on legitimate principles. That overall commitment is incompatible with a purely formal or positivist conception of the Constitution; it makes sense only within a context of substantive commitments.

B. *Formally Evenhanded Rules Can Still Be Substantively Arbitrary*

No simple dichotomy of form versus substance can apply to the constitutional requirement that government act in a lawful manner. If power should be governed by some guiding principle (a formal requirement) it follows a fortiori that it should be governed by a valid or non-illusory principle (a substantive requirement). Not just anything dressed up as a “governing principle for rule” will satisfy. A *formally* evenhanded rule can still be arbitrary in *substance*—for example, if courts were to decide all disputes by a flip of the coin.¹⁸⁴ Such a rule would treat all cases alike but would still be arbitrary. Indeed, a rule declaring that disputes would be resolved “however the king wills it” would in a sense be formally regular—but would still be arbitrary as lacking any valid guiding principle. Substantive arbitrariness renders formal regularity hollow.

For a process to be a process *of law*, it must satisfy not only formal but also substantive requirements; merely calling a substantively arbitrary procedure a law does not make it one for the same reason that form cannot exist except as composed of some substance, and substance cannot exist except in some form. This point should be a familiar one: The substance, and not merely the form, must weigh in our analysis; otherwise, it would be too easy to evade any barrier by easy fictions and disguises. The formal procedures followed by the villagers in Shirley Jackson’s “The Lottery” are regular and consistent; villagers are accorded an entirely equal “process,”¹⁸⁵ and under a

184. See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992) (“[I]t would offend common notions of justice to have [certain legal decisions] made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process.”). Murray Rothbard famously refuted Friedrich Hayek’s analysis of “coercion” on much the same grounds. Hayek had essentially held non-coercion and generality to be synonymous, but Rothbard found this “absurd[]” because “this means that, e.g., if there is a general governmental rule that *every* person shall be enslaved one year out of every three, that then such universal slavery is not at all ‘coercive.’ In what sense, then, are Hayekian general rules superior or more libertarian than *any conceivable* case of rule by arbitrary whim?” MURRAY ROTHBARD, *THE ETHICS OF LIBERTY* 226 (1982)

185. See JACKSON, *supra* note 52.

formalistic, process-only approach, a court would have to see this as adequate.¹⁸⁶ But the lack of a good reason for the violation of individual rights is logically equivalent to the lack of any reason for such violation.

A process-based approach only encourages clever evasions of substantive guarantees. To draw an example from the law of equal protection, a statute that allows whites to marry, make contracts, or testify but bars these rights to blacks or Chinese immigrants is formally equal in one sense: such a law does treat all like cases alike, and different cases differently, because it treats one racial group one way and another in another way. It is only by relying on a *substantive normative principle*—that racial groups should be treated the same in all but rare cases—that we can recognize such a distinction as lawless or arbitrary.¹⁸⁷ In defending its anti-miscegenation statute in *Loving v. Virginia*,¹⁸⁸ for example, the state argued that the law actually treated both races evenhandedly because it deprived whites of the capacity to marry members of other races just as it deprived blacks of that right.¹⁸⁹ But the Court “reject[ed] the notion that

186. Indeed, formalistic courts, requiring only an equal application of burdens but ignoring the content of those burdens, have already applied this understanding in a number of areas. Nadine Strossen observes that in the realm of the First and Fourth Amendments, the Rehnquist Court “began to overlook the absolute libertarian core of those constitutional rights and to enforce instead only their egalitarian corollaries.” Nadine Strossen, *Religion and the Constitution: A Libertarian Perspective*, 2005-2006 CATO SUP. CT. REV. 7, 19. Thus although the Constitution prohibits suspicionless searches, the Supreme Court has allowed them so long as they are “conducted in a uniform, non-discriminatory fashion. . . . So long as we are all equally subject to government invasions of our privacy, we are told, it does not matter that those invasions are unjustified, based on no individualized suspicion of any wrongdoing.” *Id.* at 20–21.

187. This was the point made in *City of Cleburne v. Cleburne Living Center* when the Court explained that it is skeptical of “statute[s that] classif[y] by race, alienage, or national origin” because “[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.” 473 U.S. 432, 440 (1985) (emphasis added). It is only the substantive commitment to a normative principle of equal treatment that allows the Court to recognize racial classifications—which appear even-handed—as invalid and arbitrary.

188. 388 U.S. 1 (1967).

189. *Id.* at 7–8 (“[T]he State argues that the meaning of the Equal Protection Clause . . . is only that state penal laws containing an interracial element as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white

the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations."¹⁹⁰ It refused to rely on a purely formal approach and instead focused on "the central meaning of the Equal Protection Clause"—that is, on the substantive normative commitment to eliminate "measures which restrict the rights of citizens on account of race."¹⁹¹ This approach echoed the Court's decision in *Brown v. Board of Education*.¹⁹² The concept of "separate but equal" does, in a purely formalistic sense, satisfy an equal-treatment standard because it technically treats like cases alike and different cases differently. Yet *Brown* recognized—as Justice Harlan had in his *Plessy v. Ferguson* dissent¹⁹³—that the Equal Protection Clause cannot be understood solely in procedural or formal terms: It contains a substantive prohibition on racial discrimination.¹⁹⁴ This is why the *Brown* Court saw segregated educational facilities as "inherently unequal."¹⁹⁵ Regardless of the factual circumstances of any particular case, separating the races violates the equal protection guarantee because the Fourteenth Amendment prohibits states from employing race as a criterion

