

terest, subject only to the specific prohibitions of the written constitution. The “vested rights” jurists thus found in the “law of the land” and the “due process” clauses of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether.⁴³² Thus, Chief Justice Taney was not innovating when, in the *Dred Scott* case, he pronounced, without elaboration, that one of the reasons that the Missouri Compromise was unconstitutional was that an act of Congress that deprived “a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”⁴³³ Following the war, with the ratification of the Fourteenth Amendment’s Due Process Clause, substantive due process interpretations were urged on the Supreme Court with regard to state legislation. First resisted, the arguments came in time to be accepted, and they imposed upon both federal and state legislation a firm judicial hand that was not to be removed until the crisis of the 1930s, and that today in non-economic legislation continues to be reasserted.

“It may prevent confusion, and relieve from repetition, if we point out that some of our cases arose under the provisions of the Fifth and others under those of the Fourteenth Amendment to the Constitution of the United States. Although the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper.”⁴³⁴ The most obvious difference between the two Due Process Clauses is that the Fifth Amendment clause as it binds the Federal Government coexists with other express provisions in the Bill of Rights guaranteeing fair procedure and non-arbitrary action, such as jury trials, grand jury indictments, and nonexcessive bail and fines, as well as just compensation, whereas the Fourteenth Amendment clause as it binds the states has been held to contain implicitly not only the standards of fairness and justness found within the Fifth Amendment’s clause but also to contain many guarantees that are expressly set out in the Bill of Rights. In that sense, the two clauses

⁴³² The full account is related in E. CORWIN, *LIBERTY AGAINST GOVERNMENT* ch. 3 (1948). The pathbreaking decision of the era was *Wynhamer v. The People*, 13 N.Y. 378 (1856).

⁴³³ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

⁴³⁴ *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901).