THE YALE LAW JOURNAL

NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL

Due Process as Separation of Powers

ABSTRACT. From its conceptual origin in Magna Charta, due process of law has required that government can deprive persons of rights only pursuant to a coordinated effort of separate institutions that make, execute, and adjudicate claims under the law. Originalist debates about whether the Fifth or Fourteenth Amendments were understood to entail modern "substantive due process" have obscured the way that many American lawyers and courts understood due process to limit the legislature from the Revolutionary era through the Civil War. They understood due process to prohibit legislatures from directly depriving persons of rights, especially vested property rights, because it was a court's role to do so pursuant to established and general law. This principle was applied against insufficiently general and prospective legislative acts under a variety of state and federal constitutional provisions through the antebellum era. Contrary to the claims of some scholars, however, there was virtually no precedent before the Fourteenth Amendment for invalidating laws that restricted liberty or the use of property. Contemporary resorts to originalism to support modern substantive due process doctrines are therefore misplaced. Understanding due process as a particular instantiation of separation of powers does, however, shed new light on a number of key twentieth-century cases which have not been fully analyzed under the requirements of due process of law.

AUTHORS. Nathan S. Chapman, Executive Director, Stanford Constitutional Law Center; Michael W. McConnell, Richard and Frances Mallery Professor of Law, Stanford Law School. Thank you to Samuel Bray, William Baude, David Bernstein, Josh Chafetz, David Engstrom, Jack Goldsmith, Robert Gordon, Philip Hamburger, Paul Harold (for research assistance), John Harrison, Richard Helmholz, Daniel Hulsebosch, Larry Kramer, Ed Larson, Kurt Lash, Earl Maltz, Jeff Powell, Michael Ramsey, Nicholas Quinn Rosenkranz, Stephen Sachs, Matthew Shapiro and the editors of *The Yale Law Journal*, the Columbia Law School Legal Theory Workshop, and the Stanford Law School Faculty Workshop.

ESSAY CONTENTS

INTRODUCTION

Scholars are showing renewed interest in the original understanding of the Due Process Clauses, and especially in whether that understanding supports the Supreme Court's modern substantive due process jurisprudence. Not long ago, most scholars accepted John Hart Ely's clever dismissal of the idea of substantive due process as an "oxymoron," on the order of "green pastel redness"[1]—with those of an originalist bent concluding that substantive due process is illegitimate[2] and those of a substantive due process bent concluding that originalism is wrongheaded.[3] Now, with originalist approaches to constitutional interpretation gaining greater adherence, even among progressives,[4] we are seeing more serious attempts to discern the "original understanding" of "due process of law."

1. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980); *see also* Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (Posner, J.) (criticizing "substantive due process" as an "oxymoron").

2. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 249-82 (1977); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 31-32 (1990); Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1, 29-30 (1979) [hereinafter Berger, *"Law of the Land" Reconsidered*] (concluding that substantive due process does not have "deep historical roots").

3. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 71-77 (1996); *see, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 6-7 (1982) (defending judicial lawmaking on extraconstitutional, "noninterpretive" grounds); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) (arguing that courts should not rely exclusively on the written constitution); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) [hereinafter Grey, *Origins of the Unwritten Constitution*] (arguing on historical grounds that there is an unwritten constitution).

4. Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 932 (2009); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 605 (2004) ("Broadly originalist arguments are widespread and are increasingly common 'in liberal and progressive theory.'" (quoting James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1344 (1997))); *see, e.g.*, Dist. of Columbia v. Heller, 554 U.S. 570, 636 (2008) (Stevens, J., dissenting); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 228 (2011); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009); CONST. ACCOUNTABILITY CTR., http://www.theusconstitution.org (last visited Feb. 3, 2012).

Scholars who have considered the evidence generally fall into two camps. Some argue that "due process" meant nothing more than judicial procedure.[5] It therefore applied to the courts and, perhaps, to the executive with respect to prosecution and the enforcement of court judgments. Under this reading, due process did not apply to the legislature. Others contend that "due process *of law*" entailed judicial procedure *and* natural law norms such as reasonableness, justice, or fairness.[6] Due process thus applied to legislative acts that failed to live up to those norms.

---

5. The most important statement of this position is Justice Hugo Black's dissenting opinion in *In re Winship*, 397 U.S. 358, 378-82 (1970). *See also* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1102-08 (1953); ELY, *supra* note 1, at 15; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 248 (1999); ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 461 (1935); HERMINE HERTA MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 125-26 (1977); HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 705-06 (1936); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 371 (1911); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (arguing that "due process" refers to common law procedures in place in 1791 plus any amendments made by the legislature to those procedures); Howard Jay Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860*, 40 CALIF. L. REV. 483, 484-86 (1952); Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations of Legislatures* (pts. 1-3), 2 TEX. L. REV. 257 (1924), 2 TEX. L. REV. 387 (1924), 3 TEX. L. REV. 1 (1924); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1412 (1974); Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1, 2 (2005); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of the Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975); Alfred H. Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1052 (1956); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 237-38 (1976); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Richard S. Myers, *The End of Substantive Due Process?*, 45 WASH. & LEE L. REV. 557, 614-15 (1988); Robert P. Reeder, *The Due Process Clauses and "The Substance of Individual Rights,"* 58 U. PA. L. REV. 191, 201 (1910); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 441 (1926); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 2), 14 CREIGHTON L. REV. 735 (1981); Stephen F. Williams, *"Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. COLO. L. REV. 117, 126-27 (1981); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213 (Eugene W. Hickok, Jr. ed., 1991).

6. *See* CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 351-55 (1997) (citing antebellum cases protecting natural rights); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999) (arguing that due process was intended to protect property rights); 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) (arguing that "law" in "due process of law" was understood to refer to an act that complies

In this *Journal*, Ryan Williams has recently offered a twist on the two prevailing interpretations of the historical evidence. He argues that few at the Founding thought that due process applied to the legislature, but that courts between the Founding and the Civil War developed a version of "substantive" due process. He concludes that the original understanding of the Fifth Amendment did not have a "substantive due process" component, but the original understanding of the Fourteenth Amendment did.[7] This leads to the intriguing possibility that, as a matter of original understanding, substantive due process is legitimate as applied to state but not to federal legislation. He is equivocal about whether the original understanding of the Fourteenth Amendment supports modern substantive due process,[8] as applied in *Roe v. Wade*,[9] *Planned Parenthood v. Casey*,[10] and *Lawrence v. Texas*.[11]

In this Essay we argue, contrary to each of these views, that by the time of adoption of the Fifth Amendment, due process was widely understood to apply to legislative acts, but that this practice did not resemble modern substantive due process. Legislative acts violated due process not because they were unreasonable or in violation of higher law, but because they exercised judicial power or abrogated common law procedural protections. These applications of due process to the legislature were based on common law principles about the nature of legislation as distinguished from judicial acts (not "natural law" as that term is commonly used), the constitutional separation of powers, and specific constitutional limits on the power of the legislature. Courts relied on different provisions depending on what constitution governed the case, but their decisions were consistently based on the same separation-of-powers and

with natural law); Grey, *Origins of the Unwritten Constitution*, *supra* note 3 (purporting to provide a historical foundation for "noninterpretive" judicial review); Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1270-73, 1322-23 (1990) (arguing that discerning the Framers' intentions is a political enterprise); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941 (suggesting that substantive due process may not be inconsistent with originalism); *cf.* RODNEY L. MOTT, DUE PROCESS OF LAW 34-36, 74-75, 123-24, 159-61 (1926) (detailing the history of due process through English and American colonial history); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1132 (1987) (noting the Founders' adoption of a doctrine of inalienable natural rights).

7. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411-12 (2010).

8. *Id.* at 510-11.

9. 410 U.S. 113 (1973).

10. 505 U.S. 833 (1992).

11. 539 U.S. 558 (2003).

due process logic.[12] It is true that not everyone was always persuaded by every application of due process to a legislature during this period (for instance, Chief Justice Taney's opinion in *Dred Scott v. Sandford*[13]); nor are we. But all of them—even the questionable opinions—relied on separation-of-powers logic. None of them invalidated a general and prospective statute on the ground that it interfered with unenumerated but inalienable rights, was unreasonable, or exceeded the police power. It was not until well after the ratification of the

12. We are not the first to note the importance of the separation of powers in the original understanding of due process of law, but not many have given it pride of place, with the notable exception of Wallace Mendelson. *See* Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 136 (1956) ("Separation with its procedural connotations had been a ready, if narrow, bridge between orthodox procedural due process and the doctrine of vested interests in an age when legislatures habitually interfered with property by crude retrospective and special, *i.e.*, quasi-judicial, measures."). Mendelson's thesis is that the separation of powers allowed the evolution of due process of law. *Id.* The causal connection may be more complicated than that: a commitment to the law of the land enabled colonial Americans to argue that Parliament had overreached well before the judicial power had been separated from it. *See infra* Sections I.B-C. It appears that separation of powers and due process of law developed together. *See infra* Sections I.A-C. Others have recognized that the separation of powers was integral to due process but have not maintained its centrality to the application of due process against the legislature. *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 272 (1985) ("[C]onsiderable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law."); JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 48-49 (2003) [hereinafter ORTH, DUE PROCESS OF LAW] ("The attempted exercise of [the judicial] power by another branch of government could be described as a procedural violation: just as a man could not be made a judge in his own case, so one who was not a judge could not make judicial rulings."); Nathan N. Frost, Rachel Beth Klein-Levine & Thomas B. McAffee, *Courts over Constitutions Revisited: Unwritten Constitutionalism in the States*, 2004 UTAH L. REV. 333, 382 ("The doctrine of vested rights grew out of a recognition that when legislatures act like courts, the potential for abuse grows not only by the omission of some particular procedure in question—such as trial by jury—but also by the departure from separation of powers."); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 520-24 (1997); Hill, *supra* note 6, at 1308 ("We may begin by noting that if a statute was deemed confiscatory, the statute was said to be void as an attempted judicial act because, under separation of powers doctrine, only a court, after 'trial had . . . and judgment pronounced,' could effectuate the divestment; and also because this was deemed to be a fundamental requirement of the law-of-the-land and due process clauses."); John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337 (1997) [hereinafter Orth, *Taking from A*]; Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1043 (2011) ("[T]he *who* question reveals that the Due Process Clause . . . is essentially a separation of powers provision."); Williams, *supra* note 7, at 424.

13. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1.

Fourteenth Amendment that these notions took hold in the form of what we now call substantive due process. The original understanding of due process of law does not support it.

The meaning of "due process of law" and the related term "law of the land" evolved over a several-hundred-year period, driven, we argue, by the increasing institutional separation of lawmaking from law enforcing and law interpreting. From at least the middle of the fourteenth century, however, due process consistently referred to the guarantee of legal judgment in a case by an authorized court in accordance with settled law. It entailed an exercise of what came to be known as the judicial power to interpret and apply standing law to a specific legal dispute. Application to the executive came first, and reflected the Whiggish contraction of royal prerogative in favor of the supremacy of Parliament with respect to lawmaking, and in favor of the judiciary with respect to adjudication of the application of law to particular persons and cases. Fundamentally, "due process" meant that the government may not interfere with established rights without legal authorization and according to law, with "law" meaning the common law as customarily applied by courts and retrospectively declared by Parliament, or as modified prospectively by general acts of Parliament.

By the time the Fifth Amendment was enacted, everyone agreed that due process applied to executive officials and courts. It meant that the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections characteristic of judicial process: generally, presentment, indictment, and trial by jury. More controversially, we contend that, by this time, many informed American legal observers—including Madison, Hamilton, Jefferson, Iredell, Chase, and Tucker—also believed that the principle of due process extended to acts of the legislature in two narrow and specific ways: statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees were subject to judicial review, and acts by the legislature that deprived specific individuals of rights or property were subject to similar challenge, either in the legislative forum itself or in the course of subsequent judicial consideration.

The distinctive aspect of modern "substantive due process," in contrast, is its treatment of natural liberty as inviolate, even as against prospective and general laws passed by the legislature and enforced by means of impeccable procedures.[14] No significant court decision, legal argument, or commentary

14. *See infra* Subsections III.C.1-2 (discussing Lochner v. New York, 198 U.S. 45 (1905), and Griswold v. Connecticut, 381 U.S. 479 (1965)). Under a softer version of substantive due

prior to the adoption of the Fourteenth Amendment, let alone the Fifth, so much as hinted that due process embodies these features. With two controversial exceptions discussed below, antebellum courts did not assert the power to declare that individuals "should have" certain rights that legislatures had denied to everyone. Every known application of the principle of due process involved the deprivation of rights (usually property rights; there are far fewer liberty cases) that had their source in positive law, whether in a written constitution, a statute, or the common law. Moreover, with the two exceptions noted, every known application of the principle of due process involved claims that the imperiled rights were being taken away without adequate process: they had been taken away by a court without proper legal procedure, by an executive official without prior authorization by a legislature or a court, or by a legislature through an act that was effectively a judicial decree. Unlike modern substantive due process decisions, courts prior to the adoption of the Fourteenth Amendment did not treat rights other than those enumerated in positive constitutional law as impervious to prospective and general legislative repeal.

We emphasize that our argument here is confined only to the Due Process Clauses, and only to their original meaning. Our argument is not based on any jurisprudential skepticism about the desirability of judicially enforceable unenumerated rights as a general matter, but solely on the historic understanding of "due process." We take no position here on whether other provisions of the Constitution, such as the Ninth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment, empower courts to engage in practices akin to substantive due process—namely, the judicial recognition of rights originating in something other than positive law, in the teeth of legislative enactments to the contrary. Those provisions have their own distinctive history.[15] We argue only that "due process" entailed no such thing.

process, courts identify "rights" not grounded in positive law, and then determine, on philosophic premises, whether the legislature's reasons for denying those rights are sufficiently persuasive. This version is no more legitimate under the original meaning of due process than the stronger version. *See infra* Subsection III.C.4 (discussing Lawrence v. Texas, 539 U.S. 558 (2003)).

15. One of us has offered his interpretation of those Clauses elsewhere. *See* Michael W. McConnell, *Natural Rights and the Ninth Amendment: How Does Lockean Legal Theory Assist in Interpretation?*, 5 N.Y.U. J.L. & LIBERTY 1 (2010) [hereinafter McConnell, *Natural Rights and the Ninth Amendment*] (arguing that the Ninth Amendment recognized a rule of statutory construction to avoid reading statutes to abrogate natural rights in the absence of evidence of clear and specific legislative intent to do so); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1024-25 (1995) (arguing that the Privileges or Immunities Clause, at most, nationalized longstanding and widespread traditional liberties originating in state law); Michael W. McConnell, *The Right To Die and*

Part I recounts the history of due process in England and America, and then the text and framing of the Fifth Amendment Due Process Clause. Part II examines the judicial, scholarly, and legislative applications of due process between 1791 and Reconstruction, showing that the meaning of due process did not change fundamentally from the Fifth to the Fourteenth Amendments. Part III analyzes how this original meaning might apply to certain well-known and controversial modern cases—in some instances showing that an understanding of the historical meaning would have provided stronger support for the holding and in some instances showing that it contradicts the holding. In particular, we find that it undermines rather than supports modern substantive due process.

I. THE FIFTH AMENDMENT DUE PROCESS CLAUSE

The due process and law-of-the-land clauses of the American state and federal constitutions originate in Magna Charta and the English customary constitution. This is uncontroversial. What commentators have underemphasized is that due process has from the beginning been bound up with the division of the authority to deprive subjects of life, liberty, or property between independent political institutions. In modern parlance, due process has always been the insistence that the executive—the branch of government that wields force against the people—deprive persons of rights only in accordance with settled rules independent of executive will, in accordance with a judgment by an independent magistrate. Magna Charta eliminated the King's power to deprive his subjects of rights without authorization by existing law and adjudication by a court. This provision gained new vitality in the hands of Sir Edward Coke, whose influence on early American lawyers was unparalleled. Coke insisted that the King was subject to the common law as expressed by custom and parliamentary declaration.[16] Thus, subjects could be deprived of rights only with the participation of Parliament and the courts. The Petition of Right, championed in Parliament by Coke and Sir John Selden, declared in no uncertain terms that the executive could deprive persons of rights only according to existing law. This argument gained new resonance against legislatures more than a hundred years later when Whigs in England and in the

the Jurisprudence of Tradition, 1997 UTAH L. REV. 665 [hereinafter McConnell, *The Right To Die*] (arguing that the Court's tradition-based due process analysis in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is more plausible under the Fourteenth Amendment's Privileges or Immunities Clause).

16. Americans would add colonial charters to the list of laws the King could not unilaterally abrogate. *See infra* Section I.C.

American colonies accused Parliament of depriving subjects of rights without due process of law by failing to give them adequate common law procedures. Due process thus entered American constitutionalism as one of the key principles for which the Revolutionaries fought.

A. English Origins of Due Process of Law: Magna Charta and Coke

Since its origins in Magna Charta, due process of law has gone hand in hand with the checks on the unilateral exercise of power that scholars now call "separated powers." Chapter 29 of Magna Charta provided that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers [or/and] by the law of the land."[17] This did not guarantee absolute rights, but instead subjected the Crown to the power of other institutions both procedurally and substantively. Procedurally, the King could no longer deprive a freeman of his life, liberty, or property without the application of general rules to the case by a tribunal of the freeman's "peers." The substance of the rule of decision would be the "law of the land," which at this time referred to standing law that governed all of the King's subjects in England. A 1354 statute first used the phrase "due process of law," stating that "no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[18] It is not known whether, or how, the meaning of this language was understood to differ from the "law of the land" provision of Magna Charta. Perhaps they were

17. MAGNA CARTA ch. 29, *reprinted and translated in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964). The Latin conjunction can be translated as either "and" or "or." Some scholars believe that it meant "and" to the parties of the original Charter. *See* WILLIAM SHARP MCKECHNIE, MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 381-82 (photo. reprint 2000) (2d ed. 1914). Sir Edward Coke translated it as "or," however, and most American constitutions that included a law-of-the-land clause opted for the "or" construction. MOTT, *supra* note 6, at 3 n.8. At least one court considered whether the disjunctive construction meant that the government may deprive someone of a right under a "law of the land" even without a trial by a jury of his peers. *See* Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 391-92 (Ct. Com. Pl. 1794).

18. 28 Edw. 3, c. 3 (1354), *reprinted in* 1 THE STATUTES OF THE REALM 345 (photo. reprint 1963) (London, Dawsons of Pall Mall 1810). Three years earlier, a statute used a similar phrase, "by the Course of the law," in a similar context. 25 Edw. 3, c. 4 (1351), *reprinted in* 1 THE STATUTES OF THE REALM, *supra*, at 321; *see* MOTT, *supra* note 6, at 4 n.11; *see also* Jurow, *supra* note 5, at 268 (noting that, while "no other statutes enacted during Edward's reign referred to 'due process of law,' . . . several . . . expressed a similar understanding of 'process of law'").

two ways of saying the same thing, as Coke would later conclude.[19] Or the term "process" may have had a narrower procedural focus akin to modern "service of process"—meaning, in effect, that the government had to proceed according to the appropriate common law writ.[20] The "law of the land" appears to point to a broader conception of the rule of law, with more emphasis on the source of legal authority—common law or statute—than on the procedures for carrying it out. Because common law remedies were inseparable from their corresponding writs,[21] however, it is probably a mistake to draw any sharp distinction.

The individual-rights implications of Magna Charta are well appreciated, but not enough attention has been paid to their connection to the separation of powers. Indeed, those rights may be best understood not as a guarantee of a certain definition of liberty or property, or of abstract principles of "fairness"—notice and the opportunity to be heard, as in modern procedural due process jurisprudence—but as a guarantee of judgment by an independent institution according to procedures designed to take the case out of the hands of the King. Magna Charta interposes an independent body of decisionmakers, a jury of one's peers, between the Crown and the subject. Before a subject may be punished, taxed, or otherwise deprived of his rights, the Crown must convince a body of lay citizens that the subject violated the settled or established law of the land, meaning either longstanding common law or a statute enacted by Parliament. This is how the principle that evolved into modern separation of powers entered English law: the Crown could deprive subjects of rights only through institutional coordination.

The core violation of Chapter 29 occurred when the King or Parliament deprived someone of life, liberty, or property without judgment by a common law court applying settled law. It was not enough for the King or even the King-in-Council to provide a hearing in advance of the deprivation. A 1368 statute, for example, provided that "no Man [shall] be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land"; the law expressly forbade

19. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (photo. reprint 2002) (London, W. Clarke & Sons 1817) (1642).

20. Jurow, *supra* note 5, at 267 (stating that the statute "appears to demand that judgment and execution were not to be rendered against any man unless and until he was brought personally before the court by the appropriate writ").

21. Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1051 (2002) (observing that the writ system of jurisdiction and forms of pleading did not evolve into a substantive jurisprudence until the nineteenth century).

adjudications by the King's councils instead of the common law courts.[22] The same year, when a royal commission purported to authorize two men to seize and imprison another and to take his property, a court determined that it was "against the law, to take a man and his good without indictment, suit of a party, or due process."[23] From the very start, then, due process required judgment by an independent court pursuant to the system of remedial writs. Most of the historical evidence calls exercises of this power "judicial," whether it was done by the King, Parliament, or courts. For clarity, we will call it "quasi-judicial."

The history of due process of law was bound up with the seventeenth-century struggle of the common law courts to assert their jurisdiction over local, ecclesiastical, and prerogative courts, thereby extending the reach of the "law of the land."[24] Insofar as this centralized power into courts that applied English law and were appointed by the King, it bolstered royal power. Insofar as it encroached on the jurisdiction of courts where the King asserted power to personally exercise judgment, however, it effectively separated from the Crown the power to deprive persons of rights without the consent of a quasi-independent tribunal.

Under the influence of early Stuart-era common law lawyers, especially Coke,[25] the requirement of due process came to limit the prerogative powers of the Crown, in defense both of courts and of an emerging parliamentary supremacy over the content of law. Coke's views were a chief source of early American constitutionalism.[26]

---

22. 42 Edw. 3, c. 3 (1368), *reprinted in* 1 THE STATUTES OF THE REALM, *supra* note 18, at 388.

23. Y.B. 42 Edw.3, fol. 258b, pl. 5 (1368), *reprinted in* YEAR BOOKS: LIBER ASSISARUM, 1327-1377, at 258 (photo. reprint 2007) (London, George Sawbridge 1678-1680) (translated from the law French by the authors).

24. *See* LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 134 (1977); Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 451 (2003).

25. For the classic biography of Sir Edward Coke, see CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE, 1552-1634 (1957). For a good study of Coke's early career, see ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE (2003). For a good study of his later career in Parliament, see STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH," 1621-1628 (1979).

26. *See, e.g.*, 11 THE WRITINGS OF THOMAS JEFFERSON, at iv (Albert Ellery Bergh ed., 1907) (noting that *Coke on Littleton*, a compilation of the first four volumes of Coke's *Institutes*, "was the universal law book of students, and a sounder Whig never wrote, nor of profounder learning in the orthodox doctrines of the British Constitution, or in what was called British liberties"); *see also* JAMES HAW, JOHN AND EDWARD RUTLEDGE OF SOUTH

Coke spent much of his career defending the supremacy of "the common law," sometimes called "*lex terrae* [law of the land]," over the "divers lawes within the realme of England."[27] The common law, he maintained, had developed organically through the adjudication of the courts since time immemorial,[28] as well as through certain declaratory acts of Parliament, which themselves were believed to articulate principles with an ancient origin. This customary law predated the rule of any English King, and therefore, the King was subject to the law.[29] He devoted little attention to legislation in the modern sense, meaning the enactment of new rules to govern future behavior, but there is no reason to doubt he regarded laws enacted by the King-in-Parliament as part of the law of the land. As stated by Sir John Selden, Coke's ally in the debate over the Petition of Right, England's first legal historian, and then a member of Parliament: "All the law you can name, that deserves the name of law, is reduced to these 2: it is either ascertained by custom or confirmed by act of parliament."[30] The law of the land came to be at once a substantive and an institutional check on the King's power to seize property, imprison individuals, or otherwise deprive subjects of their rights. Substantively, the King could deprive subjects of their rights only pursuant to customary law or an act of Parliament, and not by unilateral executive decree. Institutionally, the King could deprive persons of rights only in coordination with institutions not entirely under his control, such as Parliament, common law courts, and juries.

In the *Case of Proclamations*, for instance, Coke held that the Crown could make new law only with Parliament's consent. Without such consent, on his own authority, James I issued two proclamations prohibiting "new Buildings in and around London" and "the making of starch of wheat."[31] The question was whether, as James maintained, the Crown's "prerogative to rule was

CAROLINA 9 (1997) (noting that John Rutledge called Coke's *Institutes* "almost the foundations of our law").

27. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 11b (photo. reprint 1999) (London, J. & W.T. Clarke 1823) (1628); *see* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830, at 31 (2005) ("Coke and others elevated the common law above other sources of law within England.").

28. *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 39-40 (1987).

29. *See id.* at 37-39; *see also* Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 177 ("Coke . . . locate[d] an authority higher than the King . . . in the immemorial laws and customs of the people of England, reflected in the common law and constituting 'the ancient constitution' of the realm.").

30. POCOCK, *supra* note 28, at 296 (quoting 3 COMMONS DEBATES 1628, at 33 (Robert C. Johnson et al. eds., 1977)).

31. Case of Proclamations, (1610) 77 Eng. Rep. 1352 (K.B.) 1352; 12 Co. Rep. 74, 74.

absolute."[32] In court, Coke and his great judicial antagonist, Lord Chancellor Ellesmere,[33] took characteristically opposite views. Ellesmere argued that the judges should "maintain the power and prerogative of the King," urging that "in cases in which there is no authority and [precedent]," the judges should "leave it to the King to order it according to his wisdom."[34] This was an argument that the King could act wherever custom or statute did not forbid it.[35] Ellesmere believed, based on the divine-right theory of monarchical government, that "the giving of new customs and laws [w]as part of the personal privileges of the monarch."[36] Coke, then Chief Justice of the Court of Common Pleas, maintained that the King could not lawfully "change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament."[37] Coke was *not* arguing that the government could not prohibit making starch from wheat or erecting new buildings in London; rather he was asserting that the King could do so only in coordination with Parliament.[38]

Modern readers will recognize this as a form of the separation of powers between the legislative and executive branches of government: only the legislature can make law that deprives persons of rights; the executive merely enforces it. To Coke, however, the case turned fundamentally on the subordination of the Crown to the common law, which could be expounded only by the common law courts or the King-in-Parliament. His concern was the *rule of law*; the requirement that the King act in concert with Parliament simply followed from that commitment.

Coke also undertook to protect the separation between executive and judicial. In the course of a jurisdictional dispute between common law and ecclesiastical courts,[39] now called the *Case of Prohibitions*, King James asserted

32. KNAFLA, *supra* note 24, at 65.

33. Thomas Egerton, Lord Ellesmere, was Elizabeth's Lord Keeper and James I's Lord Chancellor. *See id.* at 29-36.

34. *Case of Proclamations*, 77 Eng. Rep. at 1353, 12 Co. Rep. at 75.

35. For a parallel between these arguments and the approach of the modern Court, see Justice Jackson's opinion in the *Steel Seizure* case. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring); *infra* Subsection III.B.1.

36. KNAFLA, *supra* note 24, at 72; *see* Ellesmere, *A Coppie of a Wrytten Discourse by the Lord Chauncellor Elsemore Concerning the Royall Prerogatiue* (c. 1604), *reprinted in* KNAFLA, *supra* note 24, at 197.

37. *Case of Proclamations*, 77 Eng. Rep. at 1353, 12 Co. Rep. at 75; *see* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 199-202 (2008); McConnell, *supra* note 29, at 177.

38. HAMBURGER, *supra* note 37, at 199-202.

39. *See* KNAFLA, *supra* note 24, at 135-37.

the authority to decide the jurisdictional dispute personally.[40] According to Coke's account,[41] James claimed that "the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself."[42] Coke insisted that the ancient customs of the realm required the King to leave the decision of cases to his judges, who are trained in the law. In response to James's claim that his faculty of reason equaled that of his judges, Coke famously replied that "causes which concern the life, inheritance, or goods, or fortunes" of English subjects "are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act that requires long study and experience, before that a man can attain to the cognizance of it."[43] When the King insisted that there was no inconsistency between their positions because the King was the source of English law, Coke put a fine point on his position: citing Bracton, he asserted that though the King be under the authority of no man, he *was* under the authority of God and the law.[44] Coke's position was based on an almost mystical reverence for the ancient law of the land, but it held the kernel of what became the separation of the executive from the judicial power.

Parliament soon had occasion to resolve a similar controversy. In 1627, King Charles I, strapped for cash and unwilling to call a Parliament, unilaterally imposed a tax—a forced loan—without parliamentary consent. Five nobles refused to pay the forced loan, and Charles ordered them imprisoned. Upon petition by the recalcitrant knights, the King's Bench issued writs of habeas corpus to decide whether the government had cause to imprison them.[45] The Attorney General argued that the King had the prerogative power under martial law to preliminarily commit the accused by "special command" (with no estimated date for a specific charge of unlawfulness and trial).[46] The

40. Prohibitions del Roy (*Case of Prohibitions*), (1607) 77 Eng. Rep. 1342 (K.B.) 1342; 12 Co. Rep. 64, 64, *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 478-81 (Steve Sheppard ed., 2003).

41. For an account of the history of the prohibitions controversy that tends to cast Lord Chancellor Ellesmere in a more favorable light, see KNAFLA, *supra* note 24, at 138-41.

42. *Case of Prohibitions*, 77 Eng. Rep. at 1342, 12 Co. Rep. at 64.

43. *Id.*

44. *Id.*, 12 Co. Rep. at 64-65; *see* 1 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 39 (Travers Twiss ed. & trans., London, Longman & Co. 1878) ("[T]he king himself ought not to be subject to man, but subject to God and to the law, for the law makes the king."). For a dramatic account of this conflict, see BOWEN, *supra* note 25, at 301-06.

45. WHITE, *supra* note 25, at 215.

46. *Id.*

knights' counsel argued that his clients were entitled under Magna Charta's "law of the land" provision to a formal charge and to be released on bail. The court denied bail and remitted the knights to prison for an indeterminate period.[47] The episode was an effective victory for Charles.

Not long afterward, the King found it necessary to summon a Parliament to raise money. Coke, who by this point had been elected a member of the House of Commons, proposed a bill to make clear that the Crown had no power to unilaterally incarcerate subjects. Any power the King might have to imprison a subject under martial law, he maintained, was subject to the authority of the common law courts to determine the legality of the act.[48]

Parliament endorsed Coke's theory by enacting the bill as the Petition of Right,[49] which became "instantly a part of the constitutional canon."[50] The Petition of Right asserted that subjects could be deprived of rights only according to "the Law of the Land," "due processe of Lawe," or "by the lawfull Judgment of his Peeres."[51] Each of these phrases was a way of expressing the same two institutional checks on the King's power to deprive persons of rights: only pursuant to positive law (common law or parliamentary statute) and only after judgment by a common law court. The "substantive" side of due process was positive, standing law; the "procedural" side was adjudication by a court. The former entailed the separation of the lawmaking function, and the latter the separation of the adjudicatory function, from the King's personal power. When Coke stated in a later commentary that Chapter 29's "law of the land" provision was equivalent to the phrase "due process of law"[52]—the commentary relied on by early Americans to equate the two constitutional guarantees[53]—he was summarizing these two aspects of the rule of the common law, which were at once designed to wrest lawmaking and judicial power from the King.

47. 3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, *supra* note 40, at 1225.

48. *See id.* at 1251 ("Two laws will never stand in England: if the courts be open, no martial law."); *id.* at 1262 ("The question must be determined by the law of England, and the martial law is bounded by it."); *id.* at 1263 ("[A rebel] may be slain in the rebellion, but after he is taken he cannot be put to death by the martial law. . . . [W]hen the courts are open martial law cannot be executed.").

49. For the full story of the bill's enactment, see WHITE, *supra* note 25, at 216-74.

50. HULSEBOSCH, *supra* note 27, at 32.

51. Petition of Right, 1628, 3 Car. 1, c. 1, §§ III, IV.

52. 2 COKE, *supra* note 19, at 50.

53. Williams, *supra* note 7, at 429.

Some scholars have argued that Coke believed that the sovereign acts of the King-in-Parliament were limited by "fundamental law."[54] They point, for example, to Coke's argument that monopolies are "against this great charter, because they are against the liberty and freedome of the subject."[55] This misunderstands Coke's position. He meant that the *King* could not unilaterally grant monopolies; as in the *Case of Proclamations*, he could issue such monopolies only with Parliament's consent.[56] This was a separation-of-powers argument, not an argument that a higher law prohibited monopolies.

The source most often invoked to support the thesis that Coke believed in a judicially enforceable "higher law" is his decision in *Bonham's Case*.[57] The Court of Common Pleas held that the Royal College of Physicians in London could not imprison doctors who practiced without a license, even though, according to the college, two acts of Parliament and the college charter gave it the authority to do so. The court disagreed. In later commentary on the case, Coke explained that the college could not have been given the authority to collect and keep fines from nonmembers, because that would make it a judge in its own case, in violation of customary law. This further dicta has spurred academic and legal commentary ever since: "[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."[58]

---

54. *See* Gedicks, *supra* note 6, at 600; *see also* ORTH, DUE PROCESS OF LAW, *supra* note 12, at 29 (arguing that Coke thought there were "things that . . . even the king in Parliament, could not lawfully do").

55. COKE, *supra* note 19, at 47; *see also* Case of Monopolies, (1602) 77 Eng. Rep. 1260 (K.B.); 8 Co. Rep. 84 b (arguing that "Monopoly" is "against the Common Law"); Gedicks, *supra* note 6, at 604-05 (describing the *Case of Monopolies*).

56. *See* Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1334 (2005) ("[T]he common law was quite amenable to exclusive trade privileges that did not emanate from the Crown."); Williams, *supra* note 7, at 430-31.

57. Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.); 8 Co. Rep. 107 a; *see* JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 51 (1992) (citing scholarly debates about whether Coke announces "a principle supporting judicial invalidation of statutes that violate higher law"); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 3), 42 HARV. L. REV. 365, 370 (1929) ("'Common right and reason' is, in short, something fundamental, something permanent; it is higher law."); Gedicks, *supra* note 6, at 600, 602-11.

58. *Bonham's Case*, 77 Eng. Rep. at 652, 8 Co. Rep. at 118a (citation omitted).

Scholars have long debated Coke's meaning.[59] Some argue that Coke's assertion that "the common law will controul [the Act]" means that courts should construe statutes in light of common law principles and reject interpretations that would abrogate those principles, on the presumption that the legislature likely did not intend to do so—a strong version of the later maxim that statutes in derogation of the common law should be narrowly construed. Others maintain that "common right and reason" amounted to an endorsement of a law higher than ordinary legislation, and that such higher law is controlling.[60]

The weight of modern scholarship tends toward the former interpretation.[61] As R.H. Helmholz explains: "[I]f one assumed . . . that the legislator had not in fact intended to stray from [natural law principles], then a decision in the case could be made in accordance with a reading of the statute that allowed natural justice to be done. That is what happened in *Bonham's Case*."[62] To be sure, Coke's use of the word "void" has the ring of judicial review to modern ears, but in context it likely was nothing more than a statement of the conclusion that the language of the statute did not govern the case. Under this

59. *See, e.g.*, GLENN BURGESS, ABSOLUTE MONARCHY AND THE STUART CONSTITUTION 193 (1996); Grey, *Origins of the Unwritten Constitution*, *supra* note 3, at 855; William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 468 (2005). These disputes are not new. *See* CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 51-53, 72 (1914); R.A. MacKay, *Coke—Parliamentary Sovereignty or the Supremacy of the Law?*, 22 MICH. L. REV. 215 (1924).

60. The classic statement is Theodore F.T. Plucknett, Bonham's Case *and Judicial Review*, 40 HARV. L. REV. 30 (1926). Edward Corwin conflated these two interpretations. Corwin, *supra* note 57, at 373 ("At the very least, therefore, we can assert that in *Bonham's Case* Coke deemed himself to be enforcing a rule of construction of statutes of higher intrinsic validity than any act of Parliament as such.").

61. The classic statement is S.E. Thorne, Dr. Bonham's Case, 54 LAW Q. REV. 543, 548-49 (1938). *See also* HAMBURGER, *supra* note 37, at 622-30 (arguing based on contemporary meanings of "void" and "control" that Coke's holding was one of "equitable interpretation" and did not "elevat[e] judicial power"); HULSEBOSCH, *supra* note 27, at 31 (arguing that, "[a]lthough *Bonham's Case* was not an early instance of . . . judicial review . . . Coke construed a statute so strongly . . . that it has understandably been interpreted as advocating something close to judicial review"); R.H. Helmholz, Bonham's Case*, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 339 (2009) (citing *Bonham's Case* for the proposition that "[j]urists took it for granted . . . that the legislator had wished to act in accordance with the principles of natural and divine law").

62. Helmholz, *supra* note 61, at 339 (citation omitted); *accord* HAMBURGER, *supra* note 37, at 622-30; Charles M. Gray, Bonham's Case *Reviewed*, 116 PROC. AM. PHIL. SOC'Y 35, 36 (1972) (arguing that an earlier manuscript based on Coke's oral statements from the bench strongly suggests that the holding was based on statutory interpretation); Thorne, *supra* note 61, at 548-49.

reading, *Bonham's Case* is not an example of "judicial review" but of equitable interpretation, and it is entirely consistent with parliamentary supremacy. Indeed, it is not much different from Blackstone's later view that "[w]here some collateral matter arises out of the general words, and happens to be unreasonable; there the judges are, in decency, to conclude that this consequence was not foreseen by the Parliament."[63] It is unsurprising that Blackstone "rejected the broad interpretation of *Bonham's Case* in favor of the narrow one: [it] merely involved statutory construction, not judicial review."[64] Though the American Founders who championed a robust judicial review often cited *Bonham's Case* as precedent,[65] Larry Kramer convincingly argues that most of the Founders believed *Bonham's Case* was about statutory construction.[66]

Furthermore, the position that courts should read statutes narrowly to conform to the common law is a far cry from an assertion that courts may strike down positive law because it does not conform to a universal higher law. Coke expressly says that the form of law that would "controul" and "adjudge such Act" of Parliament is "the common law." This was not a "higher law" or "the law of nature," but the law of the land that the common law courts, including the House of Lords in its judicial capacity, had a duty to apply. Coke knew the difference between "the law of nature" and the common law. He acknowledged that the law of nature was, along with the common law, one source of law in England,[67] but based on his practice he apparently thought the "law of nature" was relevant only where positive law was silent: he relied on it in only one significant case where there was no English positive law on point.[68]

---

63. 1 WILLIAM BLACKSTONE, COMMENTARIES *91.

64. HULSEBOSCH, *supra* note 27, at 40 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *54).

65. Hulsebosch, *supra* note 24, at 440.

66. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 19-22 (2004).

67. 1 COKE, *supra* note 27, at 11b (stating that "[t]here be divers lawes within the realme of England," the third being the "law of nature" and the fourth being "the common law of England sometime called *Lex terrae*, intended by our author in this and the like places").

68. Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.) 391-94; 7 Co. Rep. 1a, 14a-b (holding that a person born in Scotland after King James IV of Scotland acceded to the throne of England owed his allegiance under the "law of nature" to James and was therefore a natural-born subject of England, despite the fact that the two kingdoms had not yet been merged in union). Coke stated repeatedly that there were no common law precedents on point (though there was of course law on the subject of aliens and natural-born subjects of the King). *See id.* at 381, 7 Co. Rep. at 4 a ("I find a mere stranger in this case . . . . In a word, this little plea is a great stranger to the laws of England . . . ."); *id.* at 399, 7 Co. Rep. at 18 b ("[F]or want of an express text of law . . . and of examples and precedents in like cases (as was objected by

In sum, Coke and other early Stuart common lawyers worked to subject the King to law, which required the Crown to coordinate governance involving deprivations of rights with Parliament and the common law courts.[69] The Magna Charta requirement that subjects be deprived of rights only by the law of the land was understood to prohibit the Crown from depriving persons of rights without the authority of standing law, and the court maintained the jurisdiction to review the King's authority to do so. This was early modern due process of law, a precursor to modern separation of powers.

B. Pre-Revolutionary English Disputes About Parliament's Power

Parliament emerged from the civil wars of the seventeenth century supreme, although eighteenth-century politicians and lawyers from time to time asserted that one house acting alone—or even the King-in-Parliament—was subject to the English constitution.[70] Parliament increasingly acted as a legislative body, and the common law gradually became a set of default rules rather than the bedrock of legality.[71] Although courts regularly reviewed the acts of executive officials and corporate bodies—including colonial

some) we are driven to determine the question by natural reason . . . ."). *But see* KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 178-81 (2000) (arguing that Coke, Francis Bacon, Ellesmere and others deliberately distanced themselves from the rationale established by Sir John Fortescue that allegiance was based on the relationship created between the ruler and subject by positive law, not by a natural relationship of allegiance). For general background on the case, see Hulsebosch, *supra* note 24, at 447-49, 454-58.

69. *See* HULSEBOSCH, *supra* note 27, at 34 ("Today the rule of law primarily defines the boundary between the public and the private, but early modern Britons invoked it as a defense when one part of the social order overreached, vertically across social lines or horizontally across space, to trespass on the liberties of another."); *see also* W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION 35-36 (1965) (arguing that by the mid-seventeenth century a consensus had emerged that the rule of law demanded parliamentary approval of the King's actions); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1191 (2000) (arguing that "this rule-of-law rationale" for the separation of powers "is concerned with the conflict of interest presented when a single entity can both make the rules and apply them"); Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 305-06 (1989) (noting that "the rule of law rationale for separation of powers . . . has deep historical roots" going back to Coke and Locke).

70. *See* J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 174-91 (1955).

71. *See* DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 13-16 (1989).

legislatures—for their repugnance to British law,[72] Parliament's acts were subject to no such review. It was the highest court in the land and the final expositor of the content of the law of the land. [73] As Blackstone put it, "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution, that is vested with authority to control it."[74] Citing Coke's *Institutes*, Blackstone wrote that "[t]he power and jurisdiction of parliament . . . is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds."[75]

Even as Parliament gained supremacy, the individual rights of British subjects became more thoroughly ensconced in the British constitution. In the Petition of Right of 1628, the Bill of Rights of 1689, and the Act of Settlement of 1701, Parliament elaborated on the content of English rights and duties, including the right of due process of law.[76] From the Restoration through the Hanoverians, several important common lawyers, including Matthew Hale and Chief Justice Holt, insisted that Parliament, too, was limited by the English constitution.[77] These limits were for the most part strictly institutional in nature. As Holt wrote in *Ashby v. White*, "the people" elected their representatives in Parliament with "power and authority to act legislatively, not ministerially or judicially."[78] By the last third of the eighteenth century, however, few believed that Parliament's legislative power was limited by the constitution.[79] Parliament not only had the power to legislate, but it also regularly heard appeals from British common law courts and directly

72. *See, e.g.*, JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 523-25 (1950); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 539-41 (2006); Alison Gilbert Olson, *Parliament, Empire, and Parliamentary Law, 1776*, *in* THREE BRITISH REVOLUTIONS: 1641, 1688, 1776, at 289, 292 (J.G.A. Pocock ed., 1980).

73. The classic study of Parliament's power as a court is CHARLES HOWARD MCILWAIN, THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY: HISTORICAL ESSAYS ON THE BOUNDARIES BETWEEN LEGISLATION AND ADJUDICATION IN ENGLAND (1910).

74. 1 WILLIAM BLACKSTONE, COMMENTARIES *91.

75. *Id.* at *160.

76. HULSEBOSCH, *supra* note 27, at 35.

77. *Id.* at 36-37 (discussing Hale); R. v. Paty, (1704) 92 Eng. Rep. 232 (Q.B.) 236; 2 Ld. Raym. 1105, 1111-12 (describing Holt's position).

78. THE JUDGEMENTS DELIVERED BY THE LORD CHIEF JUSTICE HOLT IN THE CASE OF ASHBY V. WHITE AND OTHERS, AND IN THE CASE OF JOHN PATY AND OTHERS 60 (London, Saunders & Benning 1837).

79. HULSEBOSCH, *supra* note 27, at 7 (noting "that Parliament as a legislature reigned supreme above other sources of constitutional authority *at home*, and perhaps overseas too").

adjudicated a wide range of legal disputes between British parties,[80] and adjudicated a number of matters as the sole judge of the law and customs of Parliament.[81]

As we show in the following Section, in the 1770s only a handful of Whig members of Parliament argued that it lacked the power to deprive subjects of rights without common law procedures. Across the Atlantic, however, American colonists argued that Parliament had violated the law of the land by depriving them of local jury trials and of directly depriving them of charter rights without providing common law judicial procedures. These due process claims often get lost amidst colonial arguments that Parliament lacked any authority to levy a disproportionate tax on the colonies because they were not represented in that institution, but in light of subsequent developments, these arguments anticipate both ways in which due process would be held to apply against the legislative branch in the early Republic: to prohibit legislative acts that directly deprive specific persons of rights, and to prohibit legislative acts that reduce common law court procedures.

1. The Expulsion and Disqualification of John Wilkes

In a notorious episode, the House of Commons expelled John Wilkes for publishing seditious and obscene libel, and then disqualified him when the constituents of Middlesex persisted in reelecting him (four times in all). The background to Wilkes's disqualification is a complicated tale of politics, law, and populist propaganda,[82] but it need not detain us here. By 1768, the Commons agreed that Wilkes had to go, but they disagreed about the proper procedure. There were three positions. Some, including Blackstone, then a member of the House of Commons, thought that whatever procedure the House used would be per se in accordance with the custom and law of Parliament—*lex parliamenti*[83]—and beyond constitutional reproach. As

80. 3 WILLIAM BLACKSTONE, COMMENTARIES *411 (noting that the "house of lords [is] the dernier resort for the ultimate decision of every civil action").

81. MCILWAIN, *supra* note 73, at 244-46 (noting that the houses of Parliament acted as the courts of first instance on issues of the law and customs of Parliament).

82. *See generally* JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III 163-200 (1976) (describing Wilkes's use of propaganda and publicity); PETER D.G. THOMAS, JOHN WILKES: A FRIEND TO LIBERTY 27-108 (1996) (discussing the disqualification).

83. For a good discussion of *lex parliamenti*, see JOSH CHAFETZ, DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS 27-36 (2007).

Blackstone said in a speech to the Commons, "there is no appeal from [the House's] competence to the law of the land. There are cases in which the other House is competent: if the House of Lords . . . should determine contrary to the law of the land, what is the remedy?"[84] His point was that there was no external institution with authority to stop a house of Parliament from doing as it liked.

The second position was a bit more moderate. It was represented by George Grenville, who, despite being Wilkes's political adversary, had constitutional scruples about the procedures used for expelling him. Like Blackstone, Grenville agreed that the House of Commons was competent to expel a member but insisted that when it did so, "acting in our judicial capacity," the members should "found [our] judgment" "upon specific facts alleged and proved according to the established rules and course of our proceedings,"[85] i.e., according to *lex parliamenti*. Grenville thought the procedure employed by the House was flawed. The motion to expel him did not specify any charges, which meant that he could be stripped of his seat in the Commons based on the aggregate of votes of various members based on different theories, which was contrary "to the usage and law of parliament, to the practice of any other court of justice in the kingdom, [and] to the unalterable principles of natural equity"[86] by lumping a number of distinct allegations against Wilkes into one charge, which at common law would have been separated into multiple charges and adjudged separately.[87] In addition, the House had already expelled Wilkes, years before, for one of the seditious libels listed in the charge; the common law would have protected Wilkes from double jeopardy.[88] The sum total of Grenville's arguments was that the House should not provide less procedural protection for one of its own members than the common law courts would provide to a criminal defendant.

---

84. 3 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE 25 (1991) (alteration in original) (quoting Speech of Sir William Blackstone, 16 PARL. HIST. ENG. (1770) 802). This argument, which prevailed in the Commons, was interpreted in an anonymous letter to the Duke of Grafton as nothing less than a claim by the Commons to "an exclusive jurisdiction *without appeal in all* matters of election." *Id.*

85. 16 PARL. HIST. ENG. (1768) 561.

86. *Id.* at 550.

87. *Id.* at 553-54.

88. *Id.* at 555-56 ("There is not a rule more sacred in the jurisprudence of this county, than that a man once acquitted or condemned, shall not be tried or punished again by the same judicature for the same offence.").

Grenville's arguments failed, and the House expelled Wilkes on the basis of a complicated set of allegations. Middlesex promptly reelected him. He was expelled again, and again reelected. The House then voted to permanently disqualify him from membership.[89] The debate over disqualification only intensified Grenville's concerns. When houses of Parliament act as "courts of judicature," they "only have the power of declaring" existing "restraints," and "in the use of that [judicial] power are bound by the law as it stands at the time of making that declaration."[90] Otherwise, a "resolution of the House" could become "the law of the land by virtue of its own authority only." Instead, the opposition contended, the House when acting as a court of judicature was bound by the law of the land as embodied by "like restraints adjudged in other cases by all the courts of law; and confirmed by usage."[91] This was not quite a full-throated argument that the House was bound to operate according to the law of the land when it sat as a court, but it came close.

Forty-seven members of the House of Lords took the third position. They protested the Commons' disqualification of Wilkes, "in defense of the law of the land":

> [W]e conceive ourselves called upon to give that proposition the strongest negative; for, if admitted, the law of the land (by which all courts of judicature, without exception, are equally bound to proceed) is at once overturned and resolved into the will and pleasure of a majority of one House of Parliament, who, in assuming it, assume a power to over-rule at pleasure the fundamental right of election, which the constitution has placed in other hands, those of their constituents.[92]

Blackstone's position won the day. There was no institutional check on the Commons' power to discipline members, and therefore as a practical matter it

89. *See* REID, *supra* note 84, at 22.

90. 16 PARL. HIST. ENG. (1768) 589-90.

91. *Id.* at 590. These constitutional arguments were unsurprisingly mixed with arguments that might today be considered to touch matters of political expediency:

> That the House of Commons has the right, incidental to its judicature, of declaring what incapacities are legal. But it behoves the House to take care, that, instead of exercising the powers which it has, it assume not those which it has not; that from the temperate and judicious use of a legal power, . . . it swell not to the utmost pitch of extravagance and despotism, and make the law, under pretence of declaring it.

Id. at 591.

92. REID, *supra* note 84, at 25-26 (alteration in original) (quoting Protest of the Lords, 31 January 1770, 16 PARL. HIST. ENG. (1770) 821).

could proceed however it liked. At the same time, however, a number of the members of both houses articulated the view that each house, when sitting as a court, was obligated to proceed according to the law of the land. This notion soon expanded to cover cases where Parliament as a whole acted to deprive a specific party of its statutory or charter rights. Wilkes came to be a symbol of the democratic aspirations of the age, with "Wilkes and Liberty" the rallying cry in Boston as well as in London.

2. The East India Company Debates

In the early 1770s, the East India Company was in a state of crisis.[93] By late 1772, "[t]he [government's] attempt to co-operate with the Company in its own reform broke down,"[94] and Parliament passed a series of bills, culminating in the Regulating Act of 1773, which unilaterally amended the company's charter and had the effect of delegating power over company affairs to the Crown.[95] The first of these, the Restraining Bill, was passed in late 1772 to prevent the company from sending new commissioners to India for a period of six months.[96] The bill was a minor imposition on the company's charter compared to the subsequent Regulating Act.[97] However, as a precedent for and a barometer of the positions that various factions in Parliament would take in the broader debates, the battle over the Restraining Bill was, as Edmund Burke later observed, "[i]n Truth, the Battle for power"[98] over Parliament's authority to alter the company charter.[99]

In addition to expressing concerns about increasing the Crown's influence, the company and its supporters in Parliament argued that the Restraining Bill violated the law of the land by depriving the company of charter rights without due process of law. The bill "did not state any delinquency in the Company, though it invaded their chartered rights, the right of managing their own

93. The crisis had a number of causes, some due to mismanagement (and downright malfeasance) and some due to external forces. *See* H.V. BOWEN, REVENUE AND REFORM: THE INDIAN PROBLEM IN BRITISH POLITICS 1757-1773, at 119-32 (1991); LUCY S. SUTHERLAND, THE EAST INDIA COMPANY IN EIGHTEENTH-CENTURY POLITICS 218-35 (1952).

94. SUTHERLAND, *supra* note 93, at 230.

95. Tea Act, 1773, 13 Geo. 3, c. 44; East India Company Act, 1773, 13 Geo. 3, c. 63-64.

96. Restraining Bill, 1772, 13 Geo. 3, c. 9; *see* BOWEN, *supra* note 93, at 148-50.

97. 1773, 13 Geo. 3, c. 63; *see* BOWEN, *supra* note 93, at 169-86.

98. Letter from Edmund Burke to the Marquess of Rockingham (Jan. 7, 10, 1773), *in* 2 THE CORRESPONDENCE OF EDMUND BURKE 403 (Lucy S. Sutherland ed., 1960); *see also* BOWEN, *supra* note 93, at 149-50 (citing Burke's letter).

99. 17 PARL. HIST. ENG. (1772) 673 (Burke's speech decrying the Restraining Bill).

affairs within the bounds of law and their charter,"[100] which "the continuation thereof, have been purchased by their predecessors from the public for a valuable consideration, and repeatedly confirmed by several acts of parliament."[101] The company's counsel argued that it was "the happiness of this country to be governed by fixed and known laws, not by *ex post facto* acts passed upon the spur of a particular occasion."[102]

A small group in the House of Lords entered a protest against the bill because it "[took] away from a great body corporate, and from several free subjects of this realm, the exercise of a legal franchise, without any legal cause of forfeiture assigned."[103] The "legal rights and capacities" of the company, its electors, and its elected supervisors would be "taken away by a mere act of arbitrary power, the precedent of which leaves no sort of security to the subject for his liberties."[104] They lamented the passage of "*temporary occasional and partial* acts of parliament, which, without any consideration of their conformity to the general principles of our law and constitution, are adopted rashly and hastily on every petty occasion."[105] Furthermore, they argued, "parliament is as much bound, as any individual, to the observance of its own compacts; else it is impossible to understand what public faith means, or how public credit can subsist."[106]

These arguments were based, fundamentally, on the idea that a unilateral revocation of a particular company's charter rights was akin to a judicial decision without an adequate basis in general and prospective law. As John Phillip Reid has explained, "The constitutional theory was that the government, by granting a charter, vested in a company, colony, or individuals certain inviolable privileges and securities of property that, if not immutable, were answerable only at common law, not to legislative whim and caprice."[107] The proper way to amend the charter, opponents argued, was either to obtain the company's consent or to prevail in a common law action for breach of charter privileges. These arguments did not prevail, but they were soon repeated by American patriots who claimed that violation of their rights under

100. *Id.* at 651 (speech of the counsel for the East India Company).

101. *Id.* at 646 (petition of the East India Company).

102. *Id.* at 651 (speech of the counsel for the East India Company).

103. *Id.* at 682 (protest entered by the Duke of Richmond and four other Peers).

104. *Id.*

105. *Id.* at 682-83 (emphasis added).

106. *Id.* at 683.

107. 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 31 (1993).

colonial charters was contrary to the rights of Englishmen and the law of the land, and they would later echo in state due process and federal Contracts Clause jurisprudence. These arguments by members of Parliament on a matter unrelated to Parliament's power over the American colonies and colonial charters suggest that the American arguments about Parliament's power to alter their charters were not merely arguments about nonrepresentation or the scope of the imperial constitution; they were of a piece with British arguments about the power of even the supreme judicial and legislative body of the land to deprive specific parties of their rights without the procedural and institutional protections of the common law.

C. Revolutionary Arguments That Parliament Violated the Law of the Land

The American arguments made against British policies in the years preceding the Revolution were legal, indeed constitutional, in nature. The patriots complained that various acts of Parliament violated rights—such as the right of trial by jury and the right against taxation without representation—that pertained to all Englishmen and were guaranteed specifically to the colonists by means of colonial charters. These pre-Revolutionary arguments thus formed an important bridge between the Whiggish arguments of the Stuart period, which sought to bring royal power into subordination to law, and the Whiggish arguments of the American Revolutionaries, which applied similar logic to Parliament. By the end of the Revolutionary period, most Americans were prepared to reject the Blackstonian model of a legislature that was above the law. They instead subjected legislatures to written constitutions, which derived authority as the supreme law of the land from ratification by the people themselves.

The question of Parliament's power to deprive colonists of their rights under the law of the land first arose upon passage of a series of acts that abridged common law criminal procedures. For instance, the Stamp Act authorized trial of violations by vice-admiralty courts, which operated under admiralty law, not common law, procedures.[108] The Dockyards Act deprived colonists of the right to trial by local jurors by removing prosecutions for certain crimes to England.[109] Both statutes were intended to circumvent the practice of colonial juries who refused to convict patriots for acts of rebellion or for refusal to pay taxes popularly regarded as illegitimate. This practice, based

108. 1 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 178-79 (1986).

109. *Id.* at 191-92.

on the right of trial by a jury "of the vicinage," had rendered unpopular imperial laws unenforceable. Parliament was faced with a choice: either abrogate common law procedural protections for Bostonians or accept that the imperial writ did not run in Massachusetts.[110] These controversies raised a question of application of due process to the legislative branch that we have not yet encountered: Does an act of Parliament that purports to abrogate the procedural protections of customary law violate due process? Or is such an act by definition the "law of the land" and hence constitutionally unobjectionable? The colonists' answer to these questions—that Parliament lacks the authority to deprive them of core procedural protections—was the seed of what has come to be known in the American constitutional tradition as procedural due process.

Passage of the Coercive Acts of 1774 ("Intolerable Acts," to Americans), which asserted parliamentary sovereignty over the American colonies and punished Massachusetts for the Boston Tea Party, raised American outrage to the boiling point.[111] The Boston Port Act closed Boston Harbor to all civilian traffic "until it shall sufficiently appear to his Majesty that full satisfaction has been made [for the tea] by or on behalf of the inhabitants of the said town of Boston" to the East India Company.[112] Its advocate, Lord North, did not mince words. According to one summary of Lord North's statement, the Act was to "punish Boston, compensate the East India Company, protect the customs officers, prevent smuggling, and preserve British trade."[113] Creative lawyers (and there were many of them among the Americans) characterized the acts as deprivations of rights without adequate forms of judicial procedure—usually a notice, a hearing, and a trial by peers.

The Boston Port Act could be seen as a legislative usurpation of the essentially judicial function of resolving a legal dispute between two parties. The statute was effectively a judgment against the people of Boston, and it delegated the task of determining whether the town had made "full satisfaction" for the cost of the destroyed tea to "his Majesty." Thus, liability was determined by Parliament and damages by the executive, when it should have been handled (according to the Americans) as a tort suit, with liability and damages determined by a jury. The First Continental Congress put it this way:

110. *See* 4 REID, *supra* note 107, at 13.

111. *Id.* at 9-12, 41-42.

112. *Id.* at 9 (emphasis omitted) (quoting Boston Port Act, 1774, 14 Geo. 3, c. 19).

113. *Id.* at 10.

> Even supposing a trespass was thereby committed, and the Proprietors of the tea entitled to damages.—The Courts of Law were open, and Judges appointed by the Crown presided in them.—The East India Company however did not think proper to commence any suits, nor did they even demand satisfaction, either from individuals or from the community in general. The Ministry, it seems, officiously made the case their own, and the great Council of the nation descended to intermeddle with a dispute about private property.[114]

As Thomas Jefferson put the point in his *A Summary View of the Rights of British America*: "[W]ithout calling for a party accused, without asking a proof, without attempting a distinction between the guilty and the innocent, the whole of that antient and wealthy town is in a moment reduced from opulence to beggary."[115]

Parliament compounded the colonists' grievances by adopting the Massachusetts Acts, which changed the terms of the Massachusetts Charter to give the Crown more direct control.[116] Among other things, it replaced Massachusetts's elected council with one appointed by the Crown, gave authority to the Crown-appointed Governor to appoint most judges, and gave Governor-appointed sheriffs the authority to appoint grand and petit juries.[117] These measures raised the same constitutional questions raised by acts regulating the East India Company, but the Massachusetts Act was worse: colonials regarded the Massachusetts Charter as a binding contract. They had braved the American wilderness to form a British society there in reliance on the assurance that they would be accorded the rights of self-government listed in the charter. The First Continental Congress assailed the Act as a deprivation of the rights of Massachusetts against the law of the land: "Without incurring or being charged with a forfeiture of their rights, without being heard, without being tried, without law, and without justice, by an Act of Parliament, their

---

114. Address to the People of Great Britain (Oct. 21, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 81, 86 (Worthington Chauncey Ford ed., 1904).

115. Thomas Jefferson, *A Summary View of the Rights of British America*, *in* THOMAS JEFFERSON: WRITINGS 105, 113 (Merrill D. Peterson ed., 1984).

116. *See* 4 REID, *supra* note 107, at 12-23. In addition to the Massachusetts Government Act, 1774, 14 Geo. 3, c. 45, Parliament adopted the Administration of Justice Act, 1774, 14 Geo. 3, c. 39, which temporarily allowed British officers alleged to have violated the law in Massachusetts to be tried in Britain, and the Quartering Act, 1774, 14 Geo. 3, c. 54, which provided for the quartering of British troops in colonial barns and other uninhabited buildings. *See* 4 REID, *supra* note 107, at 17-23.

117. 4 REID, *supra* note 107, at 16.

charter is destroyed, their liberties violated, their constitution and form of government changed."[118]

The Intolerable Acts prompted the First Continental Congress to send a petition of constitutional grievances to the Crown.[119] This was essentially a list of ancient rights and liberties held by all Englishmen and guaranteed to the colonists by charter, but violated by the recent parliamentary acts, including the right to trial by jury, the right to offer a defense, the right of the consent of the governed to legislation regulating their affairs, and the rights of property and taxation only with representation.[120] In short, "we claim all the benefits secured to the subject by the English constitution."[121] And in words that closely resembled Jefferson's complaint about the Coercive Acts, the petition asserted that English history lacked a "single instance of men being condemned to suffer for imputed crimes, unheard, unquestioned, and without even the specious formality of a trial; and that too by laws made expres[s]ly for the purpose, and which had no existence at the time of the fact committed."[122] Even some prominent British figures agreed with the general thrust of these complaints. Three years later, in the ashes of the Revolutionary War, William Pitt, the Earl of Chatham, chided the House of Lords:

> You condemned a whole province without hearing, without even demanding satisfaction for the injury sustained. . . . [Y]ou deprived them, my Lords, of their most valuable privileges of the unalienable birth right of an Englishman, the trial by Jury; the trial of the vicinage, of Judges acquainted with the parts, the offence, the provocation, and the measure of punishment.[123]

In addition to their well-known complaints about the scope of Parliament's power under the imperial constitution to regulate colonial affairs, and their arguments against the constitutionality of taxation without representation in the House of Commons, American colonists couched their grievances against

118. Address to the People of Great Britain, *supra* note 114, at 87.

119. Sullivan's Draught Resolves and Declarations (Oct. 14, 1774), *in* 1 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 114, at 63, 73.

120. Address to the People of Great Britain, *supra* note 114, at 81-83.

121. *Id.* at 83.

122. *Id.* at 86. According to the First Continental Congress, the Boston Port Act reduced Boston "to the necessity of gaining subsistence from charity, till they should submit to pass under the yoke, and consent to become slaves, by confessing the omnipotence of Parliament, and acquiescing in whatever disposition they might think proper to make of their lives and property." *Id.*

123. 4 REID, *supra* note 107, at 33 (quoting Lord Chatham).

Parliament's interference in their chartered rights in the terms of the English right of due process of law. Their complaint was two-fold, and it foreshadowed the two doctrines of due process that apply to the legislature in American constitutional law. First, the colonists argued that Parliament lacked the constitutional authority to alter certain basic procedural protections of the common law. Second, the colonists argued that Parliament, no less than the Crown, lacked the power to unilaterally alter their charter rights without the application of law in the course of a fair hearing. The problem with the Boston Port Act and Massachusetts Government Act was that, as the Lords who protested the East India Acts put it, they "[took] away from a great body corporate, and from several free subjects of this realm, the exercise of a legal franchise, without any legal cause of forfeiture assigned"[124] through "temporary occasional and partial acts of parliament."[125] In other words, due process did not permit Parliament to deprive specific parties of their established property rights by special decree.

D. Early State Experiments with Legislative Supremacy

In the heady flush of Revolutionary republicanism, Americans flirted with the idea that governmental structure should be simple, allowing the unmediated will of the people to be transmuted into public policy.[126] The dominant theory of government during and after the war regarded the legislatures, and particularly the lower houses, as the most representative voice of the people. Accordingly, though they to some extent separated the executive and judicial powers from the legislature, early state constitutions provided few institutional checks on legislative power. And the constitutions themselves were acts of ordinary legislation that provided a framework for government, which could themselves be amended by ordinary legislation.

Even at the time, this experiment with legislative supremacy won critics. Thomas Jefferson, commenting on the Virginia Constitution of 1776, which had been adopted as ordinary legislation and therefore could be amended by ordinary legislation, complained that the lack of separation of powers undermined liberty and legality:

> The judiciary and executive members were left dependent on the legislative, for their subsistence in office, and some of them for their

124. 17 PARL. HIST. ENG. (1772) 682.

125. *Id.* at 682-83.

126. *See* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 53-63 (1981).

> continuance in it. If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual: because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy . . . .[127]

Jefferson asserted that placing these powers "in the same hands is precisely the definition of despotic government."[128]

By the mid-1780s, the 1776 belief that a government could rest upon the freely exercised republican virtues of the people through a more or less direct democracy gradually yielded to calls for a more robust separation of powers[129]—in no small part because of the exercise by state legislatures of powers that many believed should be reserved to an independent judiciary. Moreover, the perception that faction-ridden, unchecked state legislatures disregarded "public and personal liberty" and "private rights" in the service of "an interested and overbearing majority"[130] led many Americans to recognize that legislatures, no less than executive officials, must be controlled by the force of law. Beginning with the Massachusetts Constitution of 1780, Americans began to endorse basic frameworks of government established by an act of popular sovereignty, such as a constitutional convention elected by the

---

127. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 161 (Trenton, N.J., Wilson & Blackwell 1803).

128. *Id.* at 160; *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 454 (2d ed. 1998) ("'When the assembly leave the great business of the state, and take up private business, or interfere in disputes between contending parties . . . they are very liable to fall into mistakes, make wrong decisions, and so lose that respect which is due to them, as the Legislature of the State.'" (quoting A. Freeman, PA. PACKET & DAILY ADVERTISER, Sept. 2, 1786, at 7)).

129. *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 178-79 (1985) ("The lesson [from Shay's Rebellion and other social unrest following the Revolution] was that the American public did not possess a sufficient stock of virtue to sustain a republic, as republics had traditionally been conceived."); *id.* at 202; WOOD, *supra* note 128, at 446-53; *id.* at 432 ("'At the commencement of the revolution,' Americans were telling themselves in the eighties, 'it was supposed that what is called the executive part of a government was the only dangerous part; but we now see that quite as much mischief, if not more, may be done, and as much arbitrary conduct acted, by a legislature.'" (quoting Thomas Paine, *Number V. On the Affairs of the State*, PA. PACKET & DAILY ADVERTISER, Sept. 21, 1786, at 9)).

130. THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

people.[131] Written constitutions thus came to be superior to mere legislation as a more direct exercise of sovereignty by the people themselves. Two central features of 1780s constitutional reform were the replacement of legislative supremacy with a more definite separation of legislative, executive, and judicial powers, and the adoption of structural guarantees of judicial independence such as life tenure and stable (and sufficient) pay. Enhancing the constitutional independence of courts had a clear implication for the meaning of "law," and hence of "law of the land" and "due process of law." Just as Coke had used due process to prevent the Crown from exercising legislative or judicial functions, the new American constitutions sought to prevent legislatures from exercising executive and judicial functions.

Furthermore, the majority of state constitutions expressly provided that the government could deprive persons of rights only by the law of the land or a judgment of their peers. By 1780, all but two states (Connecticut and Rhode Island) had adopted a written constitution,[132] and most of them included a bill of rights;[133] all but two of these (New Jersey and Georgia) adopted law-of-the-land provisions.[134] Four states—New York, Delaware, Maryland, and New Jersey—expressly incorporated the English common law, along with those statutes of Parliament that had been applied by colonial courts, into their constitutions.[135] Additionally, though neither Connecticut nor Rhode Island adopted an express constitution, both states retained their charters, and thus maintained life, liberty, and property by the standards of the common law.[136]

During this period there may have been nothing that so undermined faith in legislatures as a guardian of popular liberty as legislative acts that abrogated the common law right to jury trial. According to custom, disputes for more than forty shillings fell under the jurisdiction of a common law court and almost always entailed factual determination by a twelve-member jury; smaller

131. *See, e.g.*, THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, at 19-23 (Oscar Handlin & Mary Handlin eds., 1966).

132. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 3-4 (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers, Inc., expanded ed. 2001) (1980).

133. *Id.* at 299.

134. Williams, *supra* note 7, at 437.

135. *See* ADAMS, *supra* note 132, at 4; MCDONALD, *supra* note 129, at 153.

136. *See* Charter of Connecticut—1662, *reprinted in* 1 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 529 (1909); Rhode Island Charter—1663, *reprinted in* 6 THORPE, *supra*, at 3211.

disputes typically were under the jurisdiction of a justice of the peace.[137] State legislatures, however, occasionally passed statutes either dispensing with jury trial in certain kinds of actions, or raising the forty-shilling jurisdictional floor. This posed the question whether a statute could violate the "law of the land." As we explain below, some early courts refused to enforce these statutes. Because courts at this time did not typically publish their opinions, we are left to guess their ultimate reasoning, but they were likely based on the idea that the jury trial is an essential feature of the law of the land, protected since Magna Charta. Courts also were reluctant to enforce ex post facto laws, or to interpret statutes to operate retrospectively. A South Carolina court, for example, declined to convict a recent immigrant of importing slaves when he had begun his transatlantic voyage before the prohibition had been enacted.[138] These decisions fell short of declaring the laws unconstitutional, however; instead, the courts engaged in equitable interpretation to construe statutes to avoid abrogating basic due process norms.

Likewise, courts invalidated attempts by the executive to enforce laws in a way that would have denied the defendant the benefits of the law of the land. For instance, a Maryland court prohibited the executive from depriving a woman of her liberty as a result of her parent's suspect marriage (one of them had allegedly been a slave) in the absence of a jury determination of the fact.[139] Principally, however, it was legislative—not executive—acts abrogating the trial by jury that attracted the most attention during the decade of constitution-making.

1. Isaac Austin's Case

Pennsylvania's Constitution of 1776 was regarded as the most democratic in the nation, with the fewest checks on popular enthusiasm.[140] Most strikingly, it vested the "Supreme Legislative Power" in a unicameral legislature, the House of Representatives, whose members served one-year terms and were elected by all taxpayers and sons of freeholders, with no upper house to provide a check.[141] The constitution provided for no supreme judicial body,[142] and judges

137. HAMBURGER, *supra* note 37, at 410.

138. *See* Ham v. McClaws, 1 S.C.L. (1 Bay) 93, 97-98 (1789).

139. *See* Butler v. Craig, 2 H. & McH. 214 (Md. 1787).

140. ADAMS, *supra* note 132, at 75-76.

141. PA. CONST. of 1776, § 24, *reprinted in* 5 THORPE, *supra* note 136, at 3081, 3088.

142. *Id.*

were allowed terms of only seven years.[143] In lieu of a genuinely independent judiciary, the constitution created a Council of Censors, elected every seven years, to "enquire whether the constitution ha[d] been preserved inviolate in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised other or greater powers than they are [e]ntitled to by the constitution."[144] The Council was given the power to call a constitutional convention and "to recommend to the legislature the repealing [of] such laws as appear to them to have been enacted contrary to the principles of the constitution."[145]

The Council sat for the first time from 1783 to 1784,[146] and identified a number of legislative acts that violated the constitution. One of these was a 1784 "Act To Vest in Isaac Austin a Certain Messuage, Wharf, Ferry and Ferry Landing, Situated on the Northeastern Side of Mulberry Street, at the Easternmost Extremity Thereof, in the City of Philadelphia, Late the Property of William Austin, Attainted of High Treason."[147] At the time the act was passed, Austin was involved in a lawsuit over ownership of this property. The statute was an attempt to resolve this dispute legislatively, rather than through the course of law.

According to the Censors, the "flagrant . . . infringement of the sacred rights of a citizen to trial by jury, and so manifest, and withal so wanton a violation of the constitution of this commonwealth, calls for the severest censure of the people and of this council."[148] The Council recommended repealing the act as exceeding the legislature's constitutional power to redress grievances,[149] and as a violation of the jury trial clause in the state bill of

143. *Id.* § 23, *reprinted in* 5 THORPE, *supra* note 136, at 3081, 3088.

144. *Id.* § 47, *reprinted in* 5 THORPE, *supra* note 136, at 3081, 3091.

145. *Id.*, *reprinted in* 5 THORPE, *supra* note 136, at 3081, 3092. On the general history of the Council, see Lewis H. Meader, *The Council of Censors*, 22 PA. MAG. HIST. & BIOGRAPHY 265 (1898).

146. A record of the Council's decisions is contained in THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790: THE MINUTES OF THE CONVENTION THAT FORMED THE PRESENT CONSTITUTION OF PENNSYLVANIA, TOGETHER WITH THE CHARTER TO WILLIAM PENN, THE CONSTITUTIONS OF 1776 AND 1790, AND A VIEW OF THE PROCEEDINGS OF THE CONVENTION OF 1776, AND THE COUNCIL OF CENSORS, pt. III (Harrisburg, Pa., John S. Wiestling 1825) [hereinafter PROCEEDINGS].

147. *Id.* at 87; Chapter MCIII (Aug. 6, 1784), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682-1801, at 352 (James T. Mitchell & Henry Flanders eds., 1906).

148. PROCEEDINGS, *supra* note 146, at 88.

149. *Id.* at 92. It is not entirely clear that this is about the same legislative act, for the Council dates this as April 10, 1781. It is unclear whether this was the date of Austin's petition, of the

rights.[150] A year later, "convinced of their error," the House passed an act to repeal the special bill and return the parties to the status quo ante.[151] The repeal act stated that, "had not the act aforesaid been passed," Baker's suit against Austin "might have been tried by due course of law."[152] It formally accepted the Council's constitutional claim, at least with respect to the trial-by-jury guarantee. In a much later suit brought by Austin to recover the same estate, the state supreme court, in dicta, agreed that the 1784 statute vesting the land in Austin had been a violation of the state constitution.[153] In short, every branch of the Pennsylvania government concluded that the special and retrospective act that deprived Baker of his day in court by vesting disputed property in Austin was beyond the legislature's constitutional power—even under what was perhaps the most majoritarian of the early state constitutions.

2. Holmes v. Walton

In 1778 the New Jersey General Assembly passed a law allowing "any person or persons whomsoever to seize and secure provisions, goods, wares and merchandize" carried from territory held by the British to New Jersey.[154] They could seek title to the goods, regardless of their value, according to a 1785 statute that gave jurisdiction for small claims to a justice of the peace and a jury of six, with no right of appeal.[155]

"report[] of the committee[] of grievances," *id.* at 90, or of an act of the legislature prior to the 1784 act.

150. *Id.* at 87; *see* PA. CONST. of 1776, art. XI, *reprinted in* 5 THORPE, *supra* note 136, at 3081, 3083 ("[I]n controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.").

151. Chapter MCXXXIV, An Act To Repeal an Act of Assembly, Entitled "An Act To Vest in Isaac Austin a Certain Messuage, Wharf, Ferry and Ferry Landing, Situate on the North Side of Mulberry Street, at the Easternmost Extremity Thereof, in the City of Philadelphia, Late the Property of William Austin, Attainted of High Treason," and To Restore the Possession of the Real Estate Therein Mentioned to George Adam Baker (Feb. 18, 1785), *reprinted in* 11 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682-1801, *supra* note 147, at 441, 441-44.

152. *Id.* at 442.

153. Austin v. Trs. of the Univ. of Pa., 1 Yeates 260, 261 (Pa. 1793).

154. Austin Scott, Holmes vs. Walton*: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation*, 4 AM. HIST. REV. 456, 456 (1899).

155. For a full overview of the facts and procedural history of the case, see HAMBURGER, *supra* note 37, at 407-22. The classic studies of the case are 2 CROSSKEY, *supra* note 5, at 948-52; Louis B. Boudin, *Precedents for the Judicial Power:* Holmes v. Walton *and* Brattle v. Hinckley, 3 ST. JOHN'S L. REV. 173 (1929); and Scott, *supra* note 154.

In *Holmes v. Walton*,[156] the petitioner argued that the abrogation of a twelve-person jury was "contrary to Law," "contrary to the constitution of New Jersey," and "contrary to the Constitution, practices, and Laws of the Land."[157] The New Jersey Constitution did not have a law-of-the-land clause, but it did have a clause incorporating English common law and a clause providing for trial by a jury of an unspecified number of members.[158] The New Jersey Supreme Court invalidated the statute without a written opinion. While it is impossible to know the court's specific reasoning, the court must have concluded that the legislature was prohibited by law—either by the constitution, common law, or both—from abrogating the customary right to trial by a twelve-member jury.[159] It must have been a holding that the legislature did not have free rein to make laws that would infringe traditional rights of due process.

3. Trevett v. Weeden

Nearly a decade later in 1786, in the midst of nation-wide inflation and devaluation of paper money,[160] the Rhode Island legislature passed a series of

156. There probably was no written opinion in *Holmes v. Walton*. Scott, *supra* note 154, at 459. The case was first recounted by the New Jersey Supreme Court in an 1802 case raising a constitutional question about when a state official had vacated a prior position before taking legislative office. *See* State v. Parkhurst, 9 N.J.L. 427, 444 (1802).

157. Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 CONST. COMMENT. 341, 352 (1990) (quoting N.J. Archives, Envelope No. 18354).

158. N.J. CONST. of 1776, art. XXII, *reprinted in* 5 THORPE, *supra* note 136, at 2594, 2598 ("That the common law of England, as well as so much of the statute law, as have been heretofore practised in this Colony, shall still remain in force, until they shall be altered by a future law of the Legislature; such parts only excepted as are repugnant to the rights and privileges contained in this Charter; and that the inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.").

159. Scott, *supra* note 154, at 459-60; *see also* Moore, *supra* note 157, at 352 (citing N.J. Archives, Envelope No. 18354). New Jersey's history with invalid six-person-jury statutes may have played into the court's opinion. Before the Revolution, the Crown's Privy Council had likewise invalidated another New Jersey statute, which had attempted to increase the jurisdiction of the justice of the peace and an optional six-person jury from civil suits under six pounds to those under ten pounds, thereby decreasing the common law jurisdiction of the traditional twelve-person jury for small claims. The Privy Council believed that the reduction of the twelve-person jury's jurisdiction was at best imprudent. HAMBURGER, *supra* note 37, at 411 n.29.

160. For general background on the paper-money crisis of 1786, see Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, *in* BEYOND CONFEDERATION: ORIGINS OF THE

acts making paper money legal tender, requiring merchants to accept it at face value, and authorizing buyers to bring qui tam actions against merchants that rejected it.[161] Such actions were to be subject to the jurisdiction of a special court, and trial was to be held "without any jury, by a majority of the Judges present, according to the Laws of the Land."[162] The act thus presented a bit of a puzzle. It purported to comply with the "Laws of the Land," but it dispensed with trial by jury, which was a quintessential feature of that law.

In *Trevett v. Weeden*,[163] a merchant who was sued under the statute argued that the Rhode Island charter was "declaratory of, and fully confirmed to the people the Magna Charta, and other fundamental laws of England" and that "[t]he revolution hath made no change in this respect, so as to abridge the people of the means of securing their lives, liberty, and property."[164] Moreover, he argued, the very language of the act was nonsense: by authorizing judges to "proceed to trial without any jury according to the laws of the land" the act was, by its own terms, "impossible to be executed," because the law of the land necessarily included a right to trial by jury.[165]

The court, made up of judges appointed by the legislature for one-year terms, agreed. A newspaper reported that

> Judge HOWELL . . . declared . . . the penal law to be repugnant and unconstitutional, and therefore gave it as his opinion that the Court could not take cognizance of the information.—Judge DEVOL was of the same opinion.—Judge TILLINGHAST took notice of the striking repugnancy in the expressions of the act, "*Without trial by jury, according to the laws of the land*"—and on that ground gave his judgment the same way.—Judge HAZARD voted against taking cognizance.—The Chief Justice [Mumford] declared the judgment of the Court, without giving his own opinion.[166]

CONSTITUTION AND AMERICAN NATIONAL IDENTITY 128, 142-56 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987).

161. *See* HAMBURGER, *supra* note 37, at 437. For a full account of the political, economic, and personal events surrounding the acts and the subsequent legal challenges to it, see *id.* at 435-49.

162. *Id.* at 439 (quoting Act of August 1786).

163. Trevett v. Weeden (R.I. 1786), *in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417 (Bernard Schwartz ed., 1971).

164. JAMES M. VARNUM, THE CASE, *TREVETT AGAINST WEEDEN* 15, 23 (Providence, R.I., John Carter 1787).

165. *Id.* at 31.

166. Correspondence, GAZETTE (Providence, R.I.), Oct. 7, 1786.

This remarkable decision suggests how deeply the right to jury trial was embedded in the idea of the law of the land, as understood by American judges. As Judge Tillinghast's reported remarks, in particular, indicate, the judges were unable to square the idea of the "laws of the land" with the statutory abolition of trials by jury; this smacked of a "striking repugnancy." The aftermath of the decision suggests that popular opinion was not of the same ilk, at least in democratic Rhode Island. The legislature formally rebuked the judges for this decision, and elected all new judges the following spring.[167]

4. Bayard v. Singleton

North Carolina, like most states, systematically confiscated Tory property during the Revolution. In 1784, victims of this confiscation, the Bayards, sued the subsequent buyer, Singleton, for recovery of their property.[168] The legislature intervened in favor of the buyer, passing a statute requiring courts to dismiss suits against purchasers of forfeited Tory estates "upon the motion or affidavit of the defendant."[169]

Some members of the legislature opposed the act on constitutional grounds. They advanced three arguments. First, "it is an ex post facto law . . . and therefore contrary to the constitution,"[170] which had a clause expressly prohibiting retrospective criminal laws.[171] Second, "a bill depriving all persons deriving their titles under obnoxious or incapacitated persons . . . is a violation even of the forms of justice, and as an unconstitutional law is nugatory."[172] Though not entirely clear, this may have been an argument that the bill, by "depriving" persons of certain property without adherence to "the forms of

167. MARY SARAH BILDER, THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE 191 (2004).

168. *See* HAMBURGER, *supra* note 37, at 450-52.

169. *Id.* at 452 (quoting Act of Dec. 29, 1785, *reprinted in* THE LAWS OF THE STATE OF NORTH-CAROLINA, PASSED AT NEWBERN, DECEMBER 1785, at 12-13 (Newbern, N.C., Arnett & Hodge 1786)).

170. *Id.* at 452 & n.150 (quoting Protest (Dec. 28, 1785), *in* THE JOURNALS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH-CAROLINA 51, 51 (2d pagination series, Newbern, N.C., Arnett & Hodge 1786)).

171. N.C. CONST. of 1776, art. XXIV, *reprinted in* 5 THORPE, *supra* note 136, at 2787, 2788 ("That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made.").

172. HAMBURGER, *supra* note 37, at 452 n.150 (quoting Protest (Dec. 28, 1785), *in* THE JOURNALS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH-CAROLINA 51, 51 (2d pagination series, Newbern, N.C., Arnett & Hodge 1786)).

justice," would violate the state constitution's law-of-the-land clause.[173] Third, the dissenting legislators argued that the law of the state must be generally applicable to all citizens, and laws that effectively deprive some citizens of the rights usually enjoyed by all would be "a denial of the known and established rules of justice."[174] This third argument suggests that the dissenters believed that the law of the land prohibited the legislature from adjudicating individual legal disputes. In these arguments we see the transmutation of new notions of separation of powers into individual rights claims based on the "law of the land." Consider the dissenting legislators' full argument:

> [T]he laws of this state . . . must apply to all ranks of citizens; nor do we conceive it possible under the present bill to preclude any subject from the benefit of law by a denial of the known and established rules of justice, which protect the property of all citizens equally, nor to place any of them under the adjudication of the General Assembly, whose desire to redress the grievance may be fluctuating, uncertain and ineffectual.[175]

This appears to be one of the earliest examples of the argument, which became increasingly common, that legislation depriving individuals of their property is illegitimate if it operates retroactively (as opposed to operating by "known and established rules of justice") and is insufficiently general (because it applied only to the confiscated lands of Tories). This is an argument that the General Assembly is to make law, which is to be generally applicable, to "protect the property of all citizens equally," and not to engage in an "adjudication" to "redress [a] grievance." The latter is the exclusive function of the courts. The contours of this argument suggest that "general law" interpretations of state law-of-the-land and due process clauses are not as different in basic rationale from the "procedural" or "vested rights" interpretations as some commentators have suggested.[176] As early as the 1780s, American constitutional actors (here, legislators) interpreted constitutional law-of-the-land provisions to require legislative acts to be generally applicable.

---

173. N.C. CONST. of 1776, art. XII, *reprinted in* 5 THORPE, *supra* note 136, at 2787, 2788.

174. HAMBURGER, *supra* note 37, at 452 (quoting Protest (Dec. 28, 1785), *in* THE JOURNALS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH-CAROLINA 51, 51 (2d pagination series, Newbern, N.C., Arnett & Hodge 1786)).

175. *Id.*

176. *See, e.g.*, Ely, *supra* note 6, at 336-38; Harrison, *supra* note 12, at 506-10; Williams, *supra* note 7, at 424-25.

The North Carolina legislature rejected these arguments, but the Bayards pressed their claim in district court. Singleton's lawyers urged the classic positivist argument that "all acts of Assembly were laws, and their execution could not be prevented."[177] The court unanimously concluded that the statute was unconstitutional: "[B]y the constitution every citizen had undoubtedly a right to a decision of his property by a trial by a jury," and if "the Legislature could take away this right" "[i]t might with as much authority require his life to be taken away without a trial by jury . . . [or] without the formality of any trial at all."[178] The Court "ordered, that the suits in question should stand for trial in the next term, according to the course of the common law of the land."[179]

An exchange of letters after the decision between its principal proponent, James Iredell, future Associate Justice of the United States Supreme Court, and its principal opponent, Richard Dobbs Spaight, North Carolina delegate to the 1787 Constitutional Convention, demonstrates that the dispute was primarily over the propriety of judicial review rather than the merits. Spaight was willing to concede that the statute "militat[ed] . . . against the constitution,"[180] but complained of the judges' "usurpation of the Authority" to "declare[] void" acts of the legislature.[181] This was the position that Blackstone had articulated with reference to acts of Parliament. Iredell responded simply that judges had a duty to decide cases according to the law of the land, including a written constitution.[182]

5. Alexander Hamilton's Understanding of Due Process of Law

One of the New York legislature's first acts upon the liberation of Manhattan was to pass a bill stripping "Persons therein described"—the description was of Loyalists—of their citizenship.[183] Alexander Hamilton, in a

177. HAMBURGER, *supra* note 37, at 453 (quoting *Newbern (N.C.) June 7*, PA. PACKET & DAILY ADVERTISER, July 1, 1786).

178. *Id.* at 459 (quoting *Newbern, June 7*, VA. INDEP. CHRON., July 4, 1787).

179. *Id.*

180. *Id.* at 471 (quoting Letter from Richard Dobbs Spaight to James Iredell (Aug. 12, 1787), *in* 3 THE PAPERS OF JAMES IREDELL 298 (Donna Kelly & Lang Baradell eds., 2003)).

181. *Id.* at 472.

182. *Id.* at 475 (citing Letter from James Iredell to Richard Dobbs Spaight (Aug. 26, 1787), *in* 3 THE PAPERS OF JAMES IREDELL 308-10 (Donna Kelly & Lang Baradell eds., 2003)).

183. The bill did not become law. It was vetoed by the Council of Revision, which presented its objections to the legislature in January 1784, the same month Hamilton's letter was published. *See* 3 THE PAPERS OF ALEXANDER HAMILTON 483-84 & n.1 (Harold C. Syrett &

letter to the public as Phocion, opposed the act as violating the treaty with Britain and "contrary to the law of the land."[184] He acknowledged that "[i]f there had been no treaty in the way, the legislature might, by *name*, have attainted particular persons of high treason for crimes committed during the war."[185] He argued, however, that "independent of the treaty it could not, and cannot, without tyranny, disfranchise or punish whole classes of citizens by general descriptions, without trial and conviction of offences known by laws previously established declaring the offence and prescribing the penalty."[186] To do so, he argued, would violate "[t]he 13th article of the constitution," which provided "that no member of this state shall be disfranchised or defrauded of any of the rights or privileges sacred to the subjects of this state by the constitution, unless by the law of the land or the judgment of his peers."[187] He then cited and adopted Coke's definition of the law of the land: "due process of law, that is, by indictment or presentment of good and lawful men, and trial and conviction in consequence."[188] Hamilton argued that ex post facto criminal laws violated due process of law.[189]

Hamilton's opposition to ex post facto laws against Loyalists did not end there. On January 13, 1787, Samuel Jones introduced into the New York Assembly "An Act for Regulating Elections."[190] While that act worked its way through the legislature, the legislature on January 26 passed a statutory bill of rights with three "due process" clauses.[191] About a week later, Hamilton argued

Jacob E. Cooke eds., 1962). The legislature reconsidered the law in February and declined to repass it. *Id.*

184. ALEXANDER HAMILTON, LETTER FROM PHOCION TO THE CONSIDERATE CITIZENS OF NEW YORK, ON THE POLITICS OF THE DAY 4 (New York, Samuel Loudon 1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 183, at 483.

185. *Id.* at 5.

186. *Id.*

187. *Id.* at 4 (quoting N.Y. CONST. of 1777, art. XIII, *reprinted in* 5 THORPE, *supra* note 136, at 2623, 2632).

188. *Id.* at 5.

189. *Id.* at 5-6.

190. Alexander Hamilton, Remarks on an Act for Regulating Elections (Jan. 23, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 183, at 19-21 & n.1.

191. The statutory Bill of Rights provided in part:

> Second, That no Citizen of this State shall be taken or imprisoned, or disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by due Process of Law.
>
> Third, That no Citizen of this State shall be taken or imprisoned for any Offence, upon Petition or Suggestion, unless it be by indictment or Presentment of good

to the General Assembly that a proposed Senate amendment to the Act for Regulating Elections would violate the constitutional "law of the land" clause and the new statutory "due process clause." The version passed by the Assembly would have disqualified the officers of British privateers that had attacked the "vessels, property, or persons" of the United States from holding any state office of trust.[192] The Senate amendment would have extended the disqualification to any "owner or owners of such privateers or vessels of war."[193] Hamilton said that he had been "restrained by motives of respect for the sense of a reasonable part of the house" from opposing the House's original "discriminating clauses," but was obligated to speak against the Senate addition because "it would include almost every man in the city, concerned in navigation during the war."[194] He continued:

> He hoped to be indulged by the house in explaining a sentence in the constitution, which seems not well understood by some gentlemen. In one article of it, it is said no man shall be disfranchised or deprived of any right he enjoys under the constitution, but by the *law of the land*, or the judgment of his peers. Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words "*due process*" have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.

> and lawful Men of the same Neighburhood where such Deeds be done, in due Manner, or by due Process of Law.
>
> Fourth, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.

Williams, *supra* note 7, at 441 n.134 (emphasis omitted) (quoting An Act Concerning the Rights of the Citizens of This State, 1787 N.Y. Laws 5-6).

192. Alexander Hamilton, Remarks on an Act for Regulating Elections (Feb. 6, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 183, at 34 n.1.

193. *Id.*

194. *Id.* at 34-35.

> Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?
>
> Our having done it to a certain degree is to be lamented; but it is no argument for extending it.[195]

Commentators have divided on the meaning of this statement. Some have argued that Hamilton's comment that "[t]he words 'due process' . . . can never be referred to an act of legislature" meant the proposed act of the legislature could not have violated due process.[196] This interpretation, we think, is untenable. After all, Hamilton was arguing on the floor of the legislature that the proposed statute would "commit[] a direct violation" of the "bill of rights," referring specifically to the due process clause. In light of this assertion, and particularly in light of his argument as Phocion, his speech becomes clear. Hamilton, relying on Coke, maintained that the law of the land requires certain procedural safeguards before someone may be deprived of his rights. The legislature is inherently incapable of providing those safeguards, and thus the deprivation of rights must be left to that branch of government capable of doing so. To say that due process cannot "be referred to an act of legislature" is not to say that due process principles do not apply, but that the legislature is institutionally incapable of satisfying them.[197] Hamilton specifically rejected the argument that whatever the legislature does is by definition consistent with "the law of the land." He regarded the terminology of "due process" as making this point clear.

---

195. *Id.* at 35-36. Elsewhere, Hamilton argued that there was no New York analogue to the federal prohibition on ex post facto laws. THE FEDERALIST NO. 84, *supra* note 130, at 510-11 (Alexander Hamilton).

196. *See* Berger, *"Law of the Land" Reconsidered*, *supra* note 2, at 21, 29; Easterbrook, *supra* note 5, at 98 n.35.

197. *See* Gedicks, *supra* note 6, at 632 ("[A] legislature's mere compliance with the formal requirements for enacting a law did not mean that its acts necessarily accorded with the 'law of the land,' or constituted the 'process of law' owed to a person suffering a deprivation of life, liberty, or property."); Douglas Laycock, *Due Process and Separation of Powers: The Effort To Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 891 (1982) ("Hamilton is saying that legislatures cannot enact statutes depriving persons of rights, because only courts can deprive persons of rights. He is plainly wrong; only with statutory authorization from the legislature could the courts deprive persons of the right to hold public office."); Riggs, *supra* note 6, at 990 (understanding Hamilton to be arguing that "only courts, not legislatures, can provide due process of law").

It is important to note, however, and contrary to some commentators,[198] that Hamilton's constitutional argument was about the inability of the legislature to provide judicial process, not about "substantive due process" in the modern sense. The proposed statute would violate due process, Hamilton said, because the legislature cannot provide the procedures necessary for such a deprivation of rights. His argument is not "substantive" in the modern sense that the government as a whole has no authority to abrogate certain kinds of rights even by means of general and prospective legislation.

E. The Constitution

Based on their experiences with British violations of colonists' rights during the runup to the Revolution and their early unhappy experiences with state legislative supremacy, the Framers of the United States Constitution sought a more secure and robust foundation for the rule of law by separating the lawmaking from the law-executing and judicial functions. This separation of powers gave a new meaning to the ancient idea of due process of law; it would be applied to all government action, including acts of the legislature.

1. General and Specific Provisions

The Framers decisively departed from the Revolution-era vision of unmediated popular government through legislative supremacy. The first sentence of Article I limits Congress to the exercise of enumerated "legislative" powers, vesting all executive and judicial powers in separate branches.[199] This establishes the basic framework for separation of powers. Moreover, Article I, Section 9 expressly deprives Congress of the quasi-judicial power to deprive individuals and groups of rights through bills of attainder, ex post facto laws, nonproportional taxes, or, absent certain conditions, the suspension of habeas corpus. Article I, Section 10 puts similar limits on the power of state legislatures, plus a ban on laws interfering with the obligation of contracts. The

198. *See* Ely, *supra* note 6, at 326 ("His speech . . . lends support for the view that due process placed substantive restraints on legislative power."); Laycock, *supra* note 197, at 891 (arguing that "[t]his is substantive due process with a vengeance," but "[Hamilton] was plainly wrong"); Riggs, *supra* note 6, at 990 (arguing that Hamilton's opinion, if widely held, would mean that "the fifth amendment limits the power of Congress to take away substantive rights," which he says "is the very essence of substantive due process"). Most of these commentators fail to distinguish among the kinds of legislative acts that Hamilton thought New York's due process clause prohibited; there is no indication that he thought they prohibited generally applicable and prospective laws.

199. U.S. CONST. art. I, § 1.

Bill of Rights, adopted in 1791, adds a number of provisions, originally applicable only to the federal government, which appear to be specific applications of due process, including various aspects of criminal procedure, plus the requirement of compensation for takings of property for a public use. And, of course, the Fifth Amendment includes the provision: "nor shall any person be . . . deprived of life, liberty, or property, without due process of law."[200]

What is the relation among these various provisions? It is difficult to escape the conclusion that there is substantial redundancy. Surely the prohibition on bills of attainder and the requirement of a jury trial, to name just two examples, are comprised within the demand for "due process." Some scholars have suggested that to avoid redundancy, we must interpret "due process" in such a way that it would not overlap with other, more specific procedural provisions or the Vesting Clauses of Articles I and III.[201] We think this places too much weight on the interpretive canon against superfluous language. The Framers specifically enumerated protections that they regarded as especially important, and then added a catch-all. It is impossible to give "due process of law" its historical meaning and avoid redundancy.

Early on, the question of the relation between "due process" and the more specific provisions turned out to be significant only in constitutional litigation involving state law. At the federal level, litigants tended to challenge actions that violated specifically enumerated due process principles under those specific clauses rather than under the generic grab-bag of "due process." But the Due Process and Takings Clauses of the Fifth Amendment did not apply to the states.[202] The only clauses relevant to due process principles and applicable to states were the prohibitions of bills of attainder, ex post facto laws, and impairments of the obligation of contract found in Article I, Section 10. Thus, litigants challenging state action in federal court attempted to fit violations of due process principles within one of these more specific categories. That is the reason why the Contracts Clause was the most frequently litigated constitutional provision in the early nineteenth century.[203] For example, in *Fletcher v. Peck*,[204] the government of Georgia attempted to rescind land grants that had been procured through widespread bribery. In the absence of a due

200. *Id.* amend. V.

201. *See, e.g.*, Harrison, *supra* note 12, at 520-24.

202. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833).

203. *See* CURRIE, *supra* note 12, at 128; Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 95 n.92 (1997).

204. 10 U.S. (6 Cranch) 87 (1810).

process clause or takings clause applicable to the states, the Supreme Court construed the grant of land as a kind of contract, the obligation of which could not be impaired by subsequent legislation.[205]

The prohibitions on bills of attainder, ex post facto laws, and laws impairing the obligation of contract obviously are directed at legislatures, which are the only bodies that enact "bills" and "laws." Moreover, they are targeted at two related but distinguishable legislative abuses: special laws passed by a legislature that deprive an identifiable individual of rights, and laws that operate retrospectively. Both types of legislation conflict with the separation-of-powers notion that the power to make laws—the power to "legislate"—is the power to establish general rules for the future, not to determine specific applications of law or to punish past acts.[206] As we already noted, however, this notion was given the form of a specific constitutional prohibition only when the effect was a deprivation of rights. Congress and the state legislatures remained free to enact special laws for the benefit of particular persons, or retroactive laws that did not hurt anyone.

The Constitution expressly gives four quasi-judicial functions to Congress: (1) to the House, "the sole Power of Impeachment";[207] (2) to the Senate, "the sole Power to try all Impeachments";[208] (3) to both the House and the Senate, the power to be "the Judge of the Elections, Returns and Qualifications of its own Members";[209] and (4) to each House, the power to "punish its members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[210] From early in the Republic, Congress has also successfully asserted an inherent power to subpoena persons to testify and to punish persons who resist subpoenas by contempt of Congress, at least when relevant to the consideration of legislation.[211] In addition, the Constitution left Congress

205. *Id.* at 132, 135-37, 139; *see* Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267, 272-73 (1988).

206. *Cf.* MCDONALD, *supra* note 129, at 38 ("Blackstone and others deplored what the Romans called *privilegia*, or private law, such as ex post facto laws or bills of attainder and bills of pains and penalties; but the fact was that Parliament retained the power to enact such 'unreasonable' legislation.").

207. U.S. CONST. art. I, § 2, cl. 5.

208. *Id.* § 3, cl. 6.

209. *Id.* § 5, cl. 1.

210. *Id.* § 5, cl. 2.

211. *See, e.g.*, McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("[T]he power of inquiry—with the process to enforce it—is an essential and appropriate auxiliary to the legislative function."). *See generally* Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083

the power to enact special bills for the benefit (but not the detriment or punishment) of identifiable individuals, such as land grants to specific companies. Such bills were commonly enacted by Parliament and state legislatures, including granting compensation to petitioners in cases sounding in tort or contract, which would otherwise have been barred by sovereign immunity, or pensions to soldiers and their families.[212] The Due Process Clause does not apply to such bills, but only to quasi-judicial acts that "deprive[]" someone of "life, liberty, or property."

Article III also provides a backstop for due process. Under Article III, "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," and "shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties."[213] Furthermore, Article III guarantees that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."[214] For cases falling within this compendious definition of "jurisdiction," the Constitution thus embeds the central features of due process as defined by Chapter 29 of Magna Charta, with all of its implications as a political check on legislative, executive, and national power. To be sure, not all courts were Article III courts; the Constitution implicitly recognizes the continued operation and legitimacy of state courts, and it would soon be interpreted to permit territorial courts as well as various species of Article I "courts" with power to adjudicate "public rights" where no jury trial would have been available under the common law.[215] But to a significant extent, by carving out a separate sphere of judicial authority and thus taking it away from Congress, Article III limited the range of cases in which Congress could violate due process by exercising quasi-judicial power.

(2009) (grounding the legislative contempt power in preconstitutional English and American history and in early congressional practice).

212. *See, e.g.*, Christine A. Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381, 1407-35 (1998) (exploring the function of colonial New York's General Assembly as a court of claims on public debt).

213. U.S. CONST. art. III, §§ 1, 2.

214. *Id.* § 2, cl. 3.

215. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 , 67-70 (1982); Crowell v. Benson, 285 U.S. 22, 50-51 (1932); *In re* Ross, 140 U.S. 453, 464-65 (1891); Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828). For a broad interpretation of congressional power to vest jurisdiction over even some private-rights cases in a non-Article III court, see *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833, 853-57 (1986).

2. The Due Process Clause

The text of the Fifth Amendment Due Process Clause says nothing about whether it is meant to apply against the legislature, and its legislative history is usually given little attention as a source of clues to its meaning.[216] We think the Clause's text, its legislative history, and the structure of the Constitution (including the Bill of Rights) together suggest that the Due Process Clause was a limit on the powers of all three branches.

The Due Process Clause is tucked into a compound sentence without a proper subject. The Fifth Amendment is silent about *whom* it prohibits from depriving rights "without due process of law." The passive voice suggests that the Amendment is not limited as to "who," but only as to "what." Just as importantly, the Constitution nowhere defines "due process of law." Textual arguments against applying the Due Process Clause to Congress tend to rest on two assumptions. The first is that the Framers could not have meant the Clause to be redundant with other prohibitions on Congress, such as the Article I, Section 9 prohibitions on ex post facto laws and bills of attainder. As we have argued, though,[217] that redundancy argument is unpersuasive. The Constitution and Bill of Rights are shot through with prohibitions that some Founders thought to be redundant with enumerated powers or prohibitions. Furthermore, there is no historical evidence that the Founders believed that the antiredundancy canon of interpretation should be determinative. To the contrary, the Framers no less than contemporary constitutional lawyers wrapped their arguments in as many constitutional provisions as possible.

The second main textual objection to applying the Due Process Clause to Congress is that "due process of law" assumes that there is already a "law" by which "due process" (whatever that might mean) must be afforded, and, thus, that the Due Process Clause applies only to those branches that are applying law that Congress has already made.[218] This objection makes two assumptions that the historical evidence shows to be wrong. One assumption is that "due process of law" was not a term of art that might be applied against the

216. *See, e.g.*, Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law,"* 77 MISS. L.J. 1, 131-38 (2007); Ely, *supra* note 6, at 325; Gedicks, *supra* note 6, at 641; Riggs, *supra* note 6, at 947; Williams, *supra* note 7, at 445-46.

217. *See supra* note 201 and accompanying text.

218. This argument is both very old and very recent. *See, e.g.*, Harrison, *supra* note 12, at 497; Rosenkranz, *supra* note 12, at 1041-43. Compare the arguments of Richard Dobbs Spaight in response to the decision of the North Carolina Supreme Court in *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787), discussed *supra* Subsection I.D.4.

legislature. In fact it was a term of art that had existed in the English customary constitution for at least four hundred years and that the most influential English commentator, Coke, had equated with "law of the land," a provision that was in most state constitutions and that had already been applied to acts of state legislatures. The second mistaken assumption on this reading of "due process of law" is that every time Congress acts it makes law. But Congress does not "make" a "law" when it exercises its quasi-judicial powers, such as contempt. More controversially, we argue it does not "make" a "law" when it purports to resolve a particular legal conflict, even if it employs the form of a statute to do so.

The legislative history confirms the view that the Due Process Clause was originally understood to apply to legislative as well as executive and judicial acts. When Madison first presented a series of proposed amendments to the House, he indicated where each of them should be inserted into the original Constitution. According to Madison's scheme, the proposal that ultimately became the Fifth Amendment, which at that point already provided that no one shall "be deprived of life, liberty, or property without due process of law," was to be inserted into "article 1st, section 9, between clauses 3 and 4."[219] This would have put the Due Process Clause in the section of Article I of the Constitution devoted to enumerating the limits on congressional power, directly following the clause prohibiting Congress from enacting bills of attainder and ex post facto laws.[220] Ultimately, the first Congress listed the various provisions of the Bill of Rights as a separate set of amendments, rather than interpolating them into the existing Constitution. Consequently, the explicit reference to Congress as the subject of the Due Process Clause was eliminated. But there is no reason to think that the change in lexical organization was understood or intended to be a change in substance or application. Just as the subject-less provisions of the Bill of Rights relating to

219. 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834). At the same time, Madison proposed an amendment with two clauses, the first of which ultimately failed (but was mirrored in some state constitutions). It would have added to the Constitution, as article seven, the provision that

> [t]he powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.

Id. at 435-36. The second clause of this proposed amendment became the Ninth Amendment. *See id.* at 436.

220. *See* U.S. CONST. art. I, § 9.

the quartering of soldiers in private homes,[221] to the taking of property without just compensation,[222] or to the imposition of cruel and unusual punishments[223] were uncontroversially applicable to acts of Congress, so too was the Due Process Clause.

In commenting on his proposed amendments, Madison began by justifying a bill of rights in the American context. He argued that America's situation was different from Britain's, where "the declaration of rights . . . [has] gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether indefinite."[224] By contrast, "the people of America are most alarmed" that "the trial by jury, freedom of the press, or liberty of conscience" are unsecured by "Magna Charta" or "the British Constitution."[225] While "it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States."[226] Although Madison may not have spelled out the logic of placing the Due Process Clause in Article I, this logic is apparent; it is the same as the logic for making the First Amendment apply to "Congress." Outside the limited prerogative powers of the President and inherent powers of the judiciary, the authority of those branches is confined to the execution and enforcement of the law. If Congress is forbidden to pass laws authorizing a deprivation of life, liberty, or property without due process, and the other branches are limited to executing and interpreting the law, then the Constitution secures individual liberties against all three branches.[227]

There was no commentary or debate about the text that became the Fifth Amendment Due Process Clause, but circumstances strongly suggest that Madison deliberately chose to employ the phrase "due process of law" instead of the Magna Charta formula of "law of the land." The North Carolina, Pennsylvania, and Virginia ratifying conventions each sent a proposed amendment that parroted, more or less, the "law of the land" language of Chapter 29 of Magna Charta.[228] Only New York, which, as we have seen, had

221. *Id.* amend. III.

222. *Id.* amend. V.

223. *Id.* amend. VIII.

224. 1 ANNALS OF CONG. 436 (1789) (Joseph Gales ed., 1834).

225. *Id.*

226. *Id.*

227. *See* Shrum v. City of Coweta, 449 F.3d 1132, 1140-43 (10th Cir. 2006) (McConnell, J.) (explaining why the First Amendment applies to executive action notwithstanding its first word).

228. Williams, *supra* note 7, at 445.

some experience with both a law-of-the-land and a due process clause, proposed using the phrase "due process of law."[229] It seems unlikely that Madison would have rejected the phrasing proposed by his own state, especially when that proposal commanded the assent of most others, without a solid reason.

We think it most likely that Madison was trying to avoid any textual conflict, or at least confusion, with Article VI of the Constitution. That provision states that "Laws of the United States" "made in pursuance" of "This Constitution" are "the supreme Law of the Land."[230] Had the Fifth Amendment provided that no person was to be deprived of life, liberty, or property but by the law of the land, interpreters might have presumed that deprivations were permissible whenever they were enacted pursuant to the Constitution. The logical corollary would be that no act of Congress, "the supreme Law of the Land," could violate the law-of-the-land clause.[231] By framing the Amendment in terms of due process of law instead of law of the land, Madison avoided foreclosing the possibility of applying the Due Process Clause against Congress. Recall that this was Hamilton's analysis of the significance of "due process" in the New York bill of rights.[232]

Although it might be thought in the abstract—and some modern scholars argue—that due process and the "law of the land" cannot logically apply to properly enacted laws, from the beginning legal commentators and courts disagreed. Most American courts and jurists in the early Republic agreed, at a minimum, that legislative enactments that authorized other branches to deprive persons of life, liberty, or property without traditional procedural protections or their equivalent violated due process. The preconstitutional cases invalidating statutes abridging the right to trial by jury are an example. To be sure, a handful of early decisions held that state law-of-the-land clauses did not limit the power of the state legislature.[233] These decisions, we believe,

229. *Id.*

230. U.S. CONST. art. VI, cl. 2.

231. *See* Williams, *supra* note 7, at 456.

232. *See supra* Subsection I.D.5.

233. See the inconclusive decision in *State v.* —, 2 N.C. (1 Hayw.) 38 (1794), which reversed a decision to invalidate a statute under the North Carolina Constitution's law-of-the-land clause, holding that the clause did not apply to the legislature. Ryan Williams argues that *Mayo v. Wilson*, 1 N.H. 53 (1817), held that the New Hampshire law-of-the-land clause did not apply against the legislature. *See* Williams, *supra* note 7, at 450. In fact, the court in *Mayo* held that arrests made pursuant to statutory authorization did not deprive a person of due process of law and were therefore not against the law of the land. *Mayo*, 1 N.H. at 57-58. We think the court's statement that the law-of-the-land clause "was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests

were the remnant of a dying view, based on a Blackstonian model of Parliament rather than the new American view of a Congress limited by constitutional positive law.

As to the modern view that the Due Process Clause renders certain unenumerated but fundamental rights impervious to legislative impairment, the text of the Clause seems to preclude such an interpretation. The Clause says that no one may be deprived of the relevant set of rights "without due process of law." That surely means persons may be deprived of those rights if due process of law has been accorded. The words chosen would be a very odd way of communicating the idea that the rights mentioned are inalienable.[234]

One argument for an original understanding of "substantive due process" advanced by contemporary scholars is that the "law" in "due process of law" included some form of natural law. On this understanding, laws made by Congress that did not conform to natural law were not really law. To be sure, some early American jurists held to a version of the law of nature as a universal moral code made known by conscience, reason, and even scripture,[235] but there is little evidence that any Americans in the late eighteenth century thought the law of nature trumped the enacted "municipal" law of a political society. At most, natural law principles served as rules of equitable construction, or as a way to characterize unwritten international obligations under the law of nations. Although Lockean legal theory assumed the reality of capacious natural liberty, this was not understood as trumping otherwise-valid legislation.[236] Many of the Framers understood that the express provisions of the Constitution entailed certain reservations of rights, but there is no evidence that any believed that acts of Congress would be evaluated by their conformance to natural law or any other nonpositive principles of justice or

not warranted by law," *id.* at 57, should be understood to apply to cases like the one at bar, where the legislature passes a general and prospective law that authorizes an abrogation of common law procedures. It is of a piece with *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856), and modern procedural due process.

234. *Cf.* Rosenkranz, *supra* note 12, at 1043 ("[F]ar from forbidding executive deprivations of life, liberty, and property, the clause expressly contemplates that the executive *will* deprive persons of life, liberty, and property.").

235. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *54 ("Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are . . . . On the contrary, no human legislature has power to abridge or destroy them unless the owner shall himself commit some act that amounts to a forfeiture."); THE WORKS OF JAMES WILSON, 49-127 (James De Witt Andrews ed., Chicago, Callaghan 1896) (arguing that the law of God that is promulgated by reason and conscience to men is the "law of nature," and promulgated to political societies is "the law of nations").

236. *See* McConnell, *Natural Rights and the Ninth Amendment*, *supra* note 15, at 18.

liberty. Indeed, Article VI defines "the supreme Law of the Land" in purely positivist terms: the Constitution, acts of Congress, and treaties are "law." While the law of nations and reserved (but unenumerated) individual rights are acknowledged in the text of the Constitution and the Bill of Rights, the Supremacy Clause implies that they are subordinate to the "supreme Law of the Land," which was entirely positive.

II. THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE

In 1868, in the aftermath of the Civil War and the end of slavery, the nation adopted the Fourteenth Amendment. This Amendment was principally meant to secure the civil rights of the recently freed blacks against the states. It included a Due Process Clause that was unambiguously aimed at the states, but otherwise matched the language of the Fifth Amendment word for word: "No State shall . . . deprive any person of life, liberty, or property without due process of law."[237] At the time, no one suggested that due process had come to mean something different from what it had meant in 1791, and no one argued that the Fourteenth Amendment Due Process Clause would apply to the states differently from how the Fifth Amendment Due Process Clause had applied to the federal government, or from how state due process and law-of-the-land clauses had applied to state governments. Indeed, Ohioan John Bingham, the Fourteenth Amendment's most vocal advocate in the House of Representatives, when asked about the meaning of due process, declared that "the courts have settled [the meaning of due process of law] long ago, and the gentleman can go and read their decisions."[238]

Ryan Williams has argued that early-nineteenth-century courts applied the principle of due process to legislative acts in a novel way, akin to substantive due process, and therefore dubs the Fourteenth Amendment Due Process Clause as the "one and only *substantive* due process clause."[239] We disagree. Antebellum courts applied due process to state legislative acts in a way that was essentially consistent with pre-1791 due process. As we show in this Part, courts applied due process to two sorts of legislative acts: (1) acts that operated to deprive specific persons of liberty or vested property rights and (2) acts that abrogated key procedural protections of the common law. In evaluating the

237. U.S. CONST. amend. XIV, § 1.

238. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866); *see* Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164 (1992); Williams, *supra* note 7, at 479-81.

239. Williams, *supra* note 7, at 415.

constitutionality of both kinds of acts, courts based their judgments on separation-of-powers principles—not on higher law, reasonableness, or any other principle akin to substantive due process. Courts consistently labeled these forbidden statutes as "judicial acts" that usurped the role of the courts and violated both separation of powers and due process. Far from being novel, the rationale for these decisions echoes the due process arguments of Jefferson, Hamilton, Iredell, and other prominent American legal thinkers before 1791. We show in this Part that no court and few legal thinkers before the Fourteenth Amendment suggested that due process was a source of unenumerated and inviolable individual rights; rather, it was universally understood to guarantee individual rights of legal process that only courts could provide.

A. Due Process as a Limit on the Legislature's Power of Adjudication

In the first few decades after the adoption of the Bill of Rights, state and federal courts invalidated a number of legislative acts for depriving specific persons of rights without due process of law. The classic example was an act that took a vested property right from *A* and gave it to *B*. Underlying these decisions was a separation-of-powers logic: legislatures had the power to make law; based on the common law tradition and enlightenment political science, a law was distinguished from a judicial sentence by being prospective and for the general welfare; when a legislature deprived persons of life, liberty, or property by a retrospective and insufficiently general act, it violated due process (or law of the land) constitutional requirements. In this Section, we explain each step of this logic, analyze the most important opinions that rely on it, and sort the cases into categories based on the type of legislative act that was invalidated.

At the outset, to understand the early due process cases, one must abandon a narrow version of textualism that sorts cases by constitutional text. Courts used separation-of-powers logic to invalidate legislative acts under a variety of constitutional provisions. It would be a mistake, however, to conclude that these opinions were atextual or based on an unwritten constitution. In every instance, courts moored their judgment in one or more specific constitutional clauses, and they varied their analysis based on the precise terms of the applicable clause. When reviewing state statutes under the federal constitution, courts usually invoked the Contracts Clause[240] and, to a much lesser extent, the

240. *See, e.g.*, Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 416 app. at 686 (1829) (Johnson, J., concurring) (remarking that the whole vested-rights doctrine as applied through the Contracts Clause would have been obviated "by giving to the phrase ex post facto its original and natural application"); Trs. of Dartmouth Coll. v. Woodward, 17 U.S.

Ex Post Facto and Bill of Attainder Clauses.[241] Under state constitutions, litigants invoked state provisions guaranteeing jury trials,[242] separating the judicial from the legislative power,[243] guaranteeing the protection of "standing laws,"[244] or requiring that deprivations of life, liberty, or property be pursuant

(4 Wheat.) 518, 558 (1819) ("To justify the taking away of vested rights, there must be a forfeiture; to adjudge upon and declare, which is the proper province of the judiciary."); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (Story, J.) (refusing to give effect to a Virginia law transferring traditionally Anglican land from parish vestries to county overseers as a violation of the Federal Constitution); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137 (1810) (arguing that a grant is a "contract executed"); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800) (invalidating a state law divesting someone of property without compensation because it impaired the obligations of contract); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 320 (1795); Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 761 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.) ("[A] retrospective law is one, that takes away or impairs rights acquired by existing laws."). *Ogden v. Saunders* is particularly on point. That decision held that states may enact bankruptcy laws so long as they apply only prospectively to obligations made after the adoption of the regulation. 25 U.S. (12 Wheat.) 213, 273 (1827).

241. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866). In *Cummings*, the Court invalidated a Missouri statute that imposed a test oath to punish persons who had been Confederate sympathizers during the Civil War as a bill of attainder and ex post facto law. In the course of its opinion, the Court expressly linked the Ex Post Facto and Bill of Attainder Clauses to the Due Process Clause of the Fifth Amendment, describing all three provisions as protections from retroactive deprivations of "natural rights" in life, liberty, or property. *See id.* at 298. The same year, the Court held a similar test oath imposed by an act of Congress invalid as a violation of the Fifth Amendment's Due Process Clause. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 345-48 (1866).

242. Examples include the New Jersey Supreme Court's 1779 decision in *Holmes v. Walton*, *see supra* note 156, and the North Carolina Supreme Court's 1787 decision in *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787), both discussed *supra* Section I.D. *See also* Marcy v. Clark, 17 Mass. (16 Tyng) 330 (1821) (upholding a law making members of a manufacturing company personally liable for judgments against the company under the Massachusetts Constitution's law-of-the-land and jury trial clauses on the ground that the company represents its members' interests at trial); Emerick v. Harris, 1 Binn. 416 (Pa. 1808) (upholding a statute enlarging the jurisdiction of justices of the peace to twenty pounds from ten pounds under the jury trial clause of the Pennsylvania Constitution of 1790).

243. *E.g.*, Merrill v. Sherburne, 1 N.H. 199, 211-17 (1818) (opinion of Woodbury, J.) (invalidating an act awarding a new trial in an action that had been decided in a court of law under the New Hampshire constitution's separation-of-powers clause and retrospective-law clause); *see* N.H. CONST. of 1792, art. XXXVII, *reprinted in* 4 THORPE, *supra* note 136, 2471, 2475 ("In the government of this State, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.").

244. *E.g.*, Holden v. James, 11 Mass. (10 Tyng) 396, 405 (1814) (invalidating under the Massachusetts Constitution's standing-laws clause a special act suspending the statute of

to the law of the land[245] or with due process of law.[246] The Fifth Amendment Due Process Clause, of course, did not apply to state governmental action.[247] No matter which provision was invoked, the thrust of the court's rationale was always the same: due process and certain other specific limits on legislatures were separation-of-powers provisions designed to protect individuals from the deprivation of established rights without sufficient procedural safeguards.

1. Legal Principles

The strict separation of the judicial from the legislative power was a novelty of American constitutionalism. Under the unwritten British constitution, Parliament was not only a legislature in the modern sense, but also the "highest and greatest" court in the land,[248] with authority to "expound[]" the laws through declaratory acts, as well as to make or alter them.[249] The House of Lords served as the highest appellate court, adjudicating specific cases.[250]

limitations as to plaintiff's cause of action); *see* MASS. CONST. pt. I, art. X, *reprinted in* 3 THORPE, *supra* note 136, at 1888, 1891 ("Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to the standing laws.").

245. *See, e.g.*, Allen's Adm'r v. Peeden, 4 N.C. (2 Car. L. Rep.) 442, 442 (1816) (invalidating an act freeing a particular slave without his owner's consent as a violation of the state law-of-the-land clause); Norman v. Heist, 5 Watts & Sergt. 171, 173 (Pa. 1843) (invalidating the retrospective application of a statute granting an illegitimate child an interest in his deceased mother's estate as an unconstitutional deprivation of property belonging to the mother's other heirs as an "ex post facto [law] made for the occasion," in violation of the state constitution's law-of-the-land provision).

246. *See, e.g.*, Sadler v. Langham, 34 Ala. 311, 329 (1859) (invalidating the "transfer of property by mere legislative edict, from one person to another"); Sherman v. Buick, 32 Cal. 241, 249-50 (1867) (holding that the due process provision of the state constitution prohibits a statute authorizing taking property from one person and giving it to another); Bd. of Cnty. Comm'rs v. Carter, 2 Kan. 109, 123-29 (1863) (invalidating a retroactive statute that would have transferred property from one person to another); Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 411-12 (Md. 1838) (invalidating a statute taking property from the Regents and giving it to another); Townsend v. Townsend, 7 Tenn. (Peck) 1, 17-19 (1821) (invalidating a statute forcing creditors to accept devalued notes of certain banks in satisfaction of their debts).

247. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247, 250-51 (1833) (holding that the Bill of Rights does not apply against the states).

248. 1 WILLIAM BLACKSTONE, COMMENTARIES *161; *see* MCILWAIN, *supra* note 73, at 109-66 (discussing the judicial functions of "the High court of Parliament").

249. 1 WILLIAM BLACKSTONE, COMMENTARIES *160.

250. 3 *id.* at *55.

Blackstone refers to these powers as "judicial."[251] In pre-independence America, colonial legislatures frequently exercised the same judicial powers (subject, of course, to revision by the Privy Council and Board of Trade).[252] After Independence, however, under the influence of Montesquieu,[253] every state constitution adopted some version of separation of powers and assigned the ordinary judicial functions to an independent judicial department.[254] Outside Connecticut and Rhode Island, which continued to operate under their old royal charters and preserved the power of legislative adjudication until they adopted constitutions in 1818 and 1848, respectively,[255] the only major adjudicatory powers that state and federal legislatures continued to enjoy were the power to impeach government officials and the power to satisfy private claims on public debt.[256] All criminal and civil disputes between two private parties—all cases in which it was possible for a private citizen to "be deprived of life, liberty, or property"—were allocated to a separate judiciary. This paved the way for a new understanding of due process, where judicial (or "quasi-judicial," as we term them) acts of legislatures were not deemed to be "law."

251. 1 *id.* at *167.

252. *See* CAROLL T. BOND, THE COURT OF APPEALS OF MARYLAND: A HISTORY 2 (1928); Desan, *supra* note 212, at 1407-35 (exploring the function of colonial New York's General Assembly as a court of claims on public debt); Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1551 (1997); Barbara A. Black, The Judicial Power and the General Court in Early Massachusetts, 1634-1686, at 269-71 (Dec. 1975) (unpublished Ph.D. dissertation, Yale University) (on file with Stanford Law Library) (discussing the General Assembly in seventeenth-century Massachusetts as the General Court and, in effect, supreme court of the colony).

253. *See* MONTESQUIEU, THE SPIRIT OF THE LAWS, bk. XI, ch. VI, at 156-66 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. & eds., Cambridge Univ. Press 1989) (1748).

254. *See* ADAMS, *supra* note 132, at 264-69.

255. Christopher Collier, *William J. Hamersley, Simeon E. Baldwin, and the Constitutional Revolution of 1897 in Connecticut*, 23 CONN. L. REV. 31, 37 (1990) (noting that Connecticut's legislature was the highest court in the state under the state's founding documents and custom); Amasa M. Eaton, *The Development of the Judicial System in Rhode Island,* 14 YALE L.J. 148, 152-57 (1905) (noting that in Rhode Island, the legislature's judicial power seemed to be implied and customary).

256. Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 635-43 (1985); *see* Starr v. Pease, 8 Conn. 541 (1831); Taylor v. Place, 4 R.I. 324 (1856).

The "idea that the legislature can only make laws, or legislative enactments, as contradistinguished from judicial sentences and decrees,"[257] was an American constitutional innovation. But in determining the nature of the lawmaking power, courts relied on two common law principles. First, a law was prospective. In his chapter entitled "The Nature of Laws in General," Blackstone wrote that "[a]ll laws should be . . . made to commence *in futuro*."[258] As James Kent said, "The very essence of a law is a rule for future cases."[259] Laws said how subjects will be bound, while a judgment or sentence applied the existing law by which a subject had been bound. A writer in the *North American Review* in 1843 put it this way:

> Adopt, then, the most comprehensive and unlimited theory respecting the sovereignty of the people; say that they may frame what enactments they like, on all manner of subjects, or may even annul all existing statutes, and live without law for all time to come. Still their power relates only to the present and the future. The past is fixed and irrevocable. The sovereign may enact or abrogate what rules it pleases to govern coming events and the future conduct of men; but it cannot annul the rights, the contracts, and the expectations which have grown up under the laws that did exist.[260]

This prospectivity principle had deep roots in the common law. American courts routinely cited Coke,[261] Bracton,[262] Bacon,[263] Blackstone,[264] and

---

257. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 649 (John Norton Pomeroy ed., New York, Baker, Voorhis & Co., 2d ed. 1874) (1756) (emphasis omitted).

258. 1 WILLIAM BLACKSTONE, COMMENTARIES *46.

259. Dash v. VanKleeck, 7 Johns. 477, 502 (N.Y. Sup. Ct. 1811) (Kent, J.); *see also* Merrill v. Sherburne, 1 N.H. 199, 212 (1818) ("[T]he very nature and effect of a new law is a rule for future cases.").

260. Annual Message of the Executive to the General Assembly of Maryland (Dec. 1842), *in The Independence of the Judiciary*, 57 N. AM. REV. 400, 424-25 (1843).

261. *See, e.g.*, *Dash*, 7 Johns. at 502 (citing Dr. Bonham's Case, (1610) 77 Eng. Rep. 638 (C.P.) 652; 8 Co. Rep. 107 a, 118 a).

262. BRACTON, *supra* note 44, at 531 ("[E]very new constitution ought to impose a form upon future matters, and not upon things past.").

263. 6 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 370 (Philadelphia, Philip H. Nicklin 1813).

264. 1 WILLIAM BLACKSTONE, COMMENTARIES *46 ("All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term 'prescribed.'").

Mansfield[265] for the proposition that laws must be prospective.[266] But this idea could not have had real constitutional force against retrospective legislation as long as Parliament continued to engage in legislative adjudication, either through the enactment of laws "declaratory" of what the law (supposedly) always had been, or through the review of specific cases in the capacity of the highest court. After Americans abandoned the practice of legislative adjudication by confining Congress to certain enumerated "legislative" powers and prohibiting both federal and state legislatures from passing ex post facto criminal laws and retrospective impairments of the obligation of contract, the prospectivity principle and the due process principle became mutually reinforcing: if law must be prospective and rights can be deprived only pursuant to law, then retroactive deprivations, even pursuant to legislative action, are a violation of due process.

The line between prospective and retrospective legislation is illustrated by two famous antebellum cases, *Ogden v. Saunders*[267] and *Trustees of the University of North Carolina v. Foy*.[268] In *Ogden*, the Supreme Court held, over a dissent by Chief Justice Marshall, that the Contracts Clause protects *existing* contract rights from legislative abrogation, but does not limit the power of the legislature to regulate or prohibit the making of *future* contracts.[269] Similarly, in *Foy*, the North Carolina Supreme Court held that a statute designed to divert the university's income stream to the state was valid as to *future* payments, but invalid under the state law-of-the-land clause as to payments that had already

265. Couch v. Jeffries, (1769) 98 Eng. Rep. 290 (K.B.); 4 Burr. 2460.

266. *See, e.g.*, *Dash*, 7 Johns. at 484-85 (opinion of Spencer, J.) (citing Couch v. Jeffries, (1769) 98 Eng. Rep. 290 (K.B.); 4 Burr. 2460; Helmore (Gilmore) v. Shuter, (1678) 89 Eng. Rep. 348 (K.B.); 2 Show. 16); *id.* at 483 (opinion of Yates, J.) ("[T]his case is clearly distinguishable from a known vested right, to which the doctrine cited [by plaintiff] from 4 *Bac.* would apply; that no statute ought to have a retrospect beyond the time of its commencement . . . ."); *id.* at 495-96 (opinion of Thompson, J.) (citing 6 BACON, *supra* note 263, at 370; 1 WILLIAM BLACKSTONE, COMMENTARIES *46; 2 COKE, *supra* note 19, at 360 a); *id.* at 504 (opinion of Kent, C.J.) (citing Couch v. Jeffries, (1769) 98 Eng. Rep. 290 (K.B.); 4 Burr. 2460, 2462 (Mansfield, C.J.); 3 BRACTON, *supra* note 44, at 531); *see also* Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 768 (C.C.D.N.H. 1814) (Story, J.) (citing 3 BRACTON, *supra* note 44, at 531); James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 399 (1982) ("[E]very violation of a vested right was conceived to result from the retrospective application of a rule which did not exist at the time the individual's right had vested.").

267. 25 U.S. (12 Wheat.) 213 (1827).

268. 5 N.C. (1 Mur.) 58 (1805).

269. *Ogden*, 25 U.S. (12 Wheat.) at 295 (opinion of Thompson, J.).

been made.[270] These statutes failed not because of their "substance," but because of their attempted retroactive effect. By contrast, almost thirty years after ratification of the Fourteenth Amendment, in the decision generally regarded as the Supreme Court's first unequivocal "substantive due process" case, *Allgeyer v. Louisiana*,[271] the Court for the first time held that the Due Process Clause invalidated a prospective statute that prohibited entering into certain contracts.[272] This was the real novelty and the real break from the original meaning.

Second, in contrast to a judicial judgment, a law is "general and public."[273] It must operate on all persons "under like circumstances."[274] This, too, was a long-established principle of common law, but never fully realized in a system where Parliament could enact bills of attainder or render rulings in specific cases. John Locke regarded as central to civil liberty that society be governed by "a standing Rule to live by, common to every one of that Society."[275] Blackstone wrote that law is "not a transient sudden order . . . to or concerning a particular person; but something permanent, uniform, and universal."[276] Chief Justice Marshall put it this way: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."[277] This did not mean that a law had to apply universally to

270. *Foy*, 5 N.C. (1 Mur.) at 88-89.

271. 165 U.S. 578 (1897).

272. *Id.* at 592-93.

273. Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 270 (1829) (opinion of Catron, J.) (interpreting the state constitution's law-of-the-land clause).

274. Holden v. James, 11 Mass. (9 Tyng) 396, 405 (1814) (interpreting the state constitution's standing-law clause); *see also* Merrill v. Sherburne, 1 N.H. 199, 204 (1818) ("It is the province of judicial power also, to decide private disputes between or concerning persons; but of legislative power to regulate publick concerns and to make laws for the benefit and the welfare of the state." (citations and internal quotation marks omitted)); *id.* at 212 ("They must too in general, be rules prescribed for civil conduct to the whole community, and not a transient, sudden order from a superior to, or concerning a particular person. For . . . an act, which operates on the rights or property of only a few individuals, without their consent, is a violation of the equality of privileges guaranteed to every subject." (citations and internal quotation marks omitted)).

275. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); *see also* Ogden v. Blackledge, 6 U.S. (2 Cranch) 272, 277 (1804) (opinion of Marshall, C.J.) (appearing to accept without elaboration the rule of prospectivity when raised by counsel).

276. 1 WILLIAM BLACKSTONE, COMMENTARIES *44.

277. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

all persons. A law prohibiting minors from drinking alcohol, for example, would not have been regarded as insufficiently general. The antebellum decisions did not go so far as to subject legislative classifications to judicial review for reasonableness; the due process generality principle invalidated only laws that applied to fixed and identifiable individuals or groups.

It is important to note that "private statutes" that do not "deprive" anyone of "life, liberty, or property" were not thought to run afoul of due process, even if they violated the norms of separation of powers. Antebellum courts upheld private acts that were challenged on due process and separation-of-powers grounds precisely because the legislature had not deprived anyone of a right.[278] As one court put it: "[S]uch statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they forbear to interfere with past transactions and vested rights."[279] Thus, the separation-of-powers principles of prospectivity and generality are only incompletely protected by the Constitution. John Manning has recently reminded us that under a rigorous textual approach to constitutional interpretation, *abstract* separation-of-powers

278. *See, e.g.*, Bloomer v. McQuewan, 55 U.S. (14 How.) 539, 553 (1852) (interpreting a special statute extending the term of a patent to extend the term of the original assignment of the right to use the patent as well because "a special act of Congress, passed afterwards, depriving the appellees of the right to use [the patented articles], certainly could not be regarded as due process of law"); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 661 (1829) (upholding an act of the Rhode Island legislature ratifying a private sale of land because it was meant "not to destroy existing rights, but to effectuate them, and in a manner beneficial to the parties"); Rice v. Parkman, 16 Mass. (15 Tyng) 326, 329-31 (1820) (upholding a special act allowing a father to sell real estate in which his children retained an expectation interest under the Massachusetts Constitution's structure of separation of powers because it was for the benefit of all parties involved); Cochran v. Van Surlay, 20 Wend. 365, 373-74 (N.Y. Sup. Ct. 1838) (upholding a special act allowing a trustee to sell the vested remainder interests of a class of infants because the proceeds were to be used for their benefit); Stoddart v. Smith, 5 Binn. 355, 364 (Pa. 1812) (upholding a general and prospective Maryland law under the federal Contracts Clause because it (1) did not impair contracts but created a new remedy for default and (2) probably was passed before the contracts at issue in the case, which would not "impair[]" them); *Vanzant*, 10 Tenn. (2 Yer.) at 271 (opinion of Catron, J.) (upholding under the state constitution's law-of-the-land clause a special statute that altered the time when certain parties—creditors of two named banks—were required to appear in court for questioning because it did not deprive them of the ability to obtain a final judgment on the same grounds and at the same time as a prior statute). *But see* Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 71-72 (1836) (invalidating an act authorizing particular guardians to sell infants' property to pay particular debts because the "law of the land" requires "a general and public law, operating equally upon every member of the community").

279. *Merrill*, 1 N.H. at 204 (citation omitted).

principles are not a sufficient basis for judicial invalidation of legislation.[280] Courts, he argues, should invalidate an act of Congress on separation-of-powers grounds only when it violates a *specific* constitutional provision, such as the provisions in Article I that create a bicameral legislature or that vest the House with the power to impeach and the Senate with the power to try impeachments.[281] Manning does not discuss due process as an example of a more specific principle, but to us, it qualifies. Due process is not an abstract separation-of-powers principle; rather, it is the individual right to deprivation of life, liberty, or property upon adjudication by a court according to generally applicable laws. The separation-of-powers principles that antebellum courts relied on to determine whether a legislative act violated due process, though not moored in a specific provision of the Constitution, were not free-floating notions, either: because of the text of the Due Process Clause they applied only when the legislature had *deprived* someone of a right by effectively issuing a judicial sentence.

The nature of the liberty and property that could be deprived only with due process was likewise based on common law jurisprudence. Liberty was understood to be natural. People were born with natural liberty and were free to exercise it consistent with law. In the words of John Locke's *Second Treatise on Government*, civil liberty includes "a Liberty to follow my own Will in all things, where the Rule prescribes it not."[282] Liberty only where there was no contrary law was not a tautology. It distinguished a society where the government, with the consent of the governed, was authorized to proscribe certain behaviors to protect the whole society from two extremes: anarchy (where all could exercise liberty with complete license and no one's person or goods were secure) and slavery (where a ruler could impose rules arbitrarily, purely for personal benefit). Blackstone agreed with this definition of liberty. Like the right to life,[283] he wrote, personal liberty "is a right strictly natural,"[284] which may be abridged only with "the explicit permission of the laws."[285] The

280. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1988 (2011).

281. *Id.* at 2006-13.

282. LOCKE, *supra* note 275, at 284.

283. 1 WILLIAM BLACKSTONE, COMMENTARIES *130.

284. 1 *id.* at *134.

285. *Id.*; *see* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 909 (1993) ("[U]nder civil government—that is, under secular government and its legal system—natural liberty was available only as permitted by civil law."). At least one court determined that "every man has a natural right to exercise" employment in an occupation—which means that the legislature could limit that right

most influential state constitutions of the era bear out this understanding: the Pennsylvania (1776), Virginia (1776), and Massachusetts (1780) constitutions acknowledged that citizens had a "natural" right in "enjoying and defending their lives and liberties."[286] This basic form of natural liberty was the freedom to "remov[e] one's person to whatsoever place one's own inclination may direct,"[287] but it also included the freedom to engage in the basic cooperation that is constitutive of human life, or "civil liberties" such as the freedom to worship according to conscience, to work, to contract for goods and labor, and to raise a family. All of these natural liberties could be abridged by general and prospective law.[288] Most American constitutions went a step further, and expressly put certain of these natural liberties beyond the reach of government at all. The First Amendment's protections of the freedom of religious exercise, speech, and the press are prime examples. That was the point of the command that "Congress shall make no law . . . ."[289] Liberties not singled out for constitutional protection continued to enjoy the same protection they had enjoyed since Magna Charta: the guarantee that they could not be taken away except by the law of the land, which entailed both a generally applicable law and its application to a specific case by a court.

The rights of property were more difficult to define. Property is different from liberty because property is acquired pursuant to the laws of society rather than being inherent in the nature of human life. Locke asserted that property existed in the state of nature and was acquired by use. He recognized, however, that "in Governments, the laws regulate the right of property, and the possession of land is determined by positive constitutions."[290] Similarly, Blackstone emphasized that though "the original of private property is

through a licensing system or outright prohibition. Portland Bank v. Apthorp, 12 Mass. 252, 256 (1815) (opinion of Parker, C.J.); *see id.* at 258 ("Every man has the implied permission of the government to carry on any lawful business; and there is no difference in the right, between those which require a license and those which do not, except in the prohibition, either express or implied, where a license is required.").

286. MASS. CONST. pt. I, art. I, *reprinted in* 3 THORPE, *supra* note 136, at 1888, 1889 (enumerating the rights of "enjoying and defending . . . lives and liberties" and "acquiring, possessing, and protecting property"); PA. CONST. of 1776, art. I, *reprinted in* 5 THORPE, *supra* note 136, at 3081, 3082 (enumerating the rights of "enjoying and defending life and liberty, acquiring, possessing and protecting property"); VA. CONST. of 1776, § 1, *reprinted in* 7 THORPE, *supra* note 136, at 3812, 3813 (enumerating the right to "enjoyment of life and liberty, with the means of acquiring and possessing property").

287. 1 WILLIAM BLACKSTONE, COMMENTARIES *134.

288. *See, e.g.*, *Apthorp*, 12 Mass. at 256.

289. U.S. CONST. amend. I.

290. LOCKE, *supra* note 275, at 302.

probably founded in nature, . . . certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society."[291] To be sure, the right of "acquiring, possessing, and protecting property"[292] is natural and was understood to be part of natural liberty. But the right to particular property required acquisition of title in accordance with the common law; in particular, it was inextricably bound up with remedies available pursuant to an elaborate system of writs and court procedures.[293]

We may be able to *do* whatever we wish (unless there is a law against it), but we cannot *own* whatever we wish. Liberty exists unless the law says otherwise; property exists only if the law has recognized it.[294] Importantly, unlike liberties, which usually may be exercised simultaneously by everyone (my freedom of worship coexists with yours), property is an exclusive right to control the use of land or some other thing. Only one person or group can own a particular thing. Charters, money, land, chattel, choses in action, commercial instruments, and under some circumstances public offices were property at common law, and infringements of those property rights were remedied in court through a system of writs. To be sure, the rhetoric of the ancient constitution included assertions that English political rights were a form of property, as Madison repeated in a speculative essay,[295] but this theory had no basis in the practice of law in England or early America. As James Kainen has shown, it was not until the late nineteenth century that courts began to apply this more capacious conception of property, a move that in part generated *Lochner*-style substantive due process.[296]

By and large, early American courts focused their protection of property rights from legislative deprivations of "vested" property rights. These were marked by finality. They had been conclusively acquired pursuant to the

291. 1 WILLIAM BLACKSTONE, COMMENTARIES *138.

292. See the state constitutional provisions cited *supra* note 286.

293. *See* Daniel J. Hulsebosch, *The Anti-Federalist Tradition in Nineteenth-Century Takings Jurisprudence*, 1 N.Y.U. J.L. & LIBERTY 967, 977-78 (2005).

294. Modern Supreme Court doctrine reflects this distinction, but with a twist. The Supreme Court holds that "liberty" is defined by federal constitutional law and "property" is most often defined by state positive law. *See* Bd. of Regents v. Roth, 408 U.S. 564 (1972). This imports into the distinction two institutional dichotomies: judicial versus legislative, and state versus federal.

295. *See* James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266-68 (Robert A. Rutland et al. eds., 1983) (defining "property" to include all legal rights).

296. Kainen, *supra* note 266, at 387-92.

positive law in effect at the time of acquisition. An expectation in a right that might be secured by law in the future was not vested, and neither was a right "to a particular remedy."[297] For example, in *Marbury v. Madison*, the Supreme Court held that the right to a commission vested in the appointee upon the signature of the President, attested by the seal of the United States.[298] Before that, the commission could be revoked; after that, the officeholder could be removed only through the forms of law.

Legal scholars have offered various interpretations of the logic underpinning vested rights.[299] We believe that the doctrine was based fundamentally on the separation of powers: courts invalidated legislative acts to protect vested rights because the acts were quasi-judicial "sentences" rather than genuine "laws."

Both Joseph Story and Theodore Sedgwick, the two leading antebellum constitutional treatise writers, described laws devesting vested property rights as "acts of a judicial nature,"[300] or the exercise by the legislature of "judicial functions."[301] Sedgwick provided the clearest explication of the idea. He explained that the doctrine of vested rights is "summed up in the idea that the

297. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 361 (Boston, Little, Brown 1868).

298. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162 (1803).

299. For a good, albeit somewhat dated, overview of the history, see Kainen, *supra* note 266, at 388-97. The classic statements include EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT 72 (1948); EDWARD S. CORWIN, THE TWILIGHT OF THE SUPREME COURT: A HISTORY OF OUR CONSTITUTIONAL THEORY 55-70 (1934); HAINES, *supra* note 59, at 304-05, 339-41; CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 88-95 (1930); CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835, at 32-40 (1960); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 456-57 (2d ed. 1978); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 258 (1914); Corwin, *supra* note 5, at 376-77; Ely, *supra* note 6, at 345; and William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1166 (1972). For more recent scholarship on the topic, see JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 59-82 (3d ed. 2008), which identifies natural law as the origin of vested-rights doctrine; ORTH, DUE PROCESS OF LAW, *supra* note 12, at 48-49, 91-93; Orth, *Taking from A*, *supra* note 12; and Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1423 (1999).

300. SEDGWICK, *supra* note 257, at 604.

301. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1392, at 266-67 (Boston, Hilliard, Gray & Co. 1833).

legislature can only make laws, or legislative enactments, as contradistinguished from judicial sentences and decrees."[302] Moreover,

> [i]f we renounce, as I think we must, the idea that the validity of a law can be determined by the judiciary on abstract notions of justice and right . . . then . . . no other restriction can be imposed on legislative action except such as is derived from the idea . . . expressed with equal clearness in the guaranty of the law of the land, that legislative power only is granted to it, and that vested rights of property can only be interfered with by it so far as is competent to be done by the enactment of laws.[303]

Whether or not these arguments are convincing by contemporary lights,[304] this was the orthodox constitutional theory when the Fourteenth Amendment was crafted, and was how an informed reader of the Fourteenth Amendment text would have understood the words "due process." The antebellum courts did not take upon themselves the power to evaluate the abstract reasonableness or justice of legislation, and they did not operate on the assumption that due process limited legislative sovereignty as to matters of substance. To them, the central feature of the law of the land, as applied to legislatures, was that legislatures were limited to making general and prospective law.

These differences between liberty and property meant that the prospectivity and generality principles applied differently to a claimed deprivation of liberty versus a claimed deprivation of property. Once a person had exercised a natural liberty, in a manner consistent with the positive law existing at the time of the act, the prospectivity principle precluded subsequent acts of legislation to

---

302. SEDGWICK, *supra* note 257, at 649 (emphasis omitted).

303. *Id.* (emphasis omitted).

304. The doctrine of vested rights depended on a definition of property based on exclusive rights with respect to identifiable tangible or intangible "things" (the word used by Blackstone); it could not include mere expectancies or rights to engage in future acquisition. Legal Realists regarded this understanding of property as incoherent. *See, e.g.*, Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY: NOMOS XII 69 (J. Roland Pennock & John W. Chapman eds., 1980); Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 364 (1980). Some modern scholars have defended the traditional understanding. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 782-89 (2001). But whichever scholars are most persuasive on this conceptual point, there is no serious dispute that the antebellum vested-rights cases, which formed the backdrop for adoption of the Due Process Clause of the Fourteenth Amendment, were based on this pre-Realist definition. For an illuminating exposition of this point, from a critical point of view, see Kainen, *supra* note 266, at 381, 404.

punish the conduct.[305] This principle did not, however, preclude the legislature from passing laws regulating or even forbidding such acts in the future, assuming such legislation was within the enumerated authority of the legislative body and there was no enumerated constitutional reservation of the particular right. Similarly, once a person had acquired property pursuant to the positive law existing at the time of the acquisition, the prospectivity principle precluded subsequent acts of legislation nullifying the acquisition. This principle did not, however, preclude the legislature from passing general laws regulating certain uses of property by all persons, or from passing laws regulating or forbidding particular modes of property acquisition or contract formation in the future. Nor did it prohibit the government from retrospective nullification of title to property if the government provided just compensation.[306]

The generality requirement also applied differently to claims of liberty and property. The liberty claims that have featured in modern substantive due process cases have been on behalf of all persons. Everyone has a right to make contracts to sell their labor (*Lochner*[307]), everyone has a right to engage in intimate relations with persons of either gender (*Lawrence*[308]), everyone has the right to control who may associate with one's children (*Troxel*[309]), and so forth. Thus the principle of generality plays no part in the analysis of these claims. In contrast with modern substantive due process, the vested-rights cases invariably involved exclusive rights of determinate persons. Until *Wynehamer*,[310] which we discuss below, no case invalidated a law that restricted the use of an entire category of property rights, even if that law effectively made the property contraband.

2. Illustrative cases

Henry St. George Tucker's commentary on Congress's punishment of Robert Randall, and five early and influential cases, *Calder v. Bull*,[311] *Dash v.*

305. *See, e.g.*, *In re* Dorsey, 7 Port. 293 (Ala. 1838) (invalidating a statute requiring state officials to swear they had never participated in a duel).

306. See the discussion of eminent domain *infra* Subsection II.A.3.

307. Lochner v. New York, 198 U.S. 45 (1905).

308. Lawrence v. Texas, 539 U.S. 558 (2003).

309. Troxel v. Granville, 530 U.S. 57 (2000).

310. Wynehamer v. People, 13 N.Y. 378 (1856).

311. 3 U.S. (3 Dall.) 386 (1798).

Van Kleek,[312] *Society for the Propagation of the Gospel v. Wheeler*,[313] *Hoke v. Henderson*,[314] and *Bloomer v. McQuewan*[315] illustrate these principles.

a. The Randall Affair

Robert Randall was the first person in the American Republic known to have asserted a violation of the Fifth Amendment Due Process Clause. In 1795, Randall tried to bribe a few members of the House of Representatives to grant him land in the Northwest Territory. Upon discovery of the scheme, the Speaker of the House ordered the Sergeant at Arms to take Randall into custody. The House voted him guilty of "contempt and of a breach of the privileges of the House" and ordered him detained indefinitely.[316] Randall protested that he had been arrested, tried, convicted, and imprisoned without due process of law in violation of the Fifth Amendment; the House disagreed.[317]

Later, though, Henry St. George Tucker, a prominent Virginia Jeffersonian jurist, took up Randall's cause in his influential 1803 commentary on Blackstone.[318] Tucker maintained that the House had violated due process of law by punishing Randall without indictment or presentment of a grand jury, and without conviction by an impartial jury of the state and district where the crime had been committed. The congressional contempt proceeding, he argued, violated all of these due process protections.[319] Tucker's explanation is the first extended legal analysis of the recently enacted Clause, and thus warrants quotation at length. Observe the way in which Tucker weaves together the principles of due process and governmental structure:

> By the amendments to the constitution, no person shall be deprived of life, liberty, or property, without due process of law.

---

312. 7 Johns. 477 (N.Y. Sup. Ct. 1811).

313. 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156).

314. 15 N.C. (4 Dev.) 1 (1833).

315. 55 U.S. (14 How.) 539 (1852).

316. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 232 (1997) (quoting 5 ANNALS OF CONG. 219 (1796)).

317. *See id.* at 234 n.238.

318. *See* 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA *203-06 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER'S BLACKSTONE].

319. *Id.*

> Due process of law as described by sir Edward Coke I, is by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law. Due process of law must then be had before a judicial court, or a judicial magistrate. The judicial power of the United States is vested in one supreme court, and such inferior tribunals, as congress may establish, and extends to all cases in law and equity, arising under the constitution, &c. . . . In the distribution of the powers of government, the legislative powers were vested in congress . . . the executive powers (except in the instances particularly enumerated,) in the president and senate. The judicial powers (except in the cases particularly enumerated in the first article) in the courts: the word *the*, used in defining the powers of the executive, and of the judiciary, is, with these exceptions, co-extensive in it[s] signification with the word *all*: for all the powers granted by the constitution are either legislative, and executive, or judicial; to keep them for ever separate and distinct, except in the cases positively enumerated, has been uniformly the policy, and constitutes one of the fundamental principles of the American governments.
>
> . . . .
>
> . . . It will be urged, perhaps, that the house of representatives of the United States is, like a British house of commons, a judicial court: to which the answer is, it is neither established as such by the constitution (except in respect to its own members,) nor has it been, nor can it be so established by authority of congress; for all the courts of the United States must be composed of judges commissioned by the president of the United States, and holding their offices during good behaviour, and not by the unstable tenure of biennial elections.[320]

To Tucker, then, due process means judicial process, and is tied to the "fundamental principle[] of the American governments" that legislative, executive, and judicial powers must be kept "for ever separate and distinct." Significantly, the two houses of Congress had been granted quasi-judicial authority only with respect to their own members; for them to order the imprisonment of a nonmember was a usurpation of the judicial role and thus a denial of due process. To this fundamental concern, Tucker added other constitutional failures of the contempt proceedings. The House arrested Randall without a warrant "supported by 'oath or affirmation'";[321] held Randall to answer for "an infamous crime[] without indictment or

320. *Id.* at *203-04 (second alteration in original).

321. *Id.* at *204.

presentment of a grand jury";[322] and tried him of a crime without a public trial by "an impartial jury of the state and district" where he committed the crime.[323] These specific derelictions reinforced Tucker's fundamental point that a legislative body is incapable of providing due process of law—essentially the same point Hamilton had made in the New York assembly.

Randall's imprisonment by order of the House of Representatives established a precedent that due process does not preclude the houses of Congress from punishing nonmembers for contempt. Whatever the merits of that position, which to us seems dubious,[324] the precedent remains authoritative to this day.[325] Tucker's treatment of the issue, however, was an early argument by a leading lawyer that the Due Process Clause applies to legislative action, draws much of its content from the separation of powers, and prohibits Congress from exercising quasi-judicial power to deprive an individual of liberty.

Tucker also had occasion to analyze the Due Process Clause in the context of the Alien Acts, which (among other things) gave the President unilateral authority to declare particular aliens traitors and to banish them from the United States. Tucker argued that the statute

> seems impossible to validate, unless we could conceive that aliens are not persons, that the suspicions of a president of the United States are a probable cause supported by oath, or affirmation; that the opinion or judgment of a president is a trial by jury and a conviction, (in case of treasonable acts) upon the testimony of two witnesses; and that neither imprisonment, nor banishment, is any deprivation of personal liberty.[326]

---

322. *Id.*

323. *Id.* at *205.

324. We do not doubt the power of Congress to enact laws making contempt of Congress a crime, but to us it would seem more consistent with due process for Congress to refer any cases of contempt for prosecution in the courts, at least where the sanction is detention or fine. This power of contempt appears to derive from parliamentary practice under *lex parliamenti*. *See* CHAFETZ, *supra* note 83, at 193-235. We think it is notable that the U.S. Constitution expressly adopts the customary rules of *lex parliamenti* as to certain housekeeping functions of the houses of Parliament, *see id.*, but not as to contempt of nonmembers.

325. *See* McGrain v. Daughtery, 273 U.S. 135 (1927) (upholding the power of the Senate to imprison a nonmember to coerce compliance with a subpoena to testify before a Senate committee); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (upholding the power of the House to imprison a nonmember as punishment for contempt).

326. 2 TUCKER'S BLACKSTONE, *supra* note 318, at *137 n.24.

The interesting point here is not the substance of Tucker's understanding of what due process requires, that no one may be deprived of personal liberty (including imprisonment or banishment) except by trial and conviction by a jury on charges based on probable cause supported by oath. That understanding was conventional. Chancellor Kent, from the Federalist side of the spectrum, described it as "a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken, or imprisoned, or disseised of his freehold, or liberties, or estate, or exiled, or condemned, or deprived of life, liberty, or property, unless by the law of the land, or the judgment of his peers."[327] The interesting point is that Tucker regarded the statute itself, the Alien Act, as invalid on due process grounds, and not merely the President's acts pursuant to the statute. This demonstrates that Tucker believed that due process was more than the requirement that courts and executive officers follow the law; it was a limitation on the legislature itself, preventing the legislature from authorizing courts and executive officers to invade rights without the traditional protections of probable cause and trial by jury. This principle is the nub of the modern doctrine of procedural due process, which tests the procedures provided by the legislature against enduring constitutional standards.

b. Calder v. Bull

In *Calder v. Bull*,[328] a party who had lost a probate dispute on appeal to the Connecticut General Assembly argued to the Supreme Court that the legislature's decision was an ex post facto law in violation of Article I, Section 10 of the United States Constitution. The Connecticut government operated under its 1662 charter until 1818, and under that charter the General Assembly operated as the highest judicial court, in addition to also being the legislature.[329] Three of the four Justices of the United States Supreme Court concluded that the General Assembly had acted pursuant to this traditional judicial power. If so, they decided, the Ex Post Facto Clause did not apply. An exercise of the General Assembly's judicial power did not amount to a "law."[330] Even if the act *did* amount to a law, these Justices further held, it would not

327. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 9-10 (New York, O. Halsted 1827).

328. 3 U.S. (3 Dall.) 386 (1798).

329. *Id.* at 395 (opinion of Paterson, J.); *see* Styles v. Tyler, 30 A. 165 (Conn. 1894); Collier, *supra* note 255, at 37 (noting that Connecticut's legislature was the highest court in the state under the state's founding documents and custom).

330. *Calder*, 3 U.S. (3 Dall.) at 398 (opinion of Iredell, J.) (noting that, in this case, Connecticut's legislature acted as a court, not as a legislative department).

violate the Ex Post Facto Clause because that Clause applied only to statutes that would result in criminal punishment for past actions, and not to civil matters like probate.[331]

Justice Samuel Chase was not content to leave it at that. He offered a structural analysis examining the legality of the General Assembly's act even on the assumption that it was legislative and not judicial in nature. He based his analysis on a confusing mixture of the textual provisions of Article I, Section 10 and what he called "general principles of law and reason."[332] This has led most observers to assume that Chase believed the judiciary could invalidate state law on the basis of principles of "reason" not embodied in the text of the United States Constitution.[333] A close examination of his opinion, however, reveals that his discussion of "general principles of law and reason" was in support of his interpretation of the meaning of separation of powers, and specifically his view that "legislative" power is limited to the passage of general and prospective rules of conduct. It was not an invocation of "natural law" in the sense of fundamental rights superior to positive law. He wrote:

> 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. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish

331. *Id.* at 399.

332. *Id.* at 388 (opinion of Chase, J.).

333. *See, e.g.*, CURRIE, *supra* note 12, at 46-48.

> innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.[334]

After considering the distinctions in principle between judicial and legislative authority, Chase turned to the prohibitions placed on the states by Article I, Section 10. The prohibitions on bills of attainder and ex post facto laws, he argued, are of a piece.[335] Though "legislative judgments," they are "an exercise of judicial power."[336] The other provisions of Article I, Section 10 relate to the rights of "property, or contracts."[337] He summed up these provisions, prohibiting state legislatures from authorizing paper money as legal tender and passing laws impairing the obligation of contracts, as reflecting the principle that "[i]t is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws; unless for the benefit of the whole community, and on making full satisfaction."[338]

Chase's dictum has often been cited as evidence of his willingness to go beyond the strictures of the written Constitution, and apply unwritten general principles of reason or natural law to state enactments, contrary to the Tenth Amendment, in the name of the United States Constitution. Some of his language certainly points in that direction. The key sentence is this: "To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."[339] Modern interpreters read this to say that these constitutional limitations would exist even if there were no express restraints such as the Ex Post Facto, Due Process, or Contracts Clauses.[340] Actually, in light of Blackstonian equitable interpretive vocabulary, his point was different: that the legislature should not be "presumed" to act contrary to these principles.[341]

---

334. *Calder*, 3 U.S. (3 Dall.) at 388-89 (opinion of Chase, J.) (emphases omitted).

335. *Id.* at 389.

336. *Id.*

337. *Id.* at 390.

338. *Id.* at 394.

339. *Id.* at 388-89.

340. *See, e.g.*, CURRIE, *supra* note 12, at 46-48.

341. *See* Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 403-06 (2004) (rejecting the common claim that *Calder* is properly viewed as allowing judicial invalidation of state laws abridging natural rights).

The "general principles" to which he refers are themselves based on separation of powers and the attendant limitations on state legislation. Chase argues that the central theme of the Bills of Attainder, Ex Post Facto, and Contracts Clauses of Article I, Section 10 is to prohibit state legislatures from exercising essentially judicial power to deprive subjects of property "rights vested in them by existing laws."[342] His explanation is in substance quite similar to Tucker's explanation of due process as the general principle that ties together the constitutional prohibitions on the exercise of quasi-judicial power by the federal legislature. Chase's confusing discourse was countered by Justice Iredell's clear and unequivocal opinion stating that the courts have no authority to exercise judicial review on the basis of unwritten principles.

c. Dash v. Van Kleeck

In *Dash v. Van Kleeck*,[343] the New York Supreme Court similarly struggled with the implications of the separation of powers for the practice of legislative adjudication. The facts in *Dash* were complicated. Jason Rudes was sentenced to debtors' prison but was released on bond so long as he remained within a certain area, known as gaol-liberties. On May 18, 1807, Rudes traveled outside the gaol-liberties, though he immediately returned. Under the law as then interpreted by the New York courts, a creditor could sue the sheriff for permitting a debtor to escape these bounds, and Rudes's creditor Dash did so. In April 1810, after Dash filed suit, but before it went to judgment, the legislature passed a statute declaring that a sheriff could claim as a defense to suit the capture or voluntary return of the debtor to prison before the creditor filed suit. The case presented the question whether this statute could constitutionally be applied to a suit that was pending when it was passed.[344]

The five justices entered seriatim opinions. They all agreed that the act would be constitutional as applied to suits that were not pending when it was passed.[345] The only question was whether the New York Constitution forbade the retrospective application of the act to pending suits. Two of the justices thought that the statute did nothing more than to "explain[] the true

342. *Calder*, 3 U.S. (3 Dall.) at 394 (opinion of Chase, J.).

343. 7 Johns. 477 (N.Y. Sup. Ct. 1811).

344. *Id.* at 477-79.

345. *Id.* at 482 (opinion of Yates, J.); *id.* at 486-87 (opinion of Spencer, J.); *id.* at 495 (opinion of Thompson, J.); *id.* at 502 (opinion of Kent, C.J.) ("The very essence of a new law is a rule for future cases.").

construction of the former statutes,"[346] contrary to the prior judicial interpretation. As such, it did not create a new rule of law.[347] Further, they noted that "[t]here is nothing in the state constitution to prevent legislative interference."[348] Justice Spencer even argued that the state legislature had the same supremacy as a court of last resort as Parliament:

> The construction of statutes, undoubtedly, is a judicial function, subject, however, to the uncontrollable power of the legislature, to alter that construction in cases which have not passed to judgment; and I must insist, that our state legislature, when acting within the pale of the constitutions of the United States and of this state, has the same omnipotence which Judge Blackstone ascribes to the British parliament: "It has sovereign and uncontrollable authority, in the making, confirming, restraining, abrogating, repealing, reviving and *expounding* of laws, concerning all matters of all possible denominations."[349]

Chief Justice Kent wrote an influential opinion to the contrary.[350] He based his judgment on "principles of law and the constitution."[351] The first legal principle he cited was that "[t]he very essence of a new law is a rule for future cases."[352] He contrasted this common law rule with the Roman rule that the

---

346. *Id.* at 483 (opinion of Yates, J.); *see also id.* at 487 (opinion of Spencer, J.) ("[The later statute] is, in effect a declaratory statute; in form, a directory one . . . . If it was competent to the legislature to alter the law retrospectively, it appears to me that they have effectually done it.").

347. *Id.* at 484 (opinion of Yates, J.) ("[T]he legislature were possessed of competent authority to pass this declaratory act; and that the defendant is entitled to his defence, as at common law, according to the construction given to the former statutes by this last law . . . .").

348. *Id.* at 483; *see also id.* at 488 (opinion of Spencer, J.) ("It is in vain to search for any prohibition in the state constitution . . . .").

349. *Id.* at 492-93 (opinion of Spencer, J.) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *160).

350. *Id.* at 500 (opinion of Kent, C.J.). Justice Van Ness joined Kent's opinion. *Id.* at 513. Justice Thompson wrote a separate opinion that matched Kent's reasoning and judgment. *Id.* at 493-500 (opinion of Thompson, J.). In *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814), Justice Story, riding circuit, cited the authority of Chief Justice Kent's opinion alongside *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and added that he "should be disposed to go a great way with the learned argument of Chief Justice Kent." *Wheeler*, 22 F. Cas. at 767.

351. *Dash*, 7 Johns. at 501 (opinion of Kent, C.J.).

352. *Id.* at 502; *see also id.* at 503 ("It is a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. . . . This was the doctrine as laid down by [Bracton and Coke]. [I]t received a solemn

prince may adopt retrospective laws, "for the will of the prince, under the despotism of the Roman emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial from the legislative power was not then distinctly known or prescribed."[353] This is where Kent transitioned to "the constitution":

> Our case is happily very different from that of the subjects of Justinian. With us, the power of the lawgiver is limited and defined; the judicial is regarded as a distinct, independent power: private rights have been better understood and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the Roman prince; and the principle we are considering is now to be regarded as sacred. It is not pretended that we have any express constitutional provision on the subject; nor have we any for numerous other rights dear alike to freedom and to justice.[354]

Kent thus makes clear that he was not reasoning from an express constitutional prohibition on retrospective laws, but from the constitutional separation of powers. He does not here link these principles to New York's due process clause (though, as we will show, he had already done so as a member of the New York Council of Revision), but the effect of his separation-of-powers reasoning was the same. His decision does not turn on natural law,[355] but on the prospective "essence" or "nature" of lawmaking, as contrasted with retrospective quasi-judicial legislative acts. At pre-Revolutionary common law, prospectivity was merely a principle of statutory construction because, as Justice Spencer emphasized, Parliament had authority to pass declaratory acts, as did many of the colonial and early state legislatures. It was the separation of the judicial from the legislative power effected by New York's written constitution that converted that principle into a constitutional command.

d. Society for the Propagation of the Gospel v. Wheeler

The principles of prospectivity and generality were not always self-defining. In a case resting on New Hampshire's express constitutional

recognition in the Court of K. B. [in *Gilmore v. Shuter*]." (emphasis omitted) (citations omitted)).

353. *Id.* at 504-05.

354. *Id.* (emphases omitted).

355. *Contra* Williams, *supra* note 7, at 448 & n.170.

prohibition on "[r]etrospective" laws, which went beyond the Ex Post Facto Clause by applying to civil as well as criminal laws,[356] Justice Joseph Story rendered the leading interpretation of what it meant for a civil law to be "retrospective"—an interpretation still authoritative today.[357] In *Society for the Propagation of the Gospel v. Wheeler*,[358] a British corporation (which happened to be the missionary arm of the Church of England) sued for possession of land in New Hampshire, which had been occupied for some time by New Hampshire tenants. At the time it acquired the land, the corporation gained title and "an absolute and unconditional right to [its] remedy for the possession, clear of any incumbrance, freely and without purchase."[359] Years later, the New Hampshire legislature enacted a law entitling tenants to the value of any improvements they made to a leasehold.[360] At trial, the jury required the landowner to compensate the tenants for the improvements they had made to the land.[361]

The federal court, sitting in diversity, held that the act violated article 23 of the New Hampshire Constitution, which provided that "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offences."[362] This required an interpretation of the term "retrospective." In one sense, the New Hampshire law was prospective: it applied only to improvements made after the statute was enacted. In another sense, it altered the rights the plaintiff had acquired under the law applicable at the time of the acquisition. Justice Story thus was forced to interpret the constitutional terms:

> What is a retrospective law, within the true intent and meaning of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage? [O]r does it embrace all statutes, which, though operating only from their passage, affect vested rights and past

356. N.H. CONST. of 1792, art. XXIII, *reprinted in* 4 THORPE, *supra* note 136, at 2471, 2474.

357. *See* Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 37 (2006).

358. 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.).

359. *Id.* at 759 (internal quotation marks omitted).

360. *Id.* at 767-68.

361. *Id.* at 769.

362. N.H. CONST. of 1792, art. XXIII, *reprinted in* 4 THORPE, *supra* note 136, at 2474. Before reaching that determination, Story concluded that the enactment violated neither the federal Contracts Clause as interpreted in *Fletcher v. Peck*, 10 U.S. 6 (Cranch) 87 (1810), because it touched only property and not contract rights, nor the federal Ex Post Facto Clause as interpreted in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), because it affected only civil and not criminal rights. *Wheeler*, 22 F. Cas. at 767.

> transactions? It would be a construction utterly subversive of all the objects of the provision, to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly. *Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .*[363]

Applying this test to the case at bar, Justice Story concluded that the statute was unconstitutional. It amounted to "a direct extinguishment of a vested right in all the improvements and erections on the land, which were annexed to the freehold."[364] Justice Story referred to Bracton and other common law principles of "natural justice" to *interpret* the New Hampshire Constitution's express prohibition on "retrospective" laws. Contrary to Ryan Williams's assertion,[365] Justice Story was not applying *natural law* in the sense of unwritten universal rights, and he was not ignoring a due process clause. He simply pointed out that New Hampshire's express constitutional provision, which itself referred to justice, was in accord with common law views of natural justice.[366]

e. Hoke v. Henderson

Hoke v. Henderson[367] was a more problematic attempt to deal with the ambiguities of generality and prospectivity. Under North Carolina law, court clerks were to "*hold their offices during their good behaviour*" so long as they continued to reside in the county.[368] Under the common law, such an office was recognized as a form of property.[369] In 1832, however, the legislature

363. *Wheeler*, 22 F. Cas. at 767 (emphasis added). Justice Story relied upon the reasoning in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, and *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y. Sup. Ct. 1811), stating that "in a fit case, depending upon elementary principles, I should be disposed to go a great way with the learned argument of Chief Justice Kent." *Wheeler*, 22 F. Cas. at 767. The Supreme Court recently invoked this construction of retroactivity in *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 37 (2006).

364. *Wheeler*, 22 F. Cas. at 768.

365. Williams, *supra* note 7, at 448 & n.170.

366. For instance, he cited Bracton's principle that a law must govern only future cases, "nova constitutio futuris formam imponere debet, & non praeteritis." *Wheeler*, 22 F. Cas. at 768 (quoting 3 BRACTON, *supra* note 44, at 530).

367. 15 N.C. (4 Dev.) 1 (1833).

368. *Id.* at 10.

369. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *36.

passed a one-time act that required all county clerks to stand for election,[370] following which they would return to good-behavior tenure. Lawson Henderson, who had been appointed a clerk for Lincoln County in 1807, was defeated by John Hoke.[371] Henderson refused to relinquish the office, leading to a suit by Hoke against Henderson.[372] Chief Justice Ruffin, writing for the North Carolina Supreme Court, described the statute as one that "transfer[red] the office of clerk from one of these parties to the other, without any default of the former, or any judicial sentence of removal"[373] and held that it was an invalid exercise of the General Assembly's power under the state law-of-the-land and separation-of-powers clauses.[374] Much of the court's analysis consisted of now-familiar discussion of separation-of-powers principles. Ruffin began by comparing the purely legislative powers of the General Assembly with the adjudicative powers that were exercised by Parliament. Parliament, he wrote, "decides questions of private right" and puts those decisions "into the form of a statute."[375] He continued:

> [Parliament] can adjudicate and often does substantially adjudicate, when it professes to enact new laws. That faculty is expressly denied to our Legislature, as much as legislation is denied to our Judiciary. Whenever an act of the Assembly therefore is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right: which is not a legislative, but a judicial function.[376]

Chief Justice Ruffin then stated the general rule that "where a right of property is acknowledged to have been in one person at one time and is held to cease in

370. *Hoke*, 15 N.C. (4 Dev.) at 2 (reproducing the 1832 enactment's text).

371. *Id.* at 1.

372. *Id.*

373. *Id.* at 7.

374. *Id.* at 12, 30-31; *see also* N.C. CONST. of 1776, art. XII, *reprinted in* 5 THORPE, *supra* note 136, at 2787, 2788 ("[N]o freeman ought to be taken, 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 law of the land." (emphasis added)); *id.* art. IV, *reprinted in* 5 THORPE, *supra* note 136, at 2787 ("[T]he legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other.").

375. *Hoke*, 15 N.C. (4 Dev.) at 12.

376. *Id.* at 12-13.

him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*."[377]

While noting that the common law deemed public office as a property right—an "*incorporeal hereditament*[]"[378] to be technical—Chief Justice Ruffin argued that a public office is different from many other kinds of property. It is subject to "the general interest,"[379] and, unlike most other kinds of property, it is inalienable and may be forfeited as punishment for mismanagement.[380] Nonetheless, the emoluments of the office are the officeholder's "private property, as much as the land which he tills, or the horse he rides or the debt which is owing to him."[381] The office "cannot be divested without some default of the officer, or the *cesser* [i.e., expiration] of the office itself."[382] He also stated:

> Creating a right or conferring it on one, when not already vested in another, is legislation. So prescribing the duties of officers, their qualifications, their fees, their powers and the consequences of a breach of duty, including punishment and removal, are all political regulations, and fall within the legislative province. But to inflict those punishments, after finding the default, is to adjudge; and to do it, *without* default, is equally so and still more indefensible.[383]

Chief Justice Ruffin reasoned that the legislature had deprived Henderson of a vested property right in his office by requiring an election that would result in the office's being transferred to another. But the form of the legislation was not specific as to him; the legislation requiring clerks to submit to reelection applied equally to all counties in the state of North Carolina. Was it really, therefore, a sentence? An adjudication? Ruffin struggled with the issue. He noted that "[i]f the act . . . had been confined in its terms to the clerkship of Lincoln, its judicial character would be obvious."[384] We would add that if the act had applied to all clerk positions into the future, switching from good-behavior tenure to periodic election, its legislative character would have

377. *Id.* at 13.

378. *Id.* at 7.

379. *Id.* at 19.

380. *Id.* at 19-20.

381. *Id.* at 18-19.

382. *Id.* at 19.

383. *Id.* at 15.

384. *Id.* at 13.

been equally obvious. This act seemed to be general in one respect and special in another.

Chief Justice Ruffin seemed to recognize that he was venturing into uncharted waters by invalidating as a "judicial" act a statute that was in some sense general on its face. To resolve the problem, he invoked a distinction between legislation that transfers ownership of property from one class of persons to another, and legislation that modifies or abolishes the property right itself: the legislature may "destroy[]" property created by statute, "but it cannot continue the office, and either lessen the tenure of the incumbent, or transfer it to another."[385] He thus "readily conceded" that the legislature had the power "of abolishing the office altogether," but denied that it could exercise the power "of depriving the officer of his office, while it continues."[386] The decision may be seen as a precursor to cases like *Board of Regents v. Roth*,[387] which held that the terms of public employment—pay, emoluments, duties, and the like—may be altered prospectively, by legislative action, but that removing a person from a public office, once it has vested according to the terms of the positive law in force at the time,[388] requires process either from a court or from an administrative substitute satisfying the criteria of notice and the opportunity to be heard.

f. Bloomer v. McQuewan

The Supreme Court's first decision mentioning the Fifth Amendment's Due Process Clause, *Bloomer v. McQuewan*,[389] decided three years before the better-known *Murray's Lessee v. Hoboken Land & Improvement Co.*,[390] invoked both generality and prospectivity. The case involved a federal act that extended the term of a specific patent. The Court had to determine whether the extension also effectively extended the original assignment of the right to use the patent, or whether the patent holder could reassign the patent, within its extended term, after the original assignment had been set to end. The Court interpreted the statute to extend not only the term of the patent, but also the

385. *Id.* at 26.

386. *Id.*

387. 408 U.S. 564 (1972).

388. In *Roth*, the Court did not use the nineteenth-century vocabulary of "vesting," but spoke instead of a "legitimate claim of entitlement," such as tenure. *Id.* at 577. We regard this as an equivalent, if looser, term.

389. 55 U.S. (14 How.) 539 (1853).

390. 59 U.S. (18 How.) 272 (1856).

term of the assignment. This was because "a special act of Congress, passed afterwards, depriving the appellees of the right to use [the patented articles], certainly could not be regarded as due process of law."[391] It would be hard to summarize the antebellum due process doctrine more succinctly.

3. Categories of Impermissible Quasi-Judicial Acts

a. An Act That Takes from A *and Gives to* B

Writing in 1829, Joseph Story explained:

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.[392]

The law that takes property from *A* and gives it to *B* was the paradigmatic example of an impermissible quasi-judicial act.

The earliest such cases were *Symsbury's Case*[393] and *Bowman v. Middleton*,[394] both of which involved conflicting grants of land by colonial legislatures. Both posed a conflict between the ordinary "last in time" rule that in the event of inconsistent laws by a single legislature, the later-enacted law controls, and the principle, traced to Magna Charta, that once property vested pursuant to legislative grant, subsequent legislatures did not have power to take it away.[395] The judges in *Bowman* determined that

> the plaintiffs could claim no title under the [later-enacted] act in question, as it was against common right, as well as against magna charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even the trial by a jury of the country, to determine the right in question. [The later act] was, therefore, ipso facto, void.[396]

391. *Bloomer*, 55 U.S. (14 How.) at 553.

392. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829) (Story, J.).

393. 1 Kirby 444 (Conn. 1785); *see* HAMBURGER, *supra* note 37, at 332 n.5.

394. 1 S.C.L. (1 Bay) 252 (1792).

395. *See* HAMBURGER, *supra* note 37, at 330-36.

396. *Bowman*, 1 S.C.L. at 254-55.

Trustees of the University of North Carolina v. Foy,[397] which we briefly cited as an application of the prospectivity rule, was one of the most influential early state law-of-the-land cases. The court's judgment relied expressly on separation-of-powers principles. In 1789, the North Carolina legislature granted "all the property that has heretofore or shall hereafter escheat to the state" to the Trustees of the University of North Carolina.[398] In 1800 the legislature prospectively repealed the statute, and declared that all properties that the university had been granted under the 1789 statute that it had not yet sold "shall from hence revert to the state, and henceforth be considered as the property of the same."[399] The trustees of the university sued, arguing that clawing back the unsold real estate violated the state constitution, as a "deprivation" of "property" "in violation of the law of the land."[400]

The State made two principal arguments in response: (1) that as the creator of the corporation through charter, it necessarily had the power to destroy the corporation;[401] and (2) the law of the land either did not apply to the legislature or did not apply to taking the property of corporations (as opposed to natural persons).[402]

Judge Locke, for the court, invalidated the law on two independent constitutional grounds, only one of which is relevant here: that the law was invalid under the state law-of-the-land clause because it was an exercise of judicial power by the legislature. According to Judge Locke, the law-of-the-land clause

> warrant[s] a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or property, unless by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution.[403]

397. 5 N.C. (1 Mur.) 58 (1805).

398. *Id.* at 81 (quoting Act of 1789, ch. 21, § 2, 1715-1790 N.C. Sess. Laws 474).

399. *Id.* at 81 (quoting Act of 1800, ch. 5, § 2, 1791-1803 N.C. Sess. Laws 150).

400. *See id.* at 61 (argument of Mr. Haywood, counsel for the plaintiffs).

401. *See id.* at 85.

402. *See id.* at 87.

403. *Id.* at 88.

There was some disagreement among early courts over whether the property rights of corporations were constitutionally protected,[404] but the North Carolina court took the affirmative side of that dispute. The court noted that "the Trustees are a corporation established for public purposes,"

> yet we conceive that circumstance will not make the property of the Trustees subject to the arbitrary will of the Legislature. The property vested in the Trustees must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body.[405]

The court's definition of law of the land did limit the legislature, but it limited it from depriving specific persons of property without "a trial by Jury in a court of Justice" and without "the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution." This is not akin to modern substantive due process. This is an individual freedom against the deprivation of rights except by a court in accordance with the separation of powers.

One of the most influential due process cases in the antebellum era was *Taylor v. Porter*.[406] A New York statute required town highway commissioners, upon an application by a private citizen and certification of need by twelve local freeholders, to divest a landowner of land and vest it in the applicant for a private road. The applicant was to pay the original landowner the value of the

---

404. *See, e.g.*, Turpin v. Lockett, 10 Va. (6 Call.) 113, 170 (1804) (Roane, J., concurring) ("[T]his position of vested rights, only extends to such private and perfect rights, as are not hostile to the principles of the government.").

405. *Foy*, 5 N.C. (1 Mur.) at 89. Judge Hall dissented, concluding that the law was constitutional because the Legislature had the authority as the branch assigned by the Constitution to create a university to judge the best way to provide for that university. He made no comment on the trustees' law-of-the-land argument. *Id.* at 89-92.

406. 4 Hill 140 (N.Y. Sup. Ct. 1843) (opinion of Bronson, J.); *see* Williams, *supra* note 7, at 464-65 (describing Justice Bronson's opinion in *Taylor* as "famous"); *id.* at 474 ("In 1854, Representative Gerrit Smith of New York, a former presidential candidate of the anti-slavery Liberty Party, invoked Justice Bronson's *Taylor v. Porter* decision."); *id.* at 475 ("[A]bolitionists Joel Tiffany and William Goodell both published treatises seeking to establish the unconstitutionality of slavery in which they equated 'due process' with judicial process and simultaneously invoked Justice Bronson's 1843 decision in *Taylor v. Porter*." (footnote omitted)); *id.* at 476 (claiming that *Taylor* represented the "most common" theory of due process advanced by abolitionists—viz., "that the due process guarantee protects individuals against deprivations of rights except as punishment for a crime"); *id.* at 491 (noting that Dean John Norton Pomeroy of the Law School of the University of New York quoted *Taylor* in his treatise "to demonstrate the meaning of 'due process of law'").

land, determined by a jury of six freeholders from a neighboring town. The road was then entirely private, "for the use of such applicant, his heirs and assigns."[407] Justice Bronson, writing for the New York Supreme Court, put the issue squarely:

> The property of A. is taken, without his permission, and transferred to B. . . . Whatever sum may be tendered, or however ample may be the provision for compensation, the question still remains, can the legislature compel any man to sell his land or his goods, or any interest in them, to his neighbor, when the property is not to be applied to public use?[408]

Justice Bronson held that the Act was unconstitutional, for authorizing deprivations of property without due process of law. He first stated that the Act was not included in the power of eminent domain, because that extended only to land taken for public use, not land taken from one private party and given to another.[409] He then asserted that his "present impressions" were that the New York Constitution's assignment of the "legislative power" to the General Assembly did not authorize it to pass acts taking property from *A* and giving it to *B*.[410] But he did not rely on the grant of legislative power because he thought the law-of-the-land clause and especially the due process clause were on point.

> The words "due process of law," in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be "due process of law." Perhaps the whole clause [the law-of-the-and and due process clauses] should be read together, and then if it do not, as I have supposed, amount to a direct prohibition against taking the property of

407. *Taylor*, 4 Hill at 142 (quoting 1 R.S. 513, § 54, 77-79).

408. *Id.* at 143.

409. *Id.*

410. *Id.* at 145.

> one and giving it to another, it contains, at the least, an implication too strong to be resisted that such an act cannot be done.[411]

The result is highly reminiscent of Justice Thomas's dissenting opinion in *Kelo v. City of New London*.[412]

b. An Act That Takes Land for Public Use Without Compensation

In Britain the power of eminent domain was customarily exercised by Parliament through special acts—laws specifying particular property to be taken for a public use—with just compensation. The compensation in effect satisfied due process concerns because provision of equivalent value obviated any deprivation.[413] It was not until the 1770s that Parliament authorized the executive to exercise eminent domain for the purpose of building highways, and then it required the approval of two justices, with a jury trial if the justices disagreed about the amount of compensation.[414] The practice in the colonies, too, was to provide for compensation through the political process either by statute or by jury trial.[415] Only two colonial charters guaranteed just compensation for a taking;[416] otherwise, it was merely customary.[417] Two early

---

411. *Id.* at 147 (citation omitted); *cf. In re* Albany St., 11 Wend. 149 (N.Y. Sup. Ct. 1834) (invalidating a state statute under the state takings clause insofar as it authorized commissioners to take a whole parcel of private land for the use of New York City when only a portion of the parcel was necessary for a public street). Another similar case is *In re John & Cherry Streets*, 19 Wend. 659 (N.Y. Sup. Ct. 1839), which invalidated a state statute under the state due process and takings clauses insofar as it authorized commissioners to entirely divest a private party of land and give it to the corporation of New York City for nonpublic use. This decision resembles Justice O'Connor's dissenting position in the recent case of *Kelo v. City of New London*, though the latter was based on the "public use" language of the Takings Clause rather than on due process. *See* 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting).

412. 545 U.S. at 505 (Thomas, J., dissenting).

413. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *138-39; EMER DE VATTEL, THE LAW OF NATIONS, bk. 1, ch. 20, §§ 244-46, at 232-33 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758).

414. MCDONALD, *supra* note 129, at 22.

415. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 787 (1995).

416. MASSACHUSETTS BODY OF LIBERTIES § 8 (1641), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 148, 149 (Richard L. Perry & John C. Cooper eds., 1952) [hereinafter SOURCES OF OUR LIBERTIES] (requiring "reasonable prices and hire" for public use of "Cattel or goods" and "suffitient[] recompence[]" if the "Cattle or goods shall perish or suffer damage"); FUNDAMENTAL CONSTITUTIONS OF CAROLINA, art. XLIV (1669), *reprinted in*

constitutions—those of Massachusetts and Vermont—made just compensation for takings a constitutional requirement, as did the Bill of Rights.[418] Even in states without an explicit just compensation clause, however, some courts concluded that due process required a certain judicial procedure for determining how much compensation was due.[419]

Just a few years after adoption of the Bill of Rights, in *Lindsay v. Commissioners*,[420] the South Carolina Supreme Court considered the validity of an act authorizing the City of Charleston to appoint three commissioners to take certain private lands for a public street, "and to assess the owners of lots near or adjoining to it, in proportion to the benefit they were likely to receive by it."[421] One of the landowners sued for a prohibition against the taking, arguing that the act authorized the commissioners to take land without consent, jury trial, or adequate compensation in violation of the state constitution's law-of-the-land and jury trial clauses.[422] The former provided that "[n]o freeman of this State shall 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."[423] The latter provided that "[t]he trial by

5 THORPE, *supra* note 136, at 2778 ("The damage the owner of such lands (on or through which any such public things shall be made) shall receive thereby shall be valued, and satisfaction made by such ways as the grand council shall appoint.").

417. Hulsebosch, *supra* note 293, at 977; Treanor, *supra* note 415, at 787.

418. MASS. CONST. pt. I, art. X, *reprinted in* 3 THORPE, *supra* note 136, at 1888, 1891 ("[W]henever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor."); VT. CONST. of 1777, ch. I, art. II, *reprinted in* 6 THORPE, *supra* note 136, at 3737, 3740 ("[W]henever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money."); *see also* Northwest Ordinance of 1787, art. 2, *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 416, at 392, 395 ("[S]hould the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same.").

419. *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (C.C.D. Pa. 1795); *see also* Gardner v. Trs. of the Vill. of Newburgh, 2 Johns. Ch. 162, 167-68 (N.Y. Ch. 1816) (concluding on the evidence of natural equity, English customary law, state constitutions, and the Fifth Amendment Takings Clause that it was the "sense of the people of this country" that every exercise of eminent domain requires just compensation); Hulsebosch, *supra* note 293, at 977 (discussing *Gardner*).

420. 2 S.C.L. (2 Bay) 38 (Ct. App. 1796).

421. *Id.* at 38-39 (quoting the 1795 statute).

422. *Id.* at 40.

423. S.C. CONST. of 1790, art. IX, § 2, *reprinted in* 6 THORPE, *supra* note 136, at 3258, 3264.

jury . . . shall be forever inviolably preserved."[424] The South Carolina Constitution did not have a just compensation clause—though interestingly, there had been such a clause in the colonial charter prior to independence.

The city recorder defended on the ground that the power of eminent domain had been "recognised by magna charta and confirmed to the state by our own constitution."[425] He admitted

> that the legislature had no authority to interfere between individuals in relation to their private property, and by an act in a shorthanded way to change the rights of the parties and to take the property from A. and give it to B. This, he said, was against both *magna charta* and our own constitution.[426]

But a taking for a public use, he argued, was in accord with the law.

The court split. Two of the judges voted to uphold the law.[427] The exercise of eminent domain, they concluded, was "part of the lex terrae, which both [Magna Charta and the law-of-the-land clause] meant to defend and protect."[428] They appeared to agree that just compensation was required under the law of the land, but they believed that the city's assessment of the land's value and offer of compensation were sufficient.

The other two judges thought the law was invalid as a legislative deprivation of property against the law of the land. Judge Burke wrote that the law of the land required that exercises of eminent domain be coupled with "fair compensation made to the private individual, for the loss he might sustain by it, to be ascertained by a jury of the country."[429] Judge Waties agreed, but elaborated. He cited Vattel, Bynkershoek, and Blackstone to the effect that the government may exercise the power of eminent domain, but only with just compensation.[430] He then cited an act of Parliament authorizing the taking of private land that provided for a jury trial (upon demand) on the issue of what amount of compensation would be just.[431] Quoting the law-of-the-land clause, he asserted that "[t]he rights of our citizens are not less valuable than those of

424. *Id.* § 6, *reprinted in* 6 THORPE, *supra* note 136, at 3258, 3264.

425. *Lindsay*, 2 S.C.L. (2 Bay) at 42.

426. *Id.*

427. *Id.* at 56.

428. *Id.* at 57.

429. *Id.* at 58.

430. *Id.*

431. *Id.* at 58-59.

the people of *England:* we have besides a constitution, which limits and controls the power of the legislature."[432] He maintained that the constitution prohibited the legislature from depriving a freeman of his property, "but by such means as are authorized *by the ancient common law of the land*," which, in this case, required full compensation.[433]

c. An Act That Revises a Charter or Revokes a Land Grant

We have already seen that British and American Whigs before and during the Revolution thought that Parliament violated due process when it altered the charters of the East India Company and the colony of Massachusetts. The point was that Parliament could not act like a court by passing a special bill that deprived a certain party of rights without providing basic common law procedures such as notice and a hearing. In effect, valuable rights acquired through a charter were conceptualized as a form of property, which could not be taken away except by means of generally applicable legislation administered by courts. When states separated the judicial from the legislative powers, the same logic led jurists to conclude that state legislatures could not pass statutes singling out particular charters for special deprivation.

The New York Council of Revision, a body that reviewed proposed legislation for constitutionality and public policy, provided two early examples. In 1803, the Council considered a bill that amended the charter of the Corporation of the City of New York without its consent. Chief Justice James Kent, who sat on the Council, objected to the charter revision on the ground that it would breach the Crown's covenant with the city, which guaranteed that its charter provisions would "be valid and effectual" "notwithstanding any statute of Parliament, or any act of Assembly."[434] Without appealing to the New York Constitution, Kent advised against the act as a "dangerous precedent" because,

> if the alterations contained in the said bill can be made without the consent of the corporation, the charter may with equal right be altered in other particulars, and may even be destroyed whenever it shall seem meet to the Legislature. And not only this, but every other charter, and

432. *Id.* at 59.

433. *Id.*

434. ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 424 (Albany, William Gould 1859).

> every grant from government can be altered or resumed at pleasure, for they all rest upon the same foundation.[435]

The General Assembly enacted the bill over Kent's objection.[436]

Four years later the Council considered a bill that would have altered the charter of Columbia College. The Council noted that "[t]he right in question has received the repeated and explicit sanction of government [through original charter, constitutional provisions, and statute], and it has thereby acquired all the security which any grant or chartered right can receive under the Constitution and the law of the land."[437] This time Chief Justice Kent wrote for a united Council (including Governor Lewis and Justice Thompson) that explicitly rejected the bill as a violation of due process of law:

> It is a sound principle in free governments, and one which has received frequent confirmation by the acts of the Legislature, that charters of incorporation, whether granted for private or local, or charitable, or literary or religious purposes, were not to be affected without due process of law, or without the consent of the parties concerned.[438]

Kent added that an abrogation of the charter could perhaps be justified "by some strong public necessity," but "no such necessity is presumed to exist in the present case."[439] The bill died.[440]

The separation-of-powers logic also makes sense of the first decision by the full Supreme Court to invalidate a state act under the Contracts Clause, *Fletcher v. Peck*.[441] Under the influence of bribes, the Georgia legislature had sold most of what is now Alabama and Mississippi for pennies an acre. The next year the legislature repealed the grant. Peck later acquired some of the land and sold it to Fletcher, who sued him for breach of covenant title because the grant had been repealed.[442] The Court invalidated the act revoking the land grant as an

---

435. *Id.* at 425.

436. *Id.* at 405, 423-25.

437. *Id.* at 344.

438. *Id.* at 345.

439. *Id.*

440. *Id.*

441. 10 U.S. (6 Cranch) 87 (1810); *cf.* Wales v. Stetson, 2 Mass. (2 Tyng) 143 (1806) (interpreting a statute authorizing toll gates on turnpike roads narrowly to authorize them only on private roads, and not on roads where the public had an easement, because the statute would then operate to retrospectively divest the public of a right to use the road without a toll).

442. *Fletcher*, 10 U.S. (6 Cranch) at 92.

interference with the state's contract with the buyers, in violation of either "general principles which are common to our free institutions, or . . . the particular provisions of the constitution of the United States."[443] Chief Justice Marshall, writing for the Court, determined that "when absolute rights have vested," under a statutory grant, "a repeal of the law cannot devest those rights."[444] He continued:

> To the legislature, all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.
>
> It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.[445]

One might think that the revocation of a land grant should be analyzed as a taking of property, but neither of the two federal constitutional provisions that govern deprivations of property, the Just Compensation and Due Process Clauses of the Fifth Amendment, applied to state governments. The Court therefore turned to the Contracts Clause as its ground for decision. Chief Justice Marshall reasoned that a grantor implicitly promises not to revoke its grant, constituting a binding contract. Revocation of the grant would therefore impair "the obligation of [that] contract[]" in violation of the Contracts Clause.[446] The correctness of the decision might well be questioned on the ground that the Contracts Clause might have been understood to apply only to private contracts;[447] extension of the principle to legislative promises produces conundrums about whether a legislature can bargain away the constitutional authority of successor legislators.[448] The significant point for our purposes, however, is that Marshall applied the same sort of separation-of-powers logic to the Contracts Clause that courts generally applied to questions of vested rights.

---

443. *Id.* at 139.

444. *Id.* at 135. It is unclear whether Chief Justice Marshall meant that Georgia lacked the power to revoke the grant under general principles notwithstanding the Constitution. *See* CURRIE, *supra* note 12, at 130-32.

445. *Fletcher*, 10 U.S. (6 Cranch) at 136.

446. *Id.* at 138.

447. *See* McConnell, *supra* note 205, at 290 & n.106.

448. *See* Kainen, *supra* note 266, at 405-06.

Daniel Webster's argument in *Trustees of Dartmouth College v. Woodward*[449] was even more paradigmatic of due-process-as-separation-of-powers logic. Webster argued that an act of the New Hampshire legislature that divested one named private corporation, the Trustees of Dartmouth College, of its rights pursuant to a royal charter violated the state constitution's law-of-the-land clause because the charter rights were taken away without "judgment of [their] peers, or the law of the land."[450] Webster first argued that the corporation and its trustees had property rights that were protected by the law-of-the-land clause, and concluded, as did the justices in *Trustees of the University of North Carolina v. Foy*,[451] that corporate property is protected.[452] Webster then argued that the act infringed the thirty-seventh article of the New Hampshire Constitution, which provided that the powers of government shall be kept separate:

> By these acts, the legislature assumes to exercise a judicial power. It declares a forfeiture, and resumes franchises, once granted, without trial or hearing. If the constitution be not altogether wastepaper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is, that the legislature shall pass no act directly and manifestly impairing private property, and private privileges. It shall not judge, by act. It shall not decide by act. It shall not deprive, by act. But it shall leave all these things to be tried and adjudged by the law of the land.[453]

Webster passed directly from this argument based on the separation of powers to an argument based on the fifteenth article of the state constitution, which provided that no one shall be deprived of "property, immunities, or privileges, but by the judgement of his peers or the law of the land."[454] The New Hampshire court had admitted that the property rights of the corporation and trustees were privileges protected under the law-of-the-land clause, but had said that it was difficult to know whether the legislative act under question

---

449. 17 U.S. (4 Wheat.) 518 (1819); *see also* COOLEY, *supra* note 297, at 353-54 (noting that "[n]o definition [of due process] is more often quoted" than Webster's); JOHN M. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES 207-08 (St. Louis, G.I. Jones & Co. 1879) (recounting Webster's arguments).

450. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 561.

451. 5 N.C. (1 Mur.) 58 (1805); *see supra* notes 397-405 and accompanying text.

452. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 561, 580.

453. *Id.* at 579 (emphasis omitted).

454. *Id.* at 580 (quoting N.H. CONST. of 1792, art. XV, *reprinted in* 4 THORPE, *supra* note 136, at 2471, 2473).

was a law of the land.[455] Webster's reply, which has been cited as a "substantive" interpretation,[456] was actually nothing more than a reiteration of Hamilton's point that legislatures are limited by due process and law-of-the-land principles, and that they cannot enact quasi-judicial measures that are tantamount to a judicial sentence. Citing Coke and Blackstone, Webster argued that the challenged acts of the legislature were "particular" rather than "general," and were "sentences" rather than "laws."[457] He offered this interpretation of "the law of the land":

> 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. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land.[458]

Chief Justice John Marshall decided the case on the grounds of the Contracts Clause, and not the Due Process Clause (which did not apply to the states), but his rationale tracked Webster's.[459]

d. Laws That Reduce Procedural Protections for a Small Class of Citizens

Courts likewise invalidated laws that reduced procedural protections for a small class of citizens.[460] The cases wedded the generality requirement with a

455. *See id.* at 550-51.

456. *See, e.g.*, Williams, *supra* note 7, at 424-25.

457. *Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 581-82.

458. *Id.*

459. *Id.* at 627; *see also id.* at 675, 689 (Story, J.) (noting that the royal charter provided that donations to the corporation would be administered by the trustees for the purpose of the corporation without interference by the Crown, unless "taken away by due process of law," which Justice Story interpreted to mean "without the consent of the corporation"); *id.* at 705 (arguing that each trustee has an individual legal interest in his office "and it cannot be divested but by due course of law").

460. Reed v. Wright, 2 Greene 15, 23-25 (Iowa 1849) (invalidating a state statute providing special procedures for settling title to Native American lands as a "special and limited act" against

concern about departure from traditional procedural protections that was ultimately moored in the Due Process Clause by the Supreme Court in such cases as *Murray's Lessee v. Hoboken Land & Improvement Co.*[461] and *Hurtado v. California*,[462] discussed below.[463] Two of the most important of these hybrid cases were *Holden v. James*[464] and *Bank of the State v. Cooper*.[465]

In *Holden*, the Massachusetts Supreme Court invalidated a special bill that allowed the plaintiff to sue the defendant after the statute of limitations had run. Article 10 of the Declaration of Rights provided that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to *standing laws*."[466] Although another provision of the constitution gave the legislature "the power of suspending the laws, or the execution of the laws,"[467] the court interpreted that provision as allowing only the suspension of a law in its entirety, not merely "for the government of one particular case."[468] The court explained this interpretation by reference to "the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws," which forbid "*that any one citizen* should enjoy

the state constitution's due process clause); Holden v. James, 11 Mass. (9 Tyng) 396, 401-03 (1814) (invalidating a special act suspending the statute of limitations as to plaintiff's cause of action under the Massachusetts Constitution's standing-laws clause); Baker v. Kelley, 11 Minn. 480, 496-97 (1865) (invalidating a state statute precluding the use of certain evidence as proof of title to land); Merrill v. Sherburne, 1 N.H. 199, 216-17 (1818) (invalidating an act granting a new trial to plaintiff under the New Hampshire Constitution's separation-of-powers guarantee clause and retrospective-laws clause); Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 71-72 (1836) (invalidating special legislation authorizing particular guardians to sell infants' property to pay particular debts and defining the "law of the land" to mean "a general and public law, operating equally upon every member of the community"); Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 605 (1831) (invalidating a statute establishing a specially constituted court to hear and decide all claims against a particular bank as a "partial . . . law" prohibited by the law-of-the-land provision). See also the case of *Champion v. Casey* (C.C.D.R.I. 1792), which invalidated a special act of the Rhode Island Assembly giving defendant three years to settle his accounts with British creditors without arrest or attachment as a violation of the federal Contracts Clause. The court's decision was unreported. For one account of the decision, see 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 66-68 (1922).

461. 59 U.S. (18 How.) 272 (1855).

462. 110 U.S. 516 (1884).

463. *See infra* note 635 and accompanying text.

464. 11 Mass. (9 Tyng) 396.

465. 10 Tenn. (2 Yer.) 599.

466. MASS. CONST. pt. I, art. X, *reprinted in* 3 THORPE, *supra* note 136, at 1888, 1891 (emphasis added).

467. *Holden*, 11 Mass. (9 Tyng) at 404.

468. *Id.* at 405-06.

privileges and advantages which are denied to all others under like circumstances."[469]

Citing this language, some scholars have claimed that this decision was based on "natural law," making it an example of treating natural law as superior to positive law.[470] On the contrary, the decision was based on the "standing law" clause of the Declaration of Rights, and the court invoked "natural justice" solely as a ground for a narrow interpretation of the legislature's power to suspend the execution of the laws. As such, it was a classic example of due process reasoning, based on the generality principle.

Similarly, in *Cooper,* the Supreme Court of Tennessee invalidated a statute that created a special court to hear claims brought by the Bank of Tennessee against certain officers, sureties, and defaulters. For that limited class of claims and parties, the statute replaced common law procedures and a jury trial with a court sitting at equity and no right of appeal.[471] Citing *Fletcher v. Peck* and *Holden v. James*, Justice Green focused chiefly on the partial nature of the law:

> If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others. . . . Two important privileges, the trial by jury, and the right of appeal, are by this act taken away in these special cases, while every other member of the community, having incurred similar liabilities, enjoys them. The fact that the persons embraced in this act form a class of the debtors to the bank, tends no more to give it the character of a general law than if the act had operated on one individual debtor only, whose case might have some peculiarity distinguishing it from that of all other debtors. Other banks, and many merchants, and many other members of the community, have contracts similar to the one set out in this bill. In order to have avoided the force of the objection to this act, it should have operated equally on all these; and because it has not done so, it is not "the law of the land."[472]

e. Wynehamer v. People

The first major antebellum case to go beyond these traditional, and limited, understandings of due process was the New York Court of Appeals' decision in

469. *Id.* at 405 (emphasis added).

470. *See, e.g.*, Williams, *supra* note 7, at 448 & n.170.

471. Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 599-600 (1831).

472. *Id.* at 606-08.

Wynehamer v. People.[473] In *Wynehamer*, the court invalidated a statute prohibiting the sale of liquor, reasoning that the law effectively deprived liquor owners of their property without compensation or judicial process in violation of the law-of-the-land and the due process clauses of the state constitution.[474] Regulation of this sort was entirely consistent with the reasoning of "vested" rights cases because it involved general and prospective laws that merely limited the use of property without taking it. The statute did not transfer a property right from *A* to *B*, and it applied generally to all property owners in a similar situation.

Would something have to give, however, when a statute effectively obliterated the value of an entire category of property (as opposed to merely restricting its use)? That was the issue in *Wynehamer*. Departing from the prevailing notion of due process, the New York Court of Appeals effectively treated the right to sell a certain kind of property (as opposed to manufacture, keep, or drink it) in the state of New York (as opposed to in a neighboring state or abroad) as inviolable. Additionally, *Wynehamer* involved limitations on the use of property, rather than transferring title to property from one person to another or to the state. It thus seemed to anticipate the regulatory-takings doctrine of *Pennsylvania Coal Co. v. Mahon*.[475] No antebellum case treated the regulatory destruction of the *value* of property as an impermissible deprivation of property; indeed, this was precisely the doctrinal move Chief Justice Ruffin declined to make in *Hoke v. Henderson*.[476] *Wynehamer* was immediately controversial,[477] and although Indiana courts had adopted a position similar to *Wynehamer*'s,[478] at least three other states that had adopted the vested-rights doctrine upheld prohibition statutes similar to the one struck down in *Wynehamer*.[479] Furthermore, the United States Supreme Court later upheld a similar Kansas statute against a Fourteenth Amendment due process challenge[480]—even though that statute declared all personal property used to

473. 13 N.Y. 378 (1856).

474. *Id.* at 378.

475. 260 U.S. 393 (1922).

476. 16 N.C. (4 Dev.) 1 (1833); *see supra* notes 367-388 and accompanying text.

477. Williams, *supra* note 7, at 468-69; *cf.* ELY, *supra* note 1, at 16 (declaring *Wynehamer* and *Dred Scott* "aberrations neither precedented nor destined to become precedents themselves").

478. Herman v. State, 8 Ind. 545 (1855) (invalidating a state law prohibiting the sale of liquor on similar grounds as *Wynehamer*); Beebe v. State, 6 Ind. 501 (1855) (same).

479. *See, e.g.*, Fisher v. McGirr, 67 Mass. (1 Gray) 1 (1854); State v. Gallagher, 4 Mich. 244 (1856); Lincoln v. Smith, 27 Vt. 328 (1855).

480. Mugler v. Kansas, 123 U.S. 623 (1887).

manufacture liquor to be contraband (and therefore forfeit).[481] We think *Wynehamer* was wrongly decided, and there is no evidence it had any bearing on the meaning of the Fourteenth Amendment Due Process Clause.

f. Slavery and the Dred Scott *Case*

It was well established from the time of *Somerset's Case*[482] that slavery was a product of positive law and could be legally sustained only on the basis of positive law. From the beginning of the Republic, attempts to abolish slavery met with resistance on the ground that abolition would deprive slaveowners of their vested property rights without due process.[483] Almost all formal state emancipations were gradual and prospective, applying only to those who might otherwise be born into slavery or brought into the state as a slave.[484] The

481. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861, at 17 (2005).

482. Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).

483. *See, e.g.*, CONG. GLOBE, 30th Cong., 1st Sess. 619 (1848) (statement of Sen. Bagby) (asserting, in opposition to the abolition of slavery in the territories acquired from Mexico, that "[t]he Constitution guarantees [slavery] to those who think proper to hold it; and while the Constitution exists, they cannot be deprived of it, without doing violence to that instrument"); 12 REG. DEB. 2247 (1836) (statement of Rep. Pickens) (arguing that for a state to abolish slavery would violate the "law of the land" provision of its constitution); 12 REG. DEB. 693 (1836) (statement of Sen. Walker) ("Congress has no constitutional power to abolish slavery in the District of Columbia. . . . But this petition proposes to take from the people of this District their slaves, which are their 'private property,' 'without due process of law,' 'without compensation,' and for no 'public use' . . . ." (quoting U.S. CONST. amend. V)); 12 REG. DEB. 97 (1836) (statement of Sen. Calhoun) ("Are not slaves property? [A]nd if so, how can Congress any more take away the property of a man in his slave, in this District, than it could his life and liberty?"); 33 ANNALS OF CONG. 1229 (1819) (statement of Rep. McLane) (arguing that at least as to retrospective laws, Congress lacked the "power to disturb" a slave owner's "legal title to [his slaves'] labor and services, [because] it had become a vested right"); CURRIE, *supra* note 481, at 13 (summarizing arguments made against the abolition of slavery because it would deprive owners of property without due process); DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 84 (1978) (noting that the first governor of the Northwest Territory interpreted the Northwest Ordinance's prohibition on slavery, in article 6, to be only prospective).

484. Pennsylvania (1780), Connecticut (1784), and Rhode Island (1784) adopted statutes freeing the children born subsequently (but only after those children reached the age of majority). *See* JOANNE POPE MELISH, DISOWNING SLAVERY: GRADUAL EMANCIPATION AND "RACE" IN NEW ENGLAND, 1780-1860, at 66-68 (1998). The chief exception was Vermont, which outlawed slavery whole-cloth by constitutional amendment in 1777. *See* VT. CONST. of 1777, art. I., *reprinted in* 6 THORPE, *supra* note 136, at 3737, 3739-40. In Massachusetts and New Hampshire, slavery was abolished by court interpretation of the state constitutions, but the

inverse argument, that laws enforcing slavery deprived slaves of their natural liberty, occurred relatively late in the long American political conflict over slavery,[485] and to our knowledge it was the basis of only one court decision, which in turn was soon reversed by the Supreme Court.[486] That decision interpreted due process not to place slavery out of bounds altogether, but to require that black persons have the benefit of "regular judicial proceedings, according to the course of the common law, or by a regular suit commenced and prosecuted according to the forms of law"—in short, a "day in court"—before being declared a slave under the process provided by the Fugitive Slave Act of 1850.[487] Even so, a number of abolitionists did argue that natural liberty could not be deprived on the basis of race even by validly enacted positive law. This argument may have been a noble enterprise, but it was never adopted by more than a fringe. Slavery was abolished at the point of a sword, under the President's war powers, and ultimately by a constitutional amendment that provided expressly for the abolition of slavery—not as an interpretation of due process or any other extant constitutional principle.

From a purely legal perspective, the vice of Chief Justice Taney's opinion in *Dred Scott v. Sandford*[488] was not, therefore, that it countenanced slavery in the states and territories where slavery had the sanction of positive law. That view was commonplace and legally entrenched. The vice was its extension of the idea of vested property rights to allow slavery to exist even in territories where positive law forbade it. After determining that the Court lacked jurisdiction to hear Scott's claim,[489] and that Congress lacked the power to regulate slavery in the territories,[490] Taney offhandedly asserted in the alternative that

practical effect of those rulings was a gradual emancipation, as they left a twilight where it was unclear whether the constitution had emancipated all slaves or only those who had reached majority (and had therefore given their owner fair compensation through their labor as children). *See* MELISH, *supra*, at 64-66.

485. CONG. GLOBE, 31st Cong., 1st Sess. 1146 (1850) (statement of Sen. Chase); FEHRENBACHER, *supra* note 483, at 141 ("This argument was incorporated into the platforms of the Liberty party in 1844, the Free Soil party in 1848, and the Republican party in 1856 and 1860."); *see* CURRIE, *supra* note 481, at 170; Williams, *supra* note 7, at 472.

486. *In re* Booth, 3 Wis. 1 (1854), *rev'd sub nom.* Ableman v. Booth, 62 U.S. 506 (1858).

487. *Id.* at 41-43 (internal quotation marks omitted).

488. 60 U.S. (19 How.) 393 (1857).

489. *Id.* at 405-06, 416-18, 422-23.

490. *Id.* at 432-46 (opinion of Taney, C.J.); *see also id.* at 489-90 (opinion of Daniel, J.) (asserting that the Constitution gave Congress no power "to impair the civil and political rights of the citizens of the United States" or to "exclude" slave owners from the territories).

> an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[491]

As Don Fehrenbacher has ably shown, this assertion (which was not expressly joined by any other opinion) fails to "[come] to grips with the question of whether the mere prohibition of slavery in a federal territory actually constituted deprivation of property."[492] If a person from a jurisdiction where a species of property is protected takes it voluntarily into a jurisdiction where it is contraband, he cannot complain that his property was taken. The logical implication of *Dred Scott* was that slaveowners could take their slaves into free states, thus effectively making the entire Union slave territory. It was a position even more radical and uncompromising than the proslavery Democratic Party had previously urged, and it pulled the rug out from under Stephen Douglas's attempted compromise based on popular sovereignty. Chief Justice Taney's opinion can be seen as a form of substantive due process, since it makes inviolate the right to own slaves, positive law to the contrary notwithstanding.

Unsurprisingly, the *Scott* decision was immediately controversial. Republicans derided it, while Southerners and Democrats urged respect for the Supreme Court's judgment.[493] The Republicans, of course, won in the end. The Fourteenth Amendment repudiates the *Scott* holding, and it would be perverse to think that the public at the time of adoption of that Amendment understood it to perpetuate Chief Justice Taney's approach to due process. In light of the foregoing, *Dred Scott* deserves no respect as a source of meaning of the Fourteenth Amendment Due Process Clause.

In sum, *Dred Scott* and *Wynehamer*, the two principal instances of antebellum courts' applying due process to invalidate a general and prospective law, are the faulty exceptions that prove the rule. Outside of slavery and, to a much lesser extent, the general regulation of alcohol, no one in antebellum America suggested that due process prohibited legislatures from adopting general and prospective laws. Furthermore, as radical as *Wynehamer* and *Dred Scott* were, they do not go as far as modern substantive due process cases go.

---

491. *Id.* at 450.

492. FEHRENBACHER, *supra* note 483, at 383; *see also id.* at 425 (noting that a contemporary essay of a person "identified only as '[a] Kentucky Lawyer'" was "[e]specially perceptive," "for he showed that the crucial question here was not whether slaves constituted property but whether prohibition constituted deprivation").

493. *See id.* at 417–19.

The rights protected in *Wynehamer* and *Dred Scott* had their origin in positive law. The courts held that the positive rights involved in those cases, once vested, could not be taken away. They did not hold that there is an inviolable right to sell alcohol or to own slaves, which would require every jurisdiction to allow the sale of alcoholic beverages and the ownership of slaves. Modern substantive due process goes that additional step—to hold that all people in all jurisdictions have the right to do something positive law had not permitted.

B. Due Process as a Limit on the Legislature's Power To Abrogate Common Law Judicial Procedures

Besides applying due process to invalidate quasi-judicial legislative acts that deprive persons of rights, early Americans also believed that due process prohibited the legislature from abrogating fundamental common law court procedures. These opinions built on the Revolutionary and early-Republic arguments that legislatures lacked the power to deprive defendants of trial by a local jury. And as we have seen, due process was understood to prevent a legislature from depriving a specific person or narrow class of litigants of the procedural protections otherwise enjoyed by everyone.[494] More broadly, several prominent legal thinkers treated the Fifth Amendment Due Process Clause as a kind of catchall provision for constitutional procedure: it embraced all of the procedural protections otherwise enumerated in the Constitution. As a practical matter, Congress was free to set court procedures so long as they did not conflict with a specific constitutional provision or deny litigants the procedures necessary to obtain a fundamentally fair trial. This understanding forms the basis of modern procedural due process.

In 1819, Attorney General William Wirt advised the Secretary of War that the Due Process Clause prohibited Congress from abrogating the right to jury trial.[495] The question was whether an act subjecting West Point cadets to the jurisdiction of courts martial would deprive them of the constitutional right to a jury trial. Wirt listed the Jury Trial Clause of Article III, Section 2; the Grand Jury and Due Process Clauses of the Fifth Amendment; and the Jury Trial Clause of the Seventh Amendment as "positive and repeated provisions" in the Constitution of the right to jury trial.[496] From these provisions he concluded that

494. *See supra* Section II.A.

495. Cadets at West Point, 7 Op. Att'y Gen. 276 (1819).

496. *Id.* at 276-77.

> Congress *has no power* to pass a law which shall deprive the person accused of a criminal or otherwise infamous offense, of his trial by jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger.[497]

Indeed, the entire Bill of Rights follows this pattern. Congress may not make a law "abridging the freedom of speech,"[498] and since the executive and judiciary can deprive someone of liberty only according to due process of "law," none of them can constitutionally abridge the freedom of speech.[499]

The Supreme Court's first major Due Process Clause decision applied this same logic against Congress and became the basis for what we now call procedural due process. The occasion was an act of Congress that authorized executive officials to seize private property without judicial warrant or a jury trial. In keeping with arguments advanced by lawyers and courts from the earliest days of the Republic, the Supreme Court declared in *Murray's Lessee v. Hoboken Land & Improvement Co.*[500] that to comply with due process, statutes must either provide for the use of common law procedures or, if they do not, employ alternative procedures that the courts would regard as equivalently fair and appropriate. A customs officer owed money to the Department of the Treasury. Officers of the Treasury sought to secure a lien on the custom officer's property in the amount of the debt by a "distress warrant" pursuant to an act of Congress that authorized such instruments. The Court considered whether the acts of the Treasury officers, who did not have federal judicial power under Article III of the Constitution, could deprive the customs officer of his rights, and if so, whether the warrant constituted due process of law.[501]

The Court began with the proposition that "[t]he article"—the Due Process Clause—"is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."[502] The more difficult question was how to determine which process was constitutionally due, such that Congress could not abrogate it. The Court identified two sources for evidence of the contents of due process: (1) the procedures required by the text of other constitutional provisions; and (2) the "settled usages and

497. *Id.* at 277 (emphasis added).

498. U.S. CONST. amend. I.

499. *See* Shrum v. City of Coweta, 449 F.3d 1132, 1140-43 (10th Cir. 2006) (McConnell, J.).

500. 59 U.S. (18 How.) 272 (1855).

501. *Id.* at 275-76.

502. *Id.* at 277.

modes of proceeding existing in the common and statu[t]e law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."[503] Reviewing the English history of governmental debt collections, the Court concluded that there had always been a "summary method for the recovery of debts due to the crown,"[504] which the Americans had not changed, and therefore Congress was not prohibited by the Due Process Clause from authorizing the recovery of a federal debt upon a "distress warrant," rather than by "a trial according to some settled course of judicial proceedings."[505]

The opinion in *Murray's Lessee* is relevant to our inquiry for three reasons. First, it confirms the understanding that the Due Process Clause of the Fifth Amendment applied to Congress and restrained the ability of Congress to depart from traditional legal procedures in cases affecting private rights. Second, it rejects the redundancy argument that the Due Process Clause cannot overlap other constitutional provisions.[506] And third, it addresses for the first time the relation between longstanding procedures and legislative power to change or reform those procedures. Under the Court's analysis, longstanding procedures, if not acted upon by the legislature, provide due process, and require no further examination. But if Congress has departed from longstanding procedures, the Court has an obligation to examine what Congress has done and ensure that the new procedures pass constitutional muster. Put differently, the traditional procedures of the common law are by definition sufficient to satisfy due process. Only departures from the traditional common law procedures must be scrutinized for fairness under the Due Process Clause.[507]

Another pre-Fourteenth Amendment case bears out this notion of due process as a floor or catchall for constitutional procedure. In *Griffin v. Wilcox*,[508] a Union officer in Indiana issued an order forbidding the sale of

503. *Id.*

504. *Id.*

505. *Id.* at 272, 280.

506. *See supra* notes 201, 217, and accompanying text.

507. *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990) (concluding that due process was satisfied when California state courts exercised personal jurisdiction over plaintiff who was served with process when he was in the state on a brief visit); Mathews v. Eldridge, 424 U.S. 319 (1976) (concluding that due process does not require a hearing before termination of social security benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (concluding that due process requires a hearing before termination of welfare benefits).

508. 21 Ind. 370 (1863).

alcohol to Union soldiers. Pursuant to this order, the army jailed a private citizen for an indefinite term. The prisoner did not petition for a writ of habeas corpus, but later sued the officer for false imprisonment.[509] The officer raised as a defense a congressional act insulating from liability officers acting under the President's authority.[510] Because the statute did not purport to authorize detentions, but only to provide a defense to liability, the court focused on whether the officer had the power to detain private citizens under martial law when the ordinary courts were open. It concluded that he did not.[511] In dicta, the court declared that, along with the Fourth Amendment, the Fifth Amendment Due Process Clause "prohibit[s] the passage of a law by Congress, authorizing the arrest of the citizen, without just cause, because such arrest deprives him of his liberty."[512] The state court unanimously agreed that even Congress, during time of war, could not authorize detentions of citizens without a trial when the ordinary courts of justice were open. In the words of Justice Hanna, concurring in the judgment, "to prevent such an unjust course of procedure [as in England when Parliament authorized arrests and imprisonments without judicial process], the constitution thus expressly sets up a barrier against the passage of a law by Congress authorizing the perpetuation of such acts of wantonness by those in authority."[513]

The Supreme Court embraced this version of due process a decade and a half after the ratification of the Fourteenth Amendment Due Process Clause. In *Hurtado v. California*,[514] the Court applied the Fourteenth Amendment Due Process Clause to a state law that abrogated the common law right to indictment by a grand jury. The Court upheld the law at issue, but, in dicta, gave a helpful gloss on the *Murray's Lessee* rule: "[N]ot every act, legislative in form . . . is law. Law is something more than mere will exerted as an act of power."[515] The Court went on to list the sorts of legislative acts that would run afoul of due process of law:

> acts of attainder, bills of pains and penalties, acts of confiscation, acts of reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special,

509. *Id.* at 372.

510. *Id.*

511. *Id.* at 373-74.

512. *Id.*

513. *Id.* at 397 (Hanna, J., concurring).

514. 110 U.S. 516 (1884).

515. *Id.* at 535.

> partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.[516]

The Court concluded, however, that substitute procedures provided by the legislation were sufficiently equivalent to the grand jury indictment that due process had been satisfied.[517] This decision marked a shift in procedural due process analysis, from whether the procedures employed deviated from longstanding common law methods to whether they were "arbitrary." *Hurtado* was the culmination of the interpretation of due process given by numerous early commentators and courts: due process limits a legislature's power to abrogate common law procedures and thereby to authorize another branch to directly deprive persons of rights without due process.

C. Legislative History of the Fourteenth Amendment

The Fourteenth Amendment was adopted to ensure that all persons would enjoy the same civil liberties against the states that whites had previously enjoyed against the federal government.[518] There was not much debate about the meaning of the Fourteenth Amendment Due Process Clause, presumably because it had a well-defined legal meaning. Except that it applied to the states instead of the federal government, it was lifted entirely from the Fifth Amendment. This is why Representative John Bingham, when asked what he believed due process entailed, responded that "the courts have settled that long ago, and the gentleman can go and read their decisions."[519] It is also what then-Representative James Garfield, who had served in the Thirty-Ninth Congress, meant when he later declared that the Fourteenth Amendment Due Process Clause had been copied from the Fifth Amendment. He elaborated:

> It realizes the full force and effect of the clause in Magna Charta, from which it was borrowed; and there is now no power in either the State or the national Government to deprive any person of . . . Life, liberty and

---

516. *Id.* at 536.

517. *Id.* at 538.

518. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 171 n.* (1998) ("This first sentence of the Fourteenth Amendment consciously overruled *Dred Scott*'s holding that blacks could never be 'citizens.'").

519. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866); *see* McConnell, *supra* note 238, at 1164; Williams, *supra* note 7, at 479-81.

> property, except by due process of law; that is, by an *impartial trial according to the laws of the land*.[520]

This encapsulates the position that Fourteenth Amendment due process was understood to mean nothing different than what due process and the law of the land had meant up to that point. As we have shown, due process, from before the Fifth Amendment had been ratified, was understood to apply to the legislature when it deprived persons of rights through quasi-judicial acts. The Fourteenth Amendment applied this rule to the states. Because it applied to all persons, the effect was to make the treatment of black citizens the same as the treatment of whites.

It is true that, starting in about 1840 and lasting through the Civil War, radical abolitionists, including Representative Bingham, argued that the Fifth Amendment Due Process Clause directly prohibited Congress from authorizing the institution of slavery in the territories. For instance, Bingham indulged in a bit of high-flown rhetoric on the House floor when describing the "law" that "due process of law" was meant to require: "law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice."[521] He later asserted that the Fifth Amendment Due Process Clause had "declared the equality of all men" and "forbade the Government of the United States from making any discrimination."[522] We think Bingham's comments in support of the Fourteenth Amendment—though they sounded in lofty rhetoric—when taken together, amounted to nothing more than an argument that the Fourteenth Amendment Due Process Clause would ensure that blacks would receive the same due process of law that "the courts had settled long ago." Nowhere did Bingham suggest that the Fourteenth Amendment would prohibit states from enacting general and prospective laws. Rather, he advocated a vision of law, based on divine and natural law,[523] that does not discriminate on the basis of race. And indeed, the Fourteenth Amendment, adopted after the Thirteenth Amendment had prohibited slavery, was meant to ensure that no one would be deprived of key civil rights on the basis of race. In short, there is nothing in the legislative or ratification history of the Fourteenth Amendment to suggest that it was understood to operate against states any differently than due process clauses had since the early days of the Republic.[524]

---

520. CONG. GLOBE, 42d Cong., 1st Sess. app. at 153 (1871) (emphasis added).

521. CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866).

522. *Id.* at 1292.

523. *See id.* at 1094.

524. Williams argues that late-nineteenth-century treatises—especially Thomas M. Cooley's influential treatise on constitutional law—espoused a "substantive" version of due process.

III. APPLICATIONS

In this Part we offer a quick summary of how the original meaning of due process as based on separation of powers would apply to modern cases, paying particular attention to controversial cases. In some instances our approach suggests a different outcome, and in others it supplies a more persuasive grounding for decisions that the Supreme Court analyzed in a different way. We do not attempt to analyze every due process issue, or to provide comprehensive analyses of the cases, but to show how our approach might assist in resolving some difficult cases.

A prefatory word is in order about whether applying this conception of due process is workable. The first potential problem is that distinguishing between the constitutional functions of the legislature, executive, and judiciary is "daunting, if not impossible."[525] We take no issue with John Manning's recent article arguing that constitutional interpretations should rely on specific provisions instead of vague principles derived from the tripartite structure.[526] Considering whether an act of the legislature is quasi-judicial *in the context of a deprivation of a person's rights*—especially with the aid of the generality and prospectivity requirements that the Framers knew as part of the common law

---

See Williams, *supra* note 7, at 493-94 (citing COOLEY, *supra* note 297). Cooley's understanding of due process in 1868 was consistent with the understanding exhibited by the late-eighteenth- and early-nineteenth-century state and federal court cases that we have canvassed. In fact, it is notable (though not noted by Williams) that in Cooley's first sustained treatment of "the law of the land," he asserted that a legislature has never been assigned the power to take from *A* and give to *B*, irrespective of whether there is a constitutional law-of-the-land clause, because the legislature can neither function like a court nor act arbitrarily:

> If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat. There is no difficulty in saying that any such act, which, under pretence of exercising one power is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves.

COOLEY, *supra* note 297, at 175. Note, however, that there may be a seed of rational basis review in Cooley's caveat that "a legislative enactment" "without reasons" "would be . . . void, as neither legislative nor judicial, but a mere arbitrary fiat." *Id.* He gave no example to support this assertion. Presumably Cooley was drawing on the legacy of *Bonham's Case*, which, as we have shown, was widely held by early Americans to state, at most, a common law rule of statutory construction. *See supra* notes 57-67 and accompanying text.

525. Magill, *supra* note 69, at 1193.

526. Manning, *supra* note 280, at 1943-46.

background—does not have the same pitfalls as trying to untangle the constitutional functions of the legislative and executive branches in the administrative state.

The second potential practical problem is that many of the concepts in the due process logic require interpretation to determine whether they apply to particular facts. Legislative, quasi-judicial, property, liberty, process, law, general, prospective—these are classes more than species and require sensitive interpretation in light of context. There are several reasons why we think they should nonetheless govern the legal analysis. First, the basic elements of the logic are derived from the words of the Constitution: "due process of law," "liberty," "property," "legislative Powers," and "judicial Power." There is no avoiding them. Second, even the elements of the logic that are not expressly in the text of the Constitution—the requirements that a law be general and prospective—were part of the background rules inherited by the Founders and subsequent generations as the defining features of "law." Third, courts applied them quite proficiently for many decades. They are at least as workable today as the concepts modern courts have substituted for them. Finally, the challenges of applying due process as separation of powers are no more daunting than those of any subtle legal conception. As with any other theoretical construct, there will be hard cases about which reasonable people may disagree, even within the theory. And as with any other approach to interpretation, a creative judge could stretch its elements to reach a preferred outcome. We nonetheless think that a sound general theory will make decisions in specific cases more predictable and less arbitrary. And in terms of malleability, the understanding of due process we defend is surely exceeded by modern substantive due process, which has no consistent or reliable content beyond the Justices' personal moral views.

A. Defining "Liberty" and "Property"

This Article is about the meaning of "due process of law," meaning what steps are necessary before a person may be deprived of rights protected under the Due Process Clause. We have touched only slightly on what rights are comprised within the phrase "life, liberty, or property."[527] The fallacy in modern substantive due process is not its assumption that Americans retain certain rights beyond those enumerated by the Bill of Rights, but its assumption that the Due Process Clause renders these unenumerated rights inviolable, even *with* due process. It is sufficient for present purposes to recall

527. *See supra* Section II.A.

the important difference between the legal concepts "liberty" and "property": "property" is defined by positive law, while "liberty" is natural and governs except to the extent that it has been abridged by positive law.[528] In other words, we may do whatever we like with our bodies and our property, unless there is positive law to the contrary. As Locke put it, each person has "[a] Liberty to follow [his] own Will in all things, where the Rule prescribes not."[529] Property, by contrast, is confined to interests established pursuant to positive law, such as the common law of property, inheritance law, the terms of federal land grants, patent law, or other such sources.

The Court has held that "liberty" is defined by federal constitutional law and "property" by "existing rules or understandings that stem from an independent source such as state law."[530] We think that is correct as to property, but not quite right as to liberty. Contrary to the Court's understanding, all natural liberty is protected. But it is protected only against deprivations not pursuant to law. Other than specific liberties expressly or impliedly protected elsewhere in the Constitution, there are no "fundamental rights" that enjoy a legal status superior to acts of the legislature. As to nonnatural liberties, those not existing in nature but created by positive law, their definition is to be found, like that of property, in the law that creates them.

The administrative state has complicated matters by creating a number of statutory or "public" rights foreign to the common law, which typically are conditional on the recipient's status or acts and therefore never "vest" in the classic sense. Modern due process jurisprudence allows the legislature to determine the appropriate procedures governing these new "public rights," so long as they satisfy judicially defined minima of notice, hearing, and fair procedures.[531]

The basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property. The executive had power

528. *See supra* Subsection II.A.1.

529. LOCKE, *supra* note 275, at 284.

530. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972); *cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798) (opinion of Chase, J.) ("[T]he *right*, as well as the *mode*, or *manner*, of acquiring property, and of alienating or transferring, inheriting, or transmitting it, is conferred by society; is regulated by *civil* institution, and is always subject to the rules prescribed by *positive law*.").

531. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Goldberg v. Kelly, 397 U.S. 254, 266-71 (1970).

only to enforce law in accordance with its terms, and not to make law. The judiciary was required to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of equivalent fairness. The legislative branch could enact general laws for the future, including the rules for acquisition and use of property, but could not assume the "judicial" power of deciding individual cases. This meant the legislature could not retrospectively divest a person of vested rights that had been lawfully acquired under the rules in place at the time.

B. Due Process Against the Executive

1. The Steel Seizure *Case*

The first, central, and largely uncontroversial meaning of "due process of law," the meaning established in Magna Charta and applied vigorously by Coke against the first two Stuart Kings, was that the executive may not seize the property or restrain the liberty of a person within the realm without legal authority arising either from established common law or from statute. In other words, executive decrees are not "law." The principle is so fundamental it is rarely tested. But in the most famous of all Supreme Court decisions involving an executive seizure of private property based on nothing but an executive order, the *Steel Seizure* case,[532] the Supreme Court floundered about for a legal framework for the decision and—with the exception of a casual reference in a concurring opinion—failed even to mention the Due Process Clause. Lord Coke would have done a better job with the case using nothing fancier than the Magna Charta.

At the height of the Korean War, the nation's supply of steel was endangered by a labor strike. In response, President Truman "issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[533] No Act of Congress authorized the President's order; indeed, several statutes, by negative implication, appeared to foreclose any such power.[534] The question therefore was presented whether the President could order the seizure of private property under the circumstances based on his own constitutionally vested powers.

The question elicited several of the most sophisticated constitutional opinions in the Court's history. All of them dwelt on whether the President had

532. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

533. *Id.* at 582.

534. *See id.* at 597-609 (Frankfurter, J., concurring).

attempted to exercise a power—that of making laws—that the Constitution had expressly vested in Congress. Justice Douglas also touched on the Takings Clause as a limit on the President's power to effect an expropriation.[535] Only one of the Justices' opinions—Justice Jackson's—mentioned the Fifth Amendment Due Process Clause, and that was seemingly in passing, as a counter to the President's assertion that the expropriation was pursuant to his power to faithfully execute the laws:

> [The President's authority to "take Care that the laws be faithfully executed"] must be matched against words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.[536]

That is an apt and eloquent summary of the primordial meaning of due process. Whatever the extent of the general prerogative "executive power" vested in the President by the first sentence of Article II,[537] the Due Process Clause makes clear that he cannot deprive persons in the United States of life, liberty, or property except in the course of proper execution of "law." Only Congress has power to make new law. President Truman's executive order was not "law." That would have been a complete and entirely satisfactory rationale for the decision.

Instead, Justice Jackson offered a three-part taxonomy of separation-of-powers cases, later adopted as the holding of the Court in *Dames & Moore v.*

---

535. Justice Douglas argued that congressional authorization is required to effectuate a taking, because compensation is required and Congress has control over appropriations. *See id.* at 629-32 (Douglas, J., concurring). That sounds correct in theory, but we wonder whether, under Douglas's theory, Congress's decision to enact an unlimited and indefinite appropriation to pay claims for takings adjudicated by the Court of Claims would amount to a delegation of power to effectuate the takings themselves.

536. *Id.* at 646 (Jackson, J., concurring) (omissions in original).

537. A comparison of the first sentences of Articles I, II, and III suggests that while Congress is limited to enumerated powers, the executive retains some undefined prerogative powers of an executive nature. *See* Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994). Our suggestion here is that, whatever those prerogative powers might be, in the domestic arena the President cannot deprive any person of life, liberty, or property pursuant to prerogative, but only pursuant to law.

Regan.[538] The three-part test is much admired and much quoted, and forms the basis for most modern discussions of the allocation of power between Congress and the President, especially in the international arena.[539] We do not share this admiration. Justice Jackson's first category comprises cases "[w]hen the President acts pursuant to an express or implied authorization of Congress."[540] In such cases, the act will be sustained if the federal government as a whole has the power.[541] In the third category, "the President takes measures incompatible with the expressed or implied will of Congress."[542] In such cases, the action can be sustained only if it falls within the constitutional powers of the President and the Congress has no relevant powers.[543] Jackson's intermediate, second category comprises cases where Congress has neither authorized nor forbidden the President's actions.[544] The answer in these cases, Jackson says, "is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[545]

This is needlessly complicated and contradicts the premise of the Due Process Clause—assuming, as was true in the *Steel Seizure* case, that the President's actions deprived a person of life, liberty, or property. Unless the President's acts were "pursuant to an express or implied authorization of Congress," they were not lawful. Under the original understanding of due process, only acts falling in the first category are legitimate, at least in regard to the exercise of power within the United States, against persons subject to its laws.[546] This is not to say that the President has no prerogative powers, no powers independent of congressional authorization—just that none of them extends to the deprivation of life, liberty, or property within the United States. Justice Jackson's second category suggests, inaccurately, that in some largely indeterminate category of cases a deprivation of property may be permissible

538. 453 U.S. 654, 668-69 (1981).

539. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002).

540. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring).

541. *Id.* at 636-37.

542. *Id.* at 637.

543. *Id.* at 637-38.

544. *Id.* at 637.

545. *Id.*

546. We do not here need to address acts of war, carried out by the Commander-in-Chief pursuant to congressional authorization. All the Justices in the majority concluded that seizing factories in the United States fell outside this category of authority. *See id.* at 587 (majority opinion).

even if not authorized by law. And Justice Jackson's third category flips the due process presumption on its head, by suggesting that executive seizures of property are not reliably deemed unlawful unless Congress has affirmatively legislated to make them unlawful.

Justice Jackson's three categories are reminiscent of the debate between Coke and Ellesmere in the *Case of Proclamations*.[547] Coke took the view that the King could not trench upon private rights, by royal decree, without authority under common law or an act of Parliament changing that law. In other words, only acts falling in Justice Jackson's first category are legitimate. Ellesmere took the view that the King could make new rules as he wished, unless there were a contrary law. In other words, only acts falling in Justice Jackson's third category are forbidden. Coke's view of the case has generally been thought to have prevailed, and to have been embraced by the Founders of the American Republic. Justice Jackson's suggestion that the executive may sometimes seize private property within the United States without the express or implied authorization of Congress, based on "the imperatives of events and contemporary imponderables," was a retreat from fundamental Cokean principles of separation of powers and due process. It is not necessary for Congress to forbid executive acts depriving persons of property or liberty to render them unlawful; it suffices that Congress did not authorize them.

2. Excessive Delegations of Power to the Executive

A certain degree of interpretive discretion is inherent in law execution, because no law, however precisely crafted, is self-defining with respect to all conceivable applications. Yet at a certain point, broad delegations of standardless power to the executive strain the understanding that the executive can regulate conduct only pursuant to law. For much of our history, Congress and the Supreme Court operated on the loose but workable assumption that Congress could delegate legislative power—the power to make rules—to the executive so long as it provided an "intelligible principle" to govern that discretion.[548] Since the New Deal, the Supreme Court has regarded as sufficiently "intelligible" the standard that the agency regulate "in the public interest," which is, realistically, no standard at all.[549] We think the explanation

547. *See supra* notes 31-38 and accompanying text.

548. The leading case was *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

549. Nat'l Broad. Co. v. United States, 319 U.S. 190, 225-26 (1943); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24-25 (1932). The Court recently reaffirmed these decisions in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001).

for this judicial latitudinarianism is not any doubt that the nondelegation doctrine is rooted in genuine constitutional principle; rather the explanation is the Court's conclusion, as a result of long experience, that there are no judicially manageable standards for determining "the permissible degree of policy judgment that can be left to those executing or applying the law."[550] The danger is too grave that if courts attempted to police the boundaries of permissible delegation, they would approve of delegations that seemed to them necessary in light of policy realities, and disapprove of those that did not. This would be a usurpation of the legislative function.

There are, nonetheless, three ways in which recognition of the due process principle that the executive is only the executor, not the maker, of law that affects the life, liberty, or property of persons in the United States could play an important role. First, an informed and constitutionally responsible Congress would exercise more care in limiting the scope of its delegations. This is not necessarily in the political self-interest of the legislators, because it would require them to assume greater accountability for difficult judgments rather than allowing them to kick the ball to unaccountable executive agencies. There are, however, some indications of an awakening sense among some members of Congress that their branch of government is responsible to the people for ensuring conformity of legislation to the Constitution. In the discharge of that responsibility, Congress is not constrained by the standards of judicial manageability.[551] Congress may and should insist that statutes be genuine "law" and not just authorization of executive decree.

Second, even if courts are ill-advised to declare congressional decisions to delegate power unconstitutional, they should not be reticent to ensure that discretion claimed by the executive is genuinely rooted in congressional delegation. Delegation is not only a constitutional issue; it is, in the first instance, an issue of statutory construction. Armed with the understanding that the legislative branch, not the executive, makes law, courts should interpret statutes narrowly to ensure that any delegation is the genuine intention of Congress, and not an instance of executive overreach. Scholars have called this idea a "nondelegation canon."[552] At a minimum, agencies should not be able to claim *Chevron* deference with respect to claims of their

550. *Whitman*, 531 U.S. at 474-75 (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

551. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 155-56, 189-92 (1997).

552. John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

own authority.[553] *Chevron* deference is a response to the conclusion that Congress has vested an executive agency with interpretive power. It should not be bootstrapped into deference to an agency's assertion of power.

On occasion, inattentive or collusive courts have allowed the President to conjure up an entire regulatory regime on the basis of a few stray statutory words that Congress almost certainly did not intend to be used in that way. One of the most notorious instances was President Jimmy Carter's imposition of wage and price controls in the guise of implementing federal law requiring "economy" and "efficiency" in the award of federal contracts.[554] President Nixon used the same inapt authority to require federal contractors to engage in racial affirmative action.[555] Wetlands regulation was similarly based on scanty legislative authority—though ironically, this was compelled by a court in the face of agency reluctance.[556] Some scholars contend that the use of the Troubled Asset Relief Program (TARP) of the Emergency Economic Stabilization Act of 2008, which authorized assistance to "any financial institution," to bail out General Motors and Chrysler, which are automobile manufacturers and not banks, was a similar instance of executive misinterpretation of statutory authority to accomplish ends not sanctioned by Congress.[557]

Indeed, some courts have held that an agency's own assertion of authority to regulate, based on an ambiguous statute, is entitled to deference.[558] In effect, this is a throwback to the Ellesmere position that the executive can impose regulations by decree unless there is clear legislation to the contrary.[559] To be true to the original meaning of "due process" as applied to executive action, courts must be vigilant to ensure that power exercised by the executive is

553. The clearest judicial statement of this point is Judge David Sentelle's concurrence to his own majority opinion in *American Business Ass'n v. Slater*, 231 F.3d 1, 8-9 (D.C. Cir. 2000). For a scholarly exposition, see Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence:* Chevron *Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497. Neither source mentions the Due Process Clause, though they rely on the same separation-of-powers logic that confines executive enforcement to the scope of laws enacted by Congress.

554. AFL-CIO v. Kahn, 618 F.2d 784, 788 (D.C. Cir. 1979).

555. Chrysler Corp. v. Brown, 441 U.S. 281, 304 (1979) (calling the legislative basis for the executive order "somewhat obscure").

556. Natural Res. Def. Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

557. *See* Gary Lawson, *Burying the Constitution Under a TARP*, 33 HARV. J.L. & PUB. POL'Y 55, 72 (2010).

558. *See* Sales & Adler, *supra* note 553, at 1507-18.

559. *See supra* notes 33-36 and accompanying text.

genuinely pursuant to law, meaning legislation properly enacted by Congress. Rather than defer to executive assertions of power, courts should presume that Congress has not intended to delegate power unless it has done so with clarity.

Third, in carrying out the responsibility to interpret statutes passed by Congress arguably vesting the executive with broad discretionary power, courts should bear in mind the distinction between regulatory schemes affecting the life, liberty, and property of Americans, on the one hand, and programs that merely expend money or involve exercises of power not affecting individual rights, on the other. It may not be coincidental that Congress's first serious debate over the propriety of delegating power to the executive, the Post Roads Debate, involved power that did not implicate the Due Process Clause.[560] When due process rights are implicated by executive action, courts should be especially attentive to ensure that any deprivation was pursuant to congressional decision, rather than deferring to a broad assertion of power by the executive.

3. "Substantive Due Process" Against the Executive

The Court has held that substantive due process claims against the executive—usually law enforcement officers—are governed by a "shocks the conscience" test.[561] These are cases where the executive acts pursuant to lawful authority, but uses that authority in an allegedly abusive way. The leading case is *County of Sacramento v. Lewis*.[562] When an officer told a motorcyclist to stop, the motorcyclist fled with his passenger, Lewis. The officer pursued in a patrol car at high speed through a residential neighborhood. The motorcycle tipped over and Lewis fell in front of the patrol car, which skidded into Lewis and killed him. His estate sued under 42 U.S.C. § 1983, alleging that the officer deprived him of his life without due process of law in violation of the Fourteenth Amendment.[563] If the injured party had been the motorcyclist, the object of the pursuit, the Fourth Amendment would supply the relevant standard for decision, because a chase is an attempted seizure.[564] Because the victim was a mere bystander whom the government was not attempting to seize, Fourth Amendment principles were inapplicable, and the Court turned instead to due process. A majority of the Justices agreed that the proper

560. *See* CURRIE, *supra* note 316, at 146-49.

561. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

562. 523 U.S. 833.

563. *Id.* at 837.

564. *See* Graham v. Connor, 490 U.S. 386, 394-95 (1989).

standard for police-chase cases is whether the officer intended to deprive a person of life, liberty, or property without due process of law, or acted with deliberate indifference to the risk of such a deprivation.[565] The Court located this standard under the larger umbrella of *Rochin v. California*'s "shocks the conscience" standard for determining whether executive action violates the Due Process Clause.[566]

We think the standard of intentional conduct or "deliberate" indifference was correct, but that the Court was wrong to wrest this standard from so nebulous and unrooted an inquiry as whether the act "shocks the conscience." The Due Process Clause does not forbid those acts of government that judges regard as really, really bad. The more precise question was whether the police officer confined his actions to a properly executive role. When a police officer deliberately deprives a person of life, liberty, or property outside of the deprivations authorized by a court, the officer is acting the role of judge, jury, and executioner of the law all at once. Officers who deprive someone of life, liberty, or property through negligent or reckless behavior may be, and in appropriate cases should be, subject to personal suit, discipline, or criminal action under common law or state statute. But they have not violated someone's constitutional right to due process because they have not usurped the role of the judge and jury. Not every tort committed by an officer of government in the course of official duties is a constitutional violation.

A mens rea element is required for executive officials—and not for the legislature or the courts—because, although the acts of the latter may be imprudent or abusive, they are never accidental. Congress and the courts make law and issue judgments principally through words. Executive officials, by contrast, are called upon to act. Such acts happen in real time, call for a great deal of discretion, and inevitably entail risk. We never wonder whether a legislature intended to make a law, or whether it was an incidental byproduct of other legislative duties. We never wonder whether a court intended to issue a judgment or whether judgment simply happened as the court was going about its other business. In the same way, an executive official can be said to violate due process only when he intends to deprive someone of life, liberty, or property, and does so without due process of law.

This means, in effect, that there is no such thing as a substantive due process claim against an executive officer for death or injury outside of custody, caused in the course of duty. An intentional killing before arrest is a deprivation of life without due process of law. An intentional seizure is

565. *Lewis*, 523 U.S. at 836.

566. *Id.* (discussing Rochin v. California, 342 U.S. 165, 172-73 (1952)).

governed by Fourth Amendment standards. If the officer's action is merely negligent or reckless, it is governed by state tort law. If a deprivation of life occurs during lawful custody, the standard is set by the Eighth Amendment, and is the same: deliberate indifference or intentional injury. The "shocks the conscience" standard is both vacuous and unnecessary.

4. Detention Without Trial: Korematsu *and* Hamdi

Both during World War II and more recently during the so-called War on Terror, the executive claimed authority under statute to detain citizens within the United States without indictment or trial, on the basis of mere suspicion. On both occasions, the Supreme Court affirmed the constitutionality of the detentions. In *Korematsu v. United States*,[567] persons of Japanese descent—including American citizens—living on the West Coast were detained in internment camps on suspicion that they might engage in espionage. In *Hamdi v. Rumsfeld*,[568] an American citizen captured in Afghanistan was detained on a naval vessel within United States waters on allegations of being an enemy combatant. In *Korematsu*, the Court deferred to the executive's prerogative to exercise extraordinary powers during a perceived emergency, arguing that "[t]here was evidence of disloyalty on the part of some [Americans of Japanese ancestry], the military authorities considered that the need for action was great, and time was short."[569] In *Hamdi*, a plurality concluded that the citizen was entitled only to a "meaningful opportunity" before a "neutral decisionmaker" to "contest the factual basis" for classification as an enemy combatant[570]—a proceeding that need not be judicial and in which the ultimate burden of proof may be placed on the detainee.

The cases have a common core, but *Hamdi* is far more difficult than *Korematsu*. Even apart from the use of a racial classification, which has tended to be the focus of interest in *Korematsu*, the decision was flatly inconsistent with the original meaning of due process. Congress cannot authorize the military to indefinitely incarcerate an American citizen without at least an individualized determination that the citizen is a national security threat. The executive may get a very limited grace period during an emergency—literally during and right after an attack. But even then it may incarcerate American citizens only as it makes progress toward charges, a hearing, and a preliminary

567. 323 U.S. 214 (1944).

568. 542 U.S. 507 (2004).

569. *Korematsu*, 323 U.S. at 223-24.

570. *Hamdi*, 542 U.S. at 509.

adjudication. The existence of a military emergency was not enough to dispense with due process. Extensive historical evidence shows that even during military emergencies—including actual armed rebellions on domestic soil—Parliament and the early American republicans believed that it was necessary both to pass a suspension of habeas corpus and to explicitly authorize detentions based on suspicion,[571] neither of which was done in *Korematsu*.

Hamdi was a more difficult case, because Hamdi was captured abroad in a zone of battle and arguably had taken up arms with a foreign army against the United States. It is at least plausible, as the plurality held, that American citizens caught under these circumstances may be held as the functional equivalent of prisoners of war, rather than indicted and tried for treason. As the dissent recognized, there are certain historically well-established and clearly defined exceptions to the principle that citizens may not be detained without trial: commitment of the mentally ill, quarantine of the infectious, and possibly detention of material witnesses.[572] Perhaps detention of enemy combatants as prisoners of war to prevent their return to the field of battle is another exception. We take no position on that, except to note that scholars have presented substantial historical evidence that British subjects caught fighting against the Crown were customarily tried as traitors, rather than held as prisoners.[573] If that seemingly unbroken practice establishes a constitutional norm that the public would have regarded as inherent in due process, then the *Hamdi* plurality was wrong and Justice Scalia was correct that the military had to charge and try Hamdi, or let him go.

The *Hamdi* precedent, however, must not be extended to United States citizens or others within protection who might be detained within United States territory on suspicion of involvement in terrorism or other crimes, or of being an enemy combatant. Then, the special circumstances that made *Hamdi* a close case would not exist. In this respect, we think it was a mistake for the *Hamdi* plurality to look to the balancing test of *Mathews v. Eldridge*[574] as the proper due process standard for detentions.[575] *Mathews* was devised in the context of denial of disability benefits,[576] which are a form of property

571. The evidence is recounted in Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901 (2012).

572. *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting).

573. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 45-46, 169-71 (2010); Tyler, *supra* note 571, at 1000.

574. 424 U.S. 319 (1976).

575. *Hamdi*, 542 U.S. at 529.

576. *Mathews*, 424 U.S. at 323.

unknown to the common law. As with all property, the contours of the right to welfare benefits are determined by positive law and until it vests, it is not entitled to the full protection of Magna Charta-style process. Detention, by contrast, goes to the heart of the liberty protected by the Fifth Amendment. It is contrary to the original understanding of due process to allow a citizen to be seized and detained within the United States without full traditional process—meaning prompt indictment and trial before a jury—or, at a minimum, its equivalent.

C. Substantive Due Process Against Legislatures

The best known and most controversial line of modern due process cases begins with *Allgeyer v. Louisiana*[577] and *Lochner v. New York*,[578] is repudiated by the New Deal, revives with *Griswold v. Connecticut*[579] and *Roe v. Wade*,[580] retreats with *Bowers v. Hardwick*[581] and *Washington v. Glucksberg*,[582] and springs back to life with *Lawrence v. Texas*.[583] At a certain level of detail, these decisions rest on a variety of justifications: limitations on the police power, penumbras and emanations from enumerated rights, privacy, lack of public purpose, and tradition. All of them, however, share the central assumption that courts may identify certain liberties with no source in positive law and protect them even against general and prospective legislation enforced with all proper procedure.

1. Lochner v. New York

In *Lochner v. New York*,[584] the Supreme Court held that a New York statute prohibiting bakers from working more than ten hours a day or six days a week deprived bakers and their employers of liberty without due process of law.[585]

577. 165 U.S. 578 (1897).

578. 198 U.S. 45 (1905).

579. 381 U.S. 479 (1965).

580. 410 U.S. 113 (1973).

581. 478 U.S. 186 (1986).

582. 521 U.S. 702 (1997).

583. 539 U.S. 558 (2003).

584. 198 U.S. 45 (1905).

585. *Id.* at 64; *cf.* Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897) (invalidating a state statute prohibiting the state's citizens from entering into a "contract for insurance or to do an act to effectuate such a contract already existing . . . where the contract was made outside the State").

There was no deficiency in the procedures used for enforcement. Rather, the Court's improbable logic went like this: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment . . . ."[586] States have "the right to prohibit" certain kinds of contracts in the exercise of the "somewhat vaguely termed police powers," which "relate to the safety, health, morals and general welfare of the public."[587] The question "Is it within the police power of the State? . . . must be answered by the court."[588] And how ought the Court answer that question?

> The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[589]

The New York act thus failed because it was not a "necessary or appropriate" way to effect the state's interest in protecting the health of its citizens, and so was not a valid exercise of its police powers.[590] Three of the Justices would have watered down this means-ends analysis, making it easier for the state to comply,[591] and one Justice would have invalidated the statute only if it interfered with what a "rational and fair man" would have recognized as a "fundamental" right.[592]

None of these opinions squares with anything resembling the original understanding of due process, whether in 1791 or in 1868. The liberty of contract on which the majority relies is not set forth anywhere in the Constitution and contradicts the uniform understanding from the Founding era through Reconstruction that legislatures have the authority to pass prospective and general legislation affecting contracts. The idea that individuals possess a freedom to contract with other persons to do anything they would be permitted to do individually may be attractive in the abstract (or not), but it does not appear anywhere in the Constitution. It certainly has no

586. *Lochner*, 198 U.S. at 53.

587. *Id.*

588. *Id.* at 57.

589. *Id.* at 57-58.

590. *Id.* at 58.

591. *Id.* at 68 (Harlan, J., dissenting).

592. *Id.* at 76 (Holmes, J., dissenting).

basis in the Due Process Clause, which allows deprivations of natural liberty so long as they are achieved with due process of law, meaning proper enactment by the legislature and proper enforcement by the courts. Moreover, the Court's limitation of legitimate state legislative authority to "police powers" has no textual basis. The Federal Constitution does not purport to limit the powers of state governments, except in specific ways. In *Federalist No. 45*, Madison described federal powers as "few and defined" and the powers remaining in state governments as "numerous and *indefinite*."[593] To restrict state legislatures to enacting laws "necessary and appropriate" to protect the health and safety of the citizens turns the enumeration of federal powers on its head. Indeed, the *Lochner* majority's reasoning flatly contradicts the Tenth Amendment's guarantee that all powers not denied to the states by the Constitution are reserved to them.[594] The Tenth Amendment is often dismissed as a truism,[595] but *Lochner* is one case in which the Tenth Amendment should have provided the determinative rule of decision.

Lochner's ablest and most recent defender, David Bernstein, may well be right that the decision rested on sound principles of economics and liberty, that concepts of natural rights and liberty of contract had deep roots in political theory, and that the bakers' hours legislation struck down in the case was a disguised scheme to favor entrenched and well-heeled special interests.[596] Conventional attacks on the underlying ideology of the decision may well be unfounded. But Bernstein's argument that the decision rested on sound legal principles is unpersuasive, at least as an originalist matter. He relies primarily on precedents handed down after ratification of the Fourteenth Amendment. Indeed, he acknowledges that the "liberty of contract idea" did not come to contract law until the 1870s, and was adopted by the Supreme Court as a constitutional right only in the 1890s.[597] The existence of these post-Reconstruction cases may exonerate *Lochner* of the charge of being unprecedented, if such a charge has been made, but it is irrelevant to any argument that *Lochner* was consistent with the original public understanding of the Constitution, whether in 1791 or in 1868.

593. THE FEDERALIST NO. 45, *supra* note 130, at 288, 292 (James Madison) (emphasis added).

594. U.S. CONST. amend. X.

595. *See, e.g.*, United States v. Darby, 312 U.S. 100, 124 (1941).

596. DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 3 (2011).

597. *Id.* at 18.

2. Griswold v. Connecticut

Only two years after the Supreme Court reaffirmed its abandonment of the *Lochner* doctrine as a usurpation of legislative power,[598] the Court resurrected the substantive due process doctrine, now justifying it from the opposite theoretical direction: not the absence of state power but the existence of fundamental right. In *Griswold v. Connecticut*, the Court invalidated a Connecticut statute that prohibited the sale of contraceptives to a married couple.[599] The Court began its analysis by restating the Court's prior repudiation of *Lochner*, stating that the Court does not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[600] The Court conspicuously declined to base its decision on the Due Process Clause.[601] It nonetheless struck down the Connecticut law, basing its decision on "penumbras, formed by emanations" of various provisions of the Bill of Rights that together imply a "zone of privacy."[602] The Court specifically invoked the First Amendment right of association, the Third Amendment guarantee against quartering soldiers in private homes, the Fourth Amendment right of the people against unreasonable searches and seizures, and the Fifth Amendment privilege against self-incrimination.[603] It is hard to see how the Court could get from these provisions to the right in question. Enumerated rights of course extend beyond a narrow construction of the terms (free speech includes sign language), but interpreting the Bill of Rights to include a judicially divined "zone of privacy" that includes an inalienable right for married couples to purchase contraceptives strains any reasonable construction of the document. It would have been more plausible to deduce a freedom of contract in *Lochner* from the Contracts Clause, the Takings Clause, and the Ex Post Facto Clause than it was to deduce a right for married couples to use contraceptives from provisions

598. *See* Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."); *id.* at 731 (arguing that the Constitution gives federal courts no power "to sit as a 'superlegislature to weigh the wisdom of legislation'" (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952))).

599. 381 U.S. 479 (1965).

600. *Id.* at 482.

601. *See id.*

602. *Id.* at 484-85.

603. *Id.* at 484.

about associations, quartering soldiers, searches, and self-incrimination. The decision goes beyond penumbras and emanations, to pure invention.

The *Griswold* Court attempted to distance itself from *Lochner* but wound up creating a mirror-image doctrine. In *Lochner*, the Court invalidated general and prospective state statutes on the ground that there were (unenumerated) constitutional limits on state power and that it was the Court's job to police those limits. In *Griswold*, the Court began invalidating general and prospective state laws on the ground that there were (unenumerated) individual rights that limited state power and that it was the Court's job to police those limits.

The Court's analysis in *Griswold* is made even more curious in light of the rationale it rejected. Only two years prior, in *Poe v. Ullman*,[604] the Court had declined to decide the constitutionality of the same statute for lack of a "case or controversy."[605] Justice Harlan's dissent in that case,[606] arguing against the statute's constitutionality, which he reproduced as a concurrence in *Griswold*,[607] is a more persuasive interpretation of "liberty" under the Due Process Clause, though it is still a reach from the original understanding. Harlan would have invalidated the statute on the ground that it interfered with the freedom *traditionally* afforded to married couples,[608] based on the actual practices of most of the states. (By 1965, Connecticut was an outlier—the only state in the Union to criminalize the use of contraceptives by married couples.[609]) He did not purport to create new rights on the basis of moral theory, but in effect he nationalized rights already recognized by the vast majority of states. Unfortunately, he did not explain what this has to do with due process. One of us has argued that a tradition-based analysis of unenumerated constitutional rights, similar to Harlan's, is a more plausible reading of the Privileges or Immunities Clause of the Fourteenth Amendment than of the Due Process Clause and has defended the result in *Griswold*—but not the majority's analysis—on that ground.[610]

Much later, after the abortion decisions (discussed below), it looked as though the Court might fall back to a substantive due process analysis that gave constitutional status to unenumerated liberties only if they were deeply rooted in the traditions of the American people. For example, using this

604. 367 U.S. 497 (1961).

605. *Id.* at 508-09; *see* U.S. CONST. art. III, § 2.

606. *Poe*, 367 U.S. at 522-55 (Harlan, J., dissenting).

607. 381 U.S. at 499 (Harlan, J., concurring).

608. *See Poe*, 367 U.S. at 542-43, 553 (Harlan, J., dissenting).

609. *See* RICHARD A. POSNER, SEX AND REASON 328-29 (1992).

610. McConnell, *The Right To Die*, *supra* note 15, at 692-98.

approach the Court reversed appellate court holdings that the Fourteenth Amendment Due Process Clause invalidates laws against physician-assisted suicide,[611] and it invalidated a state law that authorized courts to give child visitation rights to third parties against the wishes of a fit parent.[612] Lodged between the Court's landmark abortion decisions and *Lawrence v. Texas*, the tradition-based analysis proved to be one step back in the course of two steps toward maximizing the Court's legislative power. It is a more restrained and defensible methodology for determining the content of unenumerated fundamental rights, if they exist, but it does little to restore the original meaning of due process, which allows restraints on natural liberty when those restraints are imposed pursuant to law.

3. Roe v. Wade

In *Roe v. Wade*,[613] the Court took a giant step beyond its prior decisions. The *Roe* decision has been so much discussed from every angle that there is little fresh that can be said.[614] It is the most enduringly controversial opinion of the Court's history. Rather than rely on penumbras and emanations from enumerated rights in the Bill of Rights, as the Court had done in *Griswold*, and without making any attempt to distinguish its reasoning from that in *Lochner*, the Court resuscitated the idea of substantive due process in all its uncabined glory.[615] Unlike *Griswold*, which invalidated a unique, rarely enforced, and antiquated law, *Roe* and its companion case, *Doe v. Bolton*,[616] effectively invalidated the then-operative laws of all fifty states, including many that had been recently enacted, were consistent with the reform-minded Model Penal Code, and enjoyed widespread democratic support. The decision could therefore summon no support from Justice Harlan's tradition-based approach in *Griswold*. The Court never explained why the centerpiece of its analysis, that there is longstanding and deep-seated disagreement over the moral status of the unborn child,[617] supports the conclusion that one of the two answers—the

611. *See* Vacco v. Quill, 521 U.S. 793 (1997); Washington v. Glucksberg, 521 U.S. 702, 735 (1997). For an explanation and defense of the decisions, see Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517 (2008).

612. Troxel v. Granville, 530 U.S. 57, 67 (2000).

613. 410 U.S. 113 (1973).

614. For a sampling, see WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION (Jack M. Balkin ed., 2005).

615. *See Roe*, 410 U.S. at 164-65.

616. 410 U.S. 179 (1973).

617. *See Roe*, 410 U.S. at 116.

one not adopted by the legislature—therefore is embodied in the Constitution.[618] And for all its voluminous length, the Court's opinion did not take the trouble to explain what any of this has to do with the requirement that due process of law be followed when natural liberty is infringed. Few have defended the reasoning of *Roe* in the years since, though many have celebrated its result, and it appears to be firmly established as precedent for the foreseeable future.

4. Planned Parenthood v. Casey *and* Lawrence v. Texas

To its credit, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[619] and *Lawrence v. Texas*,[620] the Court abandoned the "privacy" rubric of *Griswold* and *Roe* and returned to the authentic language of the Fourteenth Amendment. "The controlling word in the cases before us," the Court explained, is "'liberty.'"[621] But as we have argued, substantive due process is problematic not because of its capacious understanding of natural liberty, but because of its neglect of the words that follow: "without due process of law." The *Casey* plurality noted that "a literal reading" of the Due Process Clause "might" suggest that "it governs only the procedures by which a State may deprive persons of liberty."[622] True: that is what the words mean, what the unbroken history of their interpretation meant for almost a century, and what their underlying purpose demands. But the Court went on: "for at least 105 years . . . the Clause has been understood to contain a substantive component as well."[623] For this proposition the Court cited *Mugler v. Kansas*,[624] the case that, in dictum, kickstarted the era of economic substantive due process. Given that the *Mugler-Allgeyer-Lochner* line of cases has been repudiated by the Court and is generally regarded as one of the Court's great mistakes, one might think this a

618. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) ("It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other.").

619. 505 U.S. 833.

620. 539 U.S. 558 (2003), *overruling* Bowers v. Hardwick, 478 U.S. 186 (1986). We take no position on the persuasiveness of Justice O'Connor's opinion in *Lawrence*, which rested on equal protection instead of due process grounds. *See* 539 U.S. at 579 (O'Connor, J., concurring).

621. *Casey*, 505 U.S. at 846.

622. *Id.*

623. *Id.*

624. 123 U.S. 623 (1887).

less-than-solid precedent on which to ground so broad and unchecked a power.

The Court declared that it was "tempting," but wrong, to limit the protections of the Clause to those liberties rooted in positive law, and concluded that it is an "inescapable fact" that the substantive content of fundamental rights must rest on the "reasoned judgment" of the Court.[625] Even though "[m]en and women of good conscience" disagree about the "moral and spiritual implications" of abortion, the Court's "obligation is to define the liberty of all."[626] The Court made no attempt to cabin that definition by reference to history, tradition, or national consensus. Instead, the Court located that definition in the proposition that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[627] Ultimately, the Court rested on stare decisis, both as to the legitimacy of its exercise of the substantive due process power and as to the identification of the particular right.

In *Lawrence*, the Court overruled prior precedent to invalidate a Texas statute against consensual homosexual sex.[628] In its specific application, *Lawrence* is far more defensible than *Casey* or *Roe*: the decision probably accords with majority sentiment; might arguably be supported by Justice Harlan's tradition-based approach, loosely and generously construed; is more closely connected to privacy in its ordinary meaning; and does not adversely affect the rights of vulnerable third parties. All three decisions, however, are based on an airy generality with no serious legal content, and all three assert an essentially unbounded power of the Court to dispense with laws the Court disapproves of. The rhetoric of *Casey* made it appear that stare decisis might be a serious constraint on the Court; *Lawrence* indicates that it is not. Our objection to *Lawrence* is not based on the merits of the right it creates, which we would happily vote to approve were we in the legislature, but on its assumption of a power not accorded the courts under the Constitution, at least in its original meaning.

Somewhat ironically in light of the origins of due process of law, the plurality in *Casey* asserts that "[l]iberty finds no refuge in a jurisprudence of doubt"[629] and goes on to create an inalienable liberty of undefined terms, beyond the reach of a duly elected legislature. This is precisely the opposite of

625. *Casey*, 505 U.S. at 849.

626. *Id.* at 850.

627. *Id.* at 851.

628. Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

629. *Casey*, 505 U.S. at 844.

due process in a system of separated powers, where a legislature has the power to make general and prospective laws limiting natural liberty (and to repeal those laws if public morality or culture changes), and where it is the job of a court to apply those laws to specific cases. Both *Casey* and *Lawrence* put lawmaking beyond the reach of the government without a sound basis in the text, history, or jurisprudential practice of due process of law.

5. Rational Basis Review

This observation applies equally to the judicial doctrine that statutes that the Supreme Court does not believe to be reasonable violate due process.[630] By comparison to *Lochner* and *Griswold*, rational basis review seems innocuous; the Court has rarely used it to invalidate a statute, and it may seem to be a harmless backstop against truly reason-less legislation. But when the Court purports to evaluate whether a state's interest is "legitimate" or a "justif[ied]" interference with a judge-made liberty, the result is no different in principle than in other modern substantive due process cases: it places a sphere of activity beyond the government's power to regulate without any specific constitutional warrant. We would do well to recall the first Justice Harlan's dissent in *Plessy v. Ferguson*:

> Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that, the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment."[631]

630. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.").

631. Plessy v. Ferguson, 163 U.S. 537, 558 (1896) (Harlan, J., dissenting) (quoting SEDGWICK, *supra* note 257, at 324).

To reject rational basis review is not to hold that the government may pass irrational laws. Rather, it is to hold that laws passed by the people's representatives, according to the constitutional prescriptions for enacting laws, are per se reasonable. Our protection against irrationality is institutional and democratic, not theoretical and judicial. The Constitution does not authorize courts to interfere with validly enacted laws that do not violate a stated limit on the government.

D. Incorporation of the Bill of Rights

There is little historical evidence to support the notion that the Fourteenth Amendment Due Process Clause was originally understood to apply the Bill of Rights' substantive liberty provisions against the states. The Framers of the Fourteenth Amendment understood the Due Process Clause to ensure that the states would provide prevailing notions of "due process of law" to all persons.[632] Due process of law limited a legislature's power to provide alternative judicial procedures, and prohibited it from directly depriving persons of rights through acts that were insufficiently general and prospective.[633] This had nothing to do with the sort of substantive rights the First and Eighth Amendments, for example, provide against the federal government. The bulk of scholarly analysis suggests that the Fourteenth Amendment Privileges or Immunities Clause is a more historically solid foundation for the "incorporation" of the Bill of Rights against the states.[634]

E. Legislative Acts That Raise Due Process Concerns

At the same time that courts have misapplied due process to prospective and general legislative acts, they have obscured how due process might apply to other kinds of legislative acts.

1. Northern Pipeline *Article III Cases*

Due process in its original form insisted that traditional procedures be employed in cases affecting personal rights. Those traditional procedures were, in almost all cases, common law proceedings in court. The Supreme Court has

632. *See supra* Section II.C.

633. *See supra* Sections II.A-B.

634. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 92-130 (1986).

long recognized, probably correctly, that on occasion the legislature may assign a particular set of issues to a decisionmaking process other than common law courts, provided the procedures are a fair and adequate substitute.[635] The latter inquiry has evolved into a general balancing test.[636] The question remains, however, whether the Due Process Clause in combination with other provisions, such as Article III, still requires that some traditional core of cases be decided in court, rather than in executive-branch agencies dressed up as courts.

The landmark case is *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[637] where a plurality of the Court agreed that the Bankruptcy Act of 1978 violated Article III by giving jurisdiction to non-Article III courts—courts whose judges were not insulated from the political branches by life tenure or irreducible salaries—over certain "private law" claims.[638] Justice Brennan's plurality opinion distinguished between traditional "public right" claims and "private right" claims, concluding that Congress may not assign the latter to non-Article III courts.[639] Most of the Court's opinions in this line of cases have turned on whether the claim at issue is based on a "public right."[640]

Most recently, in *Stern v. Marshall*,[641] the Court determined that a state-law tort claim brought by a debtor in a Chapter 11 bankruptcy proceeding was a private right that Congress could not authorize a non-Article III court to

635. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855).

636. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

637. 458 U.S. 50 (1982).

638. *Id.* at 70-71 (plurality opinion); *see also* Crowell v. Benson, 285 U.S. 22, 50 (1932) (distinguishing between public and private rights); *Murray's Lessee*, 59 U.S. (18 How.) at 284 ("[T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."). In *Northern Pipeline*, Justice Rehnquist, joined in a concurring opinion by Justice O'Connor, would have based the decision on a narrower ground: Article III prohibits Congress from giving jurisdiction over state law claims not governed by a federal rule of decision to a non-Article III court. *N. Pipeline*, 458 U.S. at 90-91 (Rehnquist, J., concurring).

639. *N. Pipeline*, 458 U.S. at 70 (plurality opinion).

640. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 51-55 (1989) (holding that the Seventh Amendment bars Congress from depriving parties who are contesting private rights, but not public rights, of the right to a jury trial). *But see* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986) ("[T]his Court has rejected any attempt to make determinative for Article III purposes the distinction between public rights and private rights . . . .").

641. 131 S. Ct. 2594 (2011).

adjudicate.[642] In the process, the Court rearticulated the rationale for the "public rights" exception. Chief Justice Roberts noted that the public rights exception applies especially to cases where

> "it depends upon the will of congress whether a remedy in the courts shall be allowed at all," so Congress could limit the extent to which a judicial forum was available. The challenge in *Murray's Lessee* to the Treasury Department's sale of the collector's land likewise fell within the "public rights" category of cases, because it could only be brought if the Federal Government chose to allow it by waiving sovereign immunity. The point of *Murray's Lessee* was simply that Congress may set the terms of adjudicating a suit when the suit could not otherwise proceed at all.[643]

We think that the separation-of-powers logic used by courts in early due process cases lends support to the Court's reasoning, and casts the *Northern Pipeline* line of cases in a new light. The Court has leaned heavily on Article III's grant of the "judicial Power" to courts whose judges have lifetime tenure and irreducible pay.[644] What it has forgotten by neglecting due-process-as-separation-of-powers is that Congress is likewise limited from exercising quasi-judicial power by Article I's grant of *only* (with minor exceptions) the "legislative Power,"[645] which includes the power only to make laws, not to adjudicate claims that would deprive someone of a right. By relying on the Due Process Clause, the *Murray's Lessee* Court was referring to Congress's *lack of judicial power*, not the exclusivity of Article III. Congress may or may not be able to delegate its power to make law. But it certainly cannot delegate judicial power that it lacks. That is, Congress may authorize courts *at all* only because the Constitution either expressly or implicitly gives it power to do so. It has no inherent judicial power that it may delegate to another body. The reason Congress may create Article III courts is because Article III says it can.[646] The reason it may create military tribunals and territorial courts[647] is because Article I gives Congress the powers to make rules for the regulation of the armed

642. *Id.* at 2601.

643. *Id.* at 2612 (quoting *Murray's Lessee*, 59 U.S. (18 How.) at 284).

644. U.S. CONST. art. III.

645. *Id.* art. I, § 1.

646. *Id.* art. III.

647. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 71 (1982) (plurality opinion).

forces,[648] and to govern the territories.[649] Based on the pervasively federal nature of these activities and the historical practice before and after the ratification of the Constitution, it makes sense that it would be "necessary and proper"[650] for Congress to create tribunals to adjudicate claims arising under territorial and military law. We make no claim about whether the due process limits on Congress's power to delegate "quasi-judicial" actions would expand or limit the scope of the *Northern Pipeline* doctrine. The original meaning of due process may lend credence to Justice Scalia's clear baseline in *Stern*, however: "[A]n Article III judge is required in *all* federal adjudications, unless there is a firmly established historical practice to the contrary."[651] Based on due-process-as-separation-of-powers, we might suggest an amendment to Scalia's qualification: "An Article III judge is required in *all* federal adjudications, unless the text and historical practice of the Constitution expressly or implicitly give Congress the power to authorize them."

2. United States v. Lovett

In *United States v. Lovett*,[652] the Court struggled to invalidate an act of Congress that named two government officials who were suspected of communist sympathies and effectively deprived them of their jobs. The Supreme Court held the statute to be an ex post facto law and a bill of attainder in violation of Article I, Section 9.[653] This required a less-than-clear-cut judgment that Congress's purpose was punitive. As a recent commentator has pointed out, however, that judgment could have gone either way:

> The expulsion of Communists from federal employment in *Lovett* can be seen as a nonpunitive policy reflecting a concern for filling sensitive positions in the American government with members of subversive

648. U.S. CONST. art. I, § 8, cl. 14.

649. *Id.* art. IV, § 3, cl. 2.

650. *Id.* art. I, § 8, cl. 18.

651. Stern v. Marshall, 131 S. Ct. 2594, 2621 (2011) (Scalia, J., concurring).

652. 328 U.S. 303 (1946).

653. *Id.* at 315; *id.* at 317 ("Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts.").

> organizations with ties to hostile foreign powers. Or it can be seen as punishment for the Communists' political activities.[654]

Lovett might have been easier to decide under the original meaning of the Due Process Clause. Congress deprived three government employees of their property in salaries they had already earned and of their liberty to continue working for the government by means of a legislative decree naming only those three individuals rather than by enactment and enforcement of a general and prospective rule. A general rule against employing communists in the federal government, and a proper hearing to determine whether those three parties were in fact communists, would have satisfied due process (putting aside any questions arising from the First Amendment). For the legislature to name them as suspected communists and thereby deprive them of their positions did not. The case is similar to the antebellum case of *Hoke v. Henderson*,[655] where the North Carolina Supreme Court invalidated a legislative act depriving court clerks of their jobs without basis in general law. *Lovett* is more straightforward than *Hoke*, though, because the *Lovett* statute named the parties to be deprived of rights, instead of merely mandating turnover in a position held by a limited number of known parties.

On the Supreme Court, only Justice Frankfurter acknowledged that the act might raise serious due process questions, and his reasoning was sketchy.[656] One of the judges on the Court of Claims, however, voted to invalidate the act based on reasoning closely resembling the early-nineteenth-century cases:

> I think Section 304 violates the Fifth Amendment in that it attempts to deprive the plaintiffs of liberty and property without due process of law. I recognize that the Fifth Amendment does not, like the Fourteenth, which applies only to state governmental action, expressly assure equal protection of federal laws. But a statute which selects persons for punitive action on a completely personal basis, with no

---

654. Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177, 1191 (2011).

655. 15 N.C. (4 Dev.) 1 (1833); *see supra* Subsection II.A.2.e.

656. *Lovett*, 328 U.S. at 328 (Frankfurter, J., concurring) ("The other serious problem the Court's interpretation of section 304 raises is that of due process. In one aspect this is another phase of the constitutional issue of the removal power. For, if section 304 is to be construed as a removal from office, it cannot be determined whether singling out three government employees for removal violated the Fifth Amendment until it is decided whether Congress has a removal power at all over such employees and how extensive it is. Even if the statute be read as a mere stoppage of disbursement, the question arises whether Congress can treat three employees of the Government differently from all others.").

> attempt to treat similarly