and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race."). A virtually identical argument was made by the dissenters in *Perez v. Sharp*, 32 Cal. 2d 711, 761 (1948) (Shenk, J., dissenting) (There is "no lack of equal treatment" caused by miscegenation laws because "[e]ach petitioner has the right and the privilege of marrying within his or her own group."), and *Baehr v. Lewin*, 852 P.2d 44, 71 (Haw. 1993) (Heen, J., dissenting) ("[The prohibition on same sex marriage] does not establish a 'suspect' classification based on gender because all males and females are treated alike. A male cannot obtain a license to marry another male, and a female cannot obtain a license to marry another female. Neither sex is being *granted* a right or benefit the other does not have, and neither sex is being *denied* a right or benefit that the other has.").

190. *Loving*, 388 U.S. at 8.

191. *Id.* at 12.

192. 347 U.S. 483 (1954).

193. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.").

194. As Anthony de Jasay has argued, *supra* note 67, at 182–84, the rule of treating like cases alike is ineffectual, standing alone, because the rule for determining what qualifies as a "like case" does all the work. The *Brown* and *Loving* Courts did not apply a "treat like cases alike" rule; rather, they imposed a (substantive) prohibition on using certain criteria for determining what cases are alike or different. See also H.L.A. HART, *THE CONCEPT OF LAW* 155 (1961) (making a similar point).

195. *Brown*, 347 U.S. at 495 (emphasis added).

of distinction *at all*. If we are to use the phrase “substantive due process” to describe the idea that the Due Process Clause prohibits “certain government actions regardless of the fairness of the procedures used to implement them,”¹⁹⁶ then we might also describe *Brown, Loving*, and similar cases as “substantive equal protection” cases since they prohibit certain types of government discrimination regardless of the fact that they might technically apply to all races equally.¹⁹⁷

Roscoe Pound and other Progressive legal thinkers criticized what they called the legal “formalism” of judges, whom they accused of ignoring the facts of industrial life and clinging to dogmatic economic and legal theories.¹⁹⁸ Jurisprudence was formalist or mechanical if it prioritized logical instrumentalities or technical “juridical conceptions”¹⁹⁹ over the content of the legal or social matter at issue. But a process-only approach to the Due Process Clause commits the same error: By focusing only on the shape and not the content of legislation, it disarms courts as meaningful enforcers of the Constitution’s command of lawfulness.

C. *Can Absolutely Any Order Be a Lawful Order?*

As we have noted, the due process of law guarantee means that not everything government does qualifies as a “law.” As Justice Greene Bronson of the New York Supreme Court once observed, if the lawmaker’s acts automatically qualify as law, then the law of the land requirement would be “absolutely nugatory The people would be made to say to the [legislature], ‘You shall be vested with “the legislative power of the State;” but no one “shall be disfranchised, or deprived of any of the rights or privileges” of a citizen, unless you pass a statute for that purpose:’ in other words, ‘You shall not do the wrong, unless you choose to do it.’”²⁰⁰

196. *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

197. See Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 624 n. 36 (1982) (“If . . . an antimiscegenation statute defines as identical and nonidentical, respectively, people whom the Equal Protection Clause *prohibits* from being so defined, the statute is unconstitutional.”).

198. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

199. *Id.* at 611.

200. *Taylor v. Porter & Ford*, 4 Hill 140, 145–46 (N.Y. Sup. Ct. 1843).

Professor John Harrison has called Justice Bronson's argument "circular" because the "conclusion can follow only if the clause is indeed designed to prevent legislative deprivations."²⁰¹ In Harrison's view, the law of the land or due process of law requirement "merely require[s] compliance with existing law"²⁰² or "imposes the rule of law and does nothing else."²⁰³ But this does not overcome the force of Bronson's objection. First, the tradition within which Bronson was working did indeed hold that "legislative deprivations"—that is, arbitrary restrictions or confiscations imposed by the ruler for no genuine public purpose—were among the things the due process or law of the land restrictions were intended to prevent.²⁰⁴ Bronson's position is not circular; it is a straightforward application of language that requires the legislature to abide by the principles inherent in lawfulness. This is not circular because the principles that determine an act's lawfulness are ontologically prior to legislative acts and explain or justify those acts. On the contrary, the proposition that everything a lawmaker does qualifies as law actually is circular: It assumes its own premises, making the lawfulness of a legislative act depend on nothing more than that such an act purports to be law. Second, Harrison has not provided an answer to the question: If positive law is the "law" referred to in the due process or law of the land clauses, what legislative action could possibly violate the constitutional prohibition? Without an answer to this question, Bronson's objection stands: A positivist reading of the Due Process Clause deprives that clause of any effect.

When Professor Harrison says that the Clause requires only "compliance with existing law" or "the rule of law," he apparently means that the Constitution simply requires the legislature to act in the form of statute. The post-Civil War Congress was, he points out, concerned with such abuses as "Judge Lynch" and the Black Codes: "The Amendment's authors would not have thought that imposing a federal requirement of legality was a trivial step."²⁰⁵ But the Black Codes were statutes and thus "le-

201. John Harrison, *Substantive Due Process And The Constitutional Text*, 83 VA. L. REV. 493, 550 (1997).

202. *Id.*

203. *Id.* at 547.

204. See *Taylor*, 4 Hill at 146.

205. Harrison, *supra* note 201, at 551.

gal” in a positivist sense,²⁰⁶ just as the stonings of Soraya M. or Tessie Hutchinson in “The Lottery” are legal in this sense.²⁰⁷ It is implausible that the Amendment’s authors considered promulgation by a corrupt or rebellious legislature, or a sham, predetermined legislative process, sufficient to satisfy the Due Process Clause. One can easily imagine such a legislature enacting a statute vesting lynch mobs (perhaps euphemized as “the militia”) with the full, unreviewable discretion to adjudicate and punish perceived wrongs, or a statute assigning the automatic death penalty for such vague “crimes” as “being uppity.” Such statutes—which are not that far from historical reality²⁰⁸—would be quintessential violations of the lawfulness requirement, since they would implement, respectively, procedural and substantive arbitrariness. Professor Harrison would seem to agree with this because he holds that the due process of law requirement prohibits lynch mobs and requires the rule of law. Yet these would be statutes, satisfying the procedural rules of promulgation. As we have observed, what makes “Judge Lynch” a violation of the lawfulness requirement is not only that it lacks the formalities of law, but that it is arbitrary in both procedural and substantive ways, and thus violates the “rule of law.”²⁰⁹ Arbitrariness would still violate the

206. *Id.* at 527.

207. JACKSON, *supra* note 52, at 211, makes clear not only that the lottery in her story has all the formal prerequisites of law, but that all the neighboring villages conduct annual lotteries as well. The villagers of Kupayeh, meanwhile, are so proud of their obedience to the Islamic Republic’s statutes that they are eager for Sheik Hassan to notify the national authorities of their lynching of Soraya. SAHEBJAM, *supra* note 53, at 127–28.

208. See, e.g., Michael J. Klarman, *The Racial Origin of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 49 (2000) (noting that “[f]or the southern courts, the simple fact that these defendants enjoyed the formalities of a criminal trial, rather than being lynched” was generally satisfactory, while the U.S. Supreme Court held that “criminal trials were supposed to be about adjudicating guilt or innocence” and thus applied substantive due process analysis to require higher standards for criminal convictions).

209. See also Roger Pilon, *Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty*, 4 CATO J. 813, 829–30 (1985) (“‘Due process of law’ . . . is more than mere process; and it is more than process plus any substance. It is process plus that substance that tells us when we may or may not deprive a person of his life, liberty, or property. . . . [T]hat substantive element is justified not because it reflects the will of the majority, not because it has been determined by some democratic process, but because it is derived from principles of reason. . . . We have no right to hang a man simply because he is a Jew, even if a substantial majority of the legislature says that we may. We do have a right to treat a person who has

“rule of law” requirement even if the lynch mob were to mimic the superficial procedures of a trial,²¹⁰ and even if the legislature gave the mob its imprimatur. Requiring the legislature to act by statute—in regular legislative form—is one aspect of the due process of law requirement, but it is not the whole picture. Because the legislature cannot make an arbitrary act anything but arbitrary, the lawfulness requirement substantively restricts the legislature’s authority. The due process of law requirement is incompatible with the unrestricted power of the legislature to designate as “law” anything it chooses to enact according to procedural formalities.

There is another way in which Professor Harrison’s argument falls short.²¹¹ Since law is, by nature, general, a specific order from the legislature to a particular person for a particular incident is not a law; it is a command. As Blackstone observed, a law “is a rule; not a transient sudden order from a superior, to or concerning a particular person; but something permanent, uniform, and universal.”²¹² Thus a statute that “confiscate[s] the

stolen a dollar differently than otherwise we may, even if a substantial majority of the legislature says that we may not. . . . [A] state may hang a man only with due process of law and ‘due process of law’ takes its meaning from the theory of rights—in particular . . . from the principle that no man may be hanged unless he has done something to alienate his right against being hanged.”).

210. An example from California history: In 1856, California Governor J. Neely Johnson, seeking to put down the lawless San Francisco Vigilance Committee (which gave us the term “vigilante”), prevailed upon the state’s Chief Justice, David S. Terry, to issue a writ of habeas corpus against the vigilantes, demanding they hand over a prisoner it had snatched from jail and were planning on dealing with in lynch-mob fashion. Terry issued the writ, which the vigilantes ignored, and Governor Johnson assembled a team, including Terry and General William T. Sherman, to bring the vigilantes to justice. In this effort, Terry stabbed one of the vigilantes in the neck with a bowie knife, whereupon the Vigilance Committee arrested, “tried” and “convicted” Terry of assault. See GERTRUDE ATHERTON, CALIFORNIA: AN INTIMATE HISTORY 201–17 (1914). There can be no doubt that this conviction was lawless, even though the vigilantes proceeded according to apparently fair procedural rules. Terry’s subsequent colorful history is detailed in LEONARD L. RICHARDS, THE CALIFORNIA GOLD RUSH AND THE COMING OF THE CIVIL WAR 4–5 (2007). I do not mean to deny that under certain circumstances the acts of a self-created “vigilance committee” or similar body might qualify as genuine law or might lay claim to more legitimacy than the apparent authorities. Indeed, one example of such an instance might be the “rump” procedure whereby West Virginia joined the Union after Virginia’s secession. See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 297–99 (1988).

211. Gedicks, *supra* note 6, provides a more thorough response to Professor Harrison’s argument.

212. 1 WILLIAM BLACKSTONE, COMMENTARIES *44.

goods of Titius,” or “attaint[s] him of high treason,” is not a law, “for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law.”²¹³ The same holds for statutes that confiscate the goods of a particular group or otherwise burden a group for no other reason than that the victims exercise too little political influence to defend themselves.²¹⁴ Such statutes are more like punishments than law—punishments against which the victim had no fair chance to defend himself, or which have no relationship to the victim having done anything wrong.²¹⁵ Legislation of this sort is arbitrary, based on no principle except the ipse dixit of force.²¹⁶ Harrison does not clearly indicate whether he thinks a bill of attainder violates the due process of law requirement,²¹⁷ but if the legislature has absolute authority to condemn specific persons to specific punishments, dispensing with the need for evidence or procedure, then it has no obligation to abide by the rule of law that Harrison concedes is the purpose of the Due Process Clause.

In short, Professor Harrison is correct that the Due Process Clause imposes a rule of law requirement. But the rule of law does not merely mean legislatures enacting statutes. It instead means a government that operates according to principles that are inherent in the concept of lawful order: generality, regular-

213. *Id.*

214. *See, e.g.,* *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443 (1985); *Merrifield v. Lockyer*, 547 F.3d 978, 991–92 (9th Cir. 2008).

215. Donald Kochan has recently described the “anti-interference” principle, which holds that “unequal treatment is [not] justifiable without proof of (1) *causation* of (2) real, legal *harm* that is (3) *traceable* to the action of the disadvantaged or excluded person or group.” Donald J. Kochan, *On Equality: The Anti-Interference Principle*, 45 U. RICH. L. REV. 431, 448 (2011). I see this as a function of the equality principle inherent in the requirement of lawfulness, *see supra* text accompanying notes 105–10. “Our yearning for equality is instinctual,” *id.* at 433, but it is also implicit in the very concept of a non-arbitrary order. There must be a *reason* for unequal treatment, or that unequal treatment is arbitrary.

216. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (The Due Process Clause among others is “focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”).

217. He acknowledges that they violate the specific prohibition on bills of attainder, *see* Harrison, *supra* note 201 at 533, but argues against reading the Due Process Clause as overlapping with other explicit clauses, *id.* at 549, which suggests that he would hold that the Clause does not of its own force prohibit bills of attainder.

ity, fairness, rationality, and public-orientation. These principles are conceptual elements of lawfulness—any act a ruler undertakes that lacks these elements is not a lawful act. By requiring government to act in a lawful way, the Constitution inherently limits what the executive, legislature, or judiciary may do.

Again, this is not so remarkable an assertion. There are any number of ways in which the legislature is limited by an order that is independent of the legislature's choice, but which is not explicitly articulated in the Constitution. For instance, a legislature lacks power to make laws that cannot be repealed. As Francis Bacon observed in 1620, "[a]cts which are in their natures revocable cannot by strength of words be fixed or perpetuated . . ." ²¹⁸ An attempt to make an unrepeatable law would be "void *ab initio* & *ipso facto* without repeale," simply "by the impertinency of it." ²¹⁹ Bacon, one of the great epistemologists in history, ²²⁰ understood that this restriction was not imposed by any specific determination of the legislature itself, let alone by any explicit constitutional requirement, ²²¹ but by the logic of lawfulness itself. ²²² Another example would be the

218. FRANCIS BACON, ELEMENTS OF THE COMMON LAWS OF ENGLAND 74–77 (London, John Moore 1630) (1597). Thomas Jefferson made the same point in the Virginia Statute for Religious Freedom: "[T]his Assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies constituted with powers equal to our own, and that, therefore, to declare this act to be irrevocable would be of no effect in law." Virginia Statute for Religious Freedom, VA. CODE ANN. § 57-1 (2011).

219. BACON, *supra* note 218, at 77.

220. See generally DANIEL R. COQUILLETTE, FRANCIS BACON (1992) (biography of Bacon focusing largely on his legal and logical theory).

221. Obviously, as England has no written Constitution, and Bacon died before the Protectorate, no constitutional restriction in England is explicit. The American Founding Fathers, raised in that constitutional order, were thoroughly familiar with the concept of implicit constitutional restrictions and unenumerated individual rights, as the constitution with which they were most familiar prior to 1787 featured *only* implicit constitutional restrictions and unenumerated individual rights.

222. A similar observation applies to the Realist's notion that the "[t]he law . . . is the judge's decision itself." Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1928 (2005). As Professor Green notes, this theory leads to a surprising and implausible conclusion: "Since whatever a judge decides is law, there is simply no preexisting law to discover." *Id.* at 1929. For example, what is one to make of the statement in *Lawrence v. Texas*, 539 U.S. 558, 576 (2003), that "*Bowers v. Hardwick*, 478 U.S. 186 (1986) was not correct when it was decided, and it is not correct today"? If whatever a judge decides is law, then *Bowers* cannot have been wrong when it was decided, as it was a decision by a majority of the Court. Yet it is also impossible for *Lawrence* now to be wrong about *Bowers* having been wrong

legislature's incapacity to outlaw monetary inflation. Inflation is not a phenomenon of physical nature, yet it is a natural law—a principle inherent in the concept of money itself.²²³ It cannot be legislated away, no matter how hard a ruler might try.²²⁴ In both of these cases, the ruler's power is limited by reason and the nature of the thing.

In the same way, the promise that the legislature will act according to law imposes limits on the legislature that it cannot evade by positive enactment. Because law is, by definition, not arbitrary, and the legislature cannot transform an arbitrary act into a non-arbitrary one, or an unauthorized action into an authorized one, it cannot make something that is not lawful into law. This is, of course, natural law or higher-law thinking,²²⁵ but it requires no faith in any "brooding omnipresence in the sky;"²²⁶ It requires only the principles of logic and a robust concept of lawfulness whereby the ruler's actions are not ipso facto law. This is what Justice Chase meant when he said in *Calder* that legislatures "cannot change innocence into guilt; or punish

because *Lawrence*, too, is a decision of a majority of the Court. This is the Cretan Liar paradox, and it indicates, as Professor Green concludes (for other reasons), that "the decision theory of law cannot be right, because some decisions are *not law*. A judge can make an *illegal* decision—a decision that is *contrary* to the law." Green, *supra*, at 1930. But just as I argue with regard to the legislature, so, too, with regard to the judiciary. If there is a gap between the genuine law and the decision of a particular court, then there must be accessible criteria by which to identify the actual law, and to differentiate it from the acts of courts. Those criteria can be both procedural and substantive, and both explicit or implicit, and they are binding precisely because they are what makes a law a law and not something else. That is the whole theory of substantive due process.

223. More precisely, in the phenomenon of supply and demand. See MILTON FRIEDMAN, *FREE TO CHOOSE* 248 (1980).

224. Rulers have tried. See, e.g., Michael Wines, *As Inflation Soars, Zimbabwe Economy Plunges*, N.Y. TIMES, Feb. 7, 2007, at A1.

225. See Gedicks, *supra* note 6, at 595–96 ("The eighteenth-century American adoption of seventeenth-century English higher-law constitutionalism is the necessary backdrop . . . American judges and attorneys in the late eighteenth century understood 'law' . . . as having a normative content beyond mere positivist compliance with the rule of recognition. Legislative acts that violated natural or customary rights, therefore, were not considered to be actual 'laws,' irrespective of their compliance with written constitutional prescriptions for the creation of positive law. Accordingly, deprivations of life, liberty, or property effected on the authority of such acts were not understood to comply with the 'law' of the land or the due process of 'law,' because they were not accomplished in accordance with a true 'law,' regardless of the process the acts afforded.").

226. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property."²²⁷

D. *Substantive Due Process and Democracy*

Probably the most persistent criticism of the idea that the Constitution incorporates certain implicit substantive limits on the lawmaker's authority is that it is undemocratic for courts to engage such questions.²²⁸ Yet the Constitution does not create a democratic order; it creates a lawful order, and the two are not necessarily identical.²²⁹ Democracies can be, and often have been, lawless and arbitrary. We have suggested above how the Constitution's lawfulness requirement was framed to counteract this tendency and to keep the democratic state within the bounds of lawfulness. The proposition that government exists for the public good and not for the ruler's self-interest is complicated by the operations of a democracy, in which legitimate rule for the benefit of the governed can easily be confused with the improper rule of the majority for its own self-interest.²³⁰

That is a distinction the Framers took care to maintain. In *Federalist* 10, James Madison did not define a "faction" as a minority private-interest group but as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the perma-

227. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

228. See ELY, *supra* note 3, at 14–21; BORK, *supra* note 113.

229. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 194 (1952) ("The attack on judicial review as undemocratic rests on the premise that the Constitution should be allowed to grow without a judicial check. . . . But the Constitution of the United States does not establish a parliamentary government, and attempts to interpret American government in a parliamentary perspective break down in confusion and absurdity.").

230. See Letter from James Madison to James Monroe (Oct 5, 1786), in WRITINGS OF JAMES MADISON 28–29 (Ralph Ketcham ed., 2006) ("There is no maxim in my opinion which is more liable to be misapplied, and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong. Taking the word 'interest' as synonymous with 'Ultimate happiness,' in which sense it is qualified with every necessary moral ingredient, the proposition is no doubt true. But taking it in the popular sense, as referring to immediate augmentation of property and wealth, nothing can be more false. In the latter sense it would be in the interest of the majority in every community to despoil & enslave the minority of individuals. . . . In fact, it is only reestablishing under another name, and a more specious form, force as the measure of right. . . .").

ment and aggregate interests of the community.”²³¹ The majority is just as susceptible to perverting power for its own self-interest as is a monarch—indeed, it may be more susceptible.²³² “When a majority is included in a faction,” democratic institutions “enable[] it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens,”²³³ because the majority can act as the judge in its own case. For a democracy to be a lawful order, and not mere mob-rule, the government would have to keep constantly in mind this difference between rule for the self-interest of the legislative majority and rule for the true public interest. That distinction would operate in the government’s actions through the lawfulness requirement embodied in the Due Process Clause.

Madison uses an analogy in *Federalist* 10 that indicates the deep relationship between this principle and the distinction between lawfulness and arbitrariness. Imagine, he says, a legislative proposal to abolish debt, which would benefit the self-interest of the governing faction and possibly the self-interest of the majority but would nevertheless commit an injustice against the creditors who are owed money and is thus an “improper or wicked project.”²³⁴ Madison analogizes this bill to a lawsuit: “[W]hat are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens . . . ?” In a lawsuit, “[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity,”²³⁵ and the same principle should apply when a legislature considers such a bill. But unlike in a court case, where the parties can seek adjudication by a disinterested arbiter, a democratic legislature is likely to be biased by the voters’ self-

231. THE FEDERALIST NO. 10, *supra* note 70, at 78 (James Madison) (emphasis added).

232. See James Madison, Letter to Thomas Jefferson (Oct. 17, 1788), in MADISON, *supra* note 108, at 421 (“Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance . . .”).

233. THE FEDERALIST NO. 10, *supra* note 70, at 80 (James Madison).

234. *Id.* at 84.

235. *Id.* at 79.

interest: "It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are and must be themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail."²³⁶ Madison described here the central problem in a democracy: the risk that the majority will exploit its power to serve its own self-interest instead of the general good, or even become confused about the nature of its power, so that it can no longer understand the difference between these two things.

As we have seen, the Framers regarded a government that uses its coercive powers to benefit the self-interest of the most powerful faction as an arbitrary, lawless society similar to the state of nature in which the weak are not secured against the strong. One role of the federal judiciary would be to resist such oppressions by policing the boundary of lawfulness against legislative majorities tempted to act unlawfully. Judges may sometimes err. But their resistance to the majority is not in principle contrary to the lawful democratic order, because the Constitution is, simply put, an effort by the people to restrict their representatives' acts within the boundaries of lawfulness. Federal judges are part of that system, no less than—perhaps more than²³⁷—other federal officials who are appointed by elected leaders, such as cabinet members, ambassadors, heads of administrative agencies, or military generals.²³⁸ These officials are all chosen by the people in an indirect way, and few would deny that, say, the American military is ultimately answerable to the people, even though voters do not choose its commanders. Federal judges are part of the American version of the democratic process; they do not stand outside it. Although like any other officials judges might at times abuse the citizens' trust, that is a fault with those particular officials, not with the mechanism or office itself.

236. *Id.* at 79–80.

237. "More than" because voters often consider a presidential candidate's likely judicial appointments when they decide whom to vote for. A 2007 Quinnipiac University poll showed that 52 percent of voters considered a candidate's likely Supreme Court nominees to be a "very important" consideration when choosing a presidential candidate. *Voters Back Supreme Court Limit On School Deseg.*, available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1093> (visited Nov. 8, 2011).

238. Of course, the President of the United States is himself indirectly chosen by the people, through the electoral college. That hardly makes him an undemocratic leader.

This critical point is often ignored in critiques of substantive due process theory. One author, for example, argues that the “central problem” with the Supreme Court’s powers of judicial review is that “federal judges do not represent the community, and can only exercise *carte blanche* power at the expense of the community’s authority.”²³⁹ But federal judges *do* represent the community; they are chosen within the community by the people themselves, though indirectly, and through a constitutional process that is designed to protect their independent judgment against possible biases.²⁴⁰ Federal judges do not exercise their power at the expense of the community’s authority because the community has no rightful claim to lawless authority. When the community or its elected officials act in a way that exceeds constitutional boundaries, those acts have no more authority than the arbitrator who exceeds the explicit or implicit limits on his authority, or the bank guard who decides to rob the bank. Indeed, since the Constitution—and not any particular piece of

239. Andrew T. Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 34 (2005).

240. THE FEDERALIST NO. 78, *supra* note 70, at 469 (Alexander Hamilton), contains one of the most frequently misunderstood lines in *The Federalist*: “The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” Hamilton is *not* arguing for “judicial restraint” in this passage, but quite the contrary—he is arguing for a vigorous and engaged judiciary that will aggressively protect constitutional boundaries against legislative encroachments. *Id.* at 468–69. Moreover, he is arguing for a high degree of judicial independence. *Id.* at 469. The distinction between judgment and will is central to this argument, because judgment must be kept independent from outside influences; it is the faculty responsive to logical analysis and dispassionate calculation. It would be improper to keep the faculty of judgment constrained by considerations of power. Will, by contrast, is a dangerous, pro-active force; the motive principle behind the executive arm of government. *Will* must be kept on a close leash. Hamilton would have had little sympathy for the modern conception of judicial restraint; he would have agreed with the Court’s statement in *United States v. Butler*:

It is sometimes said that the court assumes a power to overrule or control the action of the people’s representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.

297 U.S. 1, 62–63 (1936).

legislation—reflects the true intent of the people, a court that invalidates a piece of legislation that goes beyond constitutional boundaries is actually enforcing the true will of the people.²⁴¹ This is why Justice Stephen Field described the Supreme Court as the “most Democratic” of the federal government’s three branches: “Senators represent their States, and Representatives their constituents, but this court stands for the whole country”²⁴² Moreover, as Ralph Lerner and others have noted, the Founders saw federal judges as “republican schoolmasters,” whose duties included articulating the principles of the Constitution to the people and, in reverse, articulating the people’s sense to the bar.²⁴³

Alongside this “democracy” critique, however, many opponents of substantive due process argue that courts should not introduce normative elements into the law *at all*.²⁴⁴ According to this argument, the major problem of constitutional interpretation is confirmation bias—a tendency to read into constitutional language whatever the reader wants to see. Since judges cannot be trusted to be objective—indeed, nobody can be—the best way to prevent such biases is to restrict judicial review as much as possible and expand the role of majority rule. Note first that this argument is self-contradictory; it holds that imposing normative views in the law is wrong, yet that position is itself a normative commitment. One critic of substantive due process has called judges who use the due process clause to

241. THE FEDERALIST NO. 78, *supra* note 70, at 468 (Alexander Hamilton).

242. Appendix: Correspondence between Mr. Justice Field and the Other Members of the Court with Regard to His Retiring from the Bench, 168 U.S. 713, 717 (1897).

243. RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLES AND PRACTICE IN THE NEW REPUBLIC* 91–136 (1987). See also Walter Berns, *The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the “Genius of the People”*, in *THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM* 3, 5–8 (Bradford P. Wilson & Ken Masugi eds., 1998).

244. This argument often proceeds from the premise that there are no moral truths, only moral tastes, so that on balance it is better for the collective tastes to prevail than the tastes of one particular person. The strong connection between this moral nihilism and the doctrine of judicial restraint is particularly prominent in the jurisprudence of Oliver Wendell Holmes. See ALSCHULER, *supra* note 153; Sandefur, *Privileges*, *supra* note 169, at 157–58. For example, one of Holmes’s most prominent contemporary followers, Robert Bork, has written that “[i]t is doubtful that there are any moral ‘facts,’ as opposed to moral convictions” BORK, *supra* note 113, at 121. From this, Bork concludes that “[m]oral outrage is a sufficient ground for prohibitory legislation.” *Id.* at 124. Not moral reasons, but moral outrage, which Bork makes clear is fundamentally subjective and arbitrary in his view.

impose their own policy preferences “lawless judges”²⁴⁵—meaning, presumably, that their decisions do not qualify as law, even though they are promulgated according to formal, procedural rules. In other words, such decisions are arbitrary, unprincipled, or lack other substantive elements that make a correct judicial determination a “law.” But if it is possible to describe a *judge’s* acts as arbitrary or “lawless” even though promulgated according to procedural formalities, then why is it not also possible to discern when a *legislature* acts lawlessly, even though pursuant to procedural formalities? In either case, one must make that decision by reference to substantive normative commitments—whether one believes that democracy requires more limited judicial review or that principles of classical liberalism require more meaningful judicial engagement. Either way, one depends on normative principles and imposes those in one’s policy prescriptions. In short, proponents of judicial restraint who base their arguments on an appeal to the value of democracy cannot simultaneously claim that it is wrong to impose one’s (allegedly subjective) normative commitments in the guise of constitutional interpretation, because they are doing precisely the same thing.

Second, the positivist’s basic premise is dubious: It is *not* clear that constitutional interpretation just means a judge rationalizing the imposition of her policy preferences as law. On the contrary, one’s policy preferences and constitutional interpretations have a much more subtle relationship to one another—a relationship I call “potential congruence.”²⁴⁶ A good-faith reader of the Constitution might be drawn to those constitutional interpretations that will allow for her preferred policy outcomes, but she also is drawn to policies that she considers to be constitutional. These two opinions—policy and constitutionalism—will tend to jostle against each other and reach a basic equilibrium. A person will generally discard policies she believes cannot be reconciled with her constitutional views and vice versa. There are plenty of examples of people acknowledging that their preferred policy outcomes are unconstitutional—almost anyone who calls for amending the Constitution is, in

245. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1560 (2004) (emphasis added).

246. Borrowing the term from Samuel Scheffler, *Potential Congruence*, in MORALITY AND SELF-INTEREST 117, 118 (Paul Bloomfield ed., 2008).

substance, making such an admission—or admitting that an unwise policy is constitutional.²⁴⁷

Moreover, a person generally will be drawn to study constitutional interpretation in the first place because of her general approval of the Constitution as she understands it. That initial understanding might be biased by her instructors, and she will refine it as she learns more, or she may even decide to reject the Constitution because she decides it does not actually live up to her initial approval—people go through similar phases of intellectual exploration and ideological refinement all the time. Just as we refine our scientific or philosophical theories by debate and elaboration, so do we refine constitutional theory. Nothing about this process of debate and elaboration entails that there is no fact of the matter to be apprehended, or that all interpretive methods are equally acceptable. Nor does it render constitutional interpretation or the doctrine of substantive due process suspect. Government is a human enterprise, liable to human failings, but the Framers, expecting judges to apply normative criteria to their interpretive tasks, and knowing they might sometimes even be misled or corrupted, provided means for counteracting such tendencies if necessary, such as impeachment,²⁴⁸ or Congress's power over jurisdiction.

Does this mean a judge should shamelessly impose her normative views as law? Of course not. As a constitutional officer, sworn to uphold the Constitution, a judge is bound to impose the normative views that she, in her best judgment, believes are present in the Constitution.²⁴⁹ But a Constitution is not a neutral

247. To name just two recent examples, Justice Clarence Thomas dissented in *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting), while admitting that he believed the statute challenged in that case was “uncommonly silly.” Justice John Paul Stevens, author of *Kelo v. City of New London*, 545 U.S. 469 (2005), later acknowledged that he disagreed with the policy outcome but believed the decision was required as a matter of constitutional interpretation. See John Paul Stevens, *Judicial Predilections*, 6 NEV. L.J. 1, 4 (2005) (“My own view is that the allocation of economic resources that result from the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials.”).

248. I have come to reject the view I expressed at an earlier time, that impeachment should not be used to enforce political orthodoxy on the bench. See John C. Eastman & Timothy Sandefur, *The Senate is Supposed to Advise and Consent, Not Obstruct and Delay*, 7 NEXUS 11, 16 (2002).

249. See Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All*, 20 CAN. J.L. & JURISPRUDENCE 201, 221 (2007) (“The assumption that natural law looses a judge to do whatever she wants, ignoring even clear texts,

document “made for people of fundamentally differing views”²⁵⁰ and cannot be equally compatible with all political or economic perspectives. On the contrary, it incorporates a classical liberal political philosophy rooted in individual rights and the tradition of lawful, non-arbitrary rule. This should not be a controversial proposition. Nobody would deny, for example, that the Constitution incorporates the English common law system, or assert that it is written to accommodate fundamentally differing legal systems.²⁵¹ Yet the Constitution does not explicitly adopt the common law system—it incorporates the common law implicitly, by implication from textual references to “cases in law and equity,”²⁵² “suits at common law”²⁵³ and “writs” such as “habeas corpus.”²⁵⁴ When interpreting these terms, courts properly refer to outside sources for definitions and for explanations of how habeas corpus and other devices operate.²⁵⁵ In the same way, the Constitution’s text implicitly incorporates the classical liberal political philosophy of the late eighteenth century by implication from textual references to “liberty,”²⁵⁶ “property,”²⁵⁷ and “other” rights.²⁵⁸ The Preamble declares unambiguously that “liberty” is a “blessing.”²⁵⁹ And in the Due Process Clause, the Constitution incorporates a promise that government will treat individuals in a lawful, non-arbitrary manner. These terms are properly interpreted by reference to other documents and experiences in the classical liberal tradition and American historical experience.²⁶⁰ The Constitution’s text, in short, indicates that it has a specific normative direction and that it incorporates substantive political values. A judge interpreting the Constitution

is wrong. Natural law . . . empowers her, at most, to reach decisions she believes are required by her own views of a sound, defensible moral and political theory.”).

250. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

251. To name just one example, the Constitution explicitly guarantees a republican form of government for each state. U.S. CONST. art. IV, § 4. It is therefore incompatible at least with non-republican forms of government.

252. U.S. CONST. art. III, § 2, cl. 1.

253. U.S. CONST. amend. VII.

254. U.S. CONST. art. I, § 9, cl. 2.

255. *See, e.g., Boumediene v. Bush*, 553 U.S. 723, 739–52 (2008) (reviewing common law contours of habeas corpus).

256. U.S. CONST. amend. V.

257. *Id.*

258. U.S. CONST. amend. IX.

259. U.S. CONST. pmbl.

260. *See Sandefur, Liberal Originalism, supra* note 155.

may not be able to avoid ideological biases in every case, but as a deputy indirectly chosen by the people to interpret and apply its text, a judge is faithful to her task when she makes her judgments guided by principles found both explicitly and implicitly in the instrument itself.²⁶¹

CONCLUSION

The phrase “separation of powers” is nowhere to be found in the Constitution, and it is sometimes difficult to apply in particular cases because the Constitution does not precisely define the boundaries between the three branches’ powers and because the details of particular cases may be complex. Nevertheless, the principle of separation of powers is part of our law because it is inherent in the logical structure described by the Constitution’s words and found throughout the founding era documents. It would be perverse to abandon this principle just because it is not explicitly stated in the text or to ridicule the logic on which it stands as being a set of subjective value-judgments. The same holds also for substantive due process. The Due Process Clause’s prohibition on arbitrary action may be complicated to apply; it may respond to difficult and overlapping demands of law and political philosophy. Nevertheless, it is part of our law. Indeed, in a way, it just *is* the law. Breezy rejections of substantive due process as an “oxymoron” or as a simple trick for judges to do whatever they wish are superficial and unserious, and they should not be indulged by mature lawyers.

Substantive due process might be the most complicated area of American constitutional law; it is certainly among the most hotly contested. This Article will not resolve those arguments, but I hope it will convey the basic logic of both the promise of lawful rule and the guarantee against arbitrary government action. This promise includes certain inherent restrictions on the rulemaking authority; they incorporate into our basic law certain norms of generality, regularity, fairness, rationality, and public-orientation. We should be wary of hastily disregarding, attacking, or ridiculing such principles—and we should cherish the Clause’s protections.

261. See Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt’s The Myth of Judicial Activism*, 23 J.L. & POL. 1, 21–22 (2007) (defending judicial review more thoroughly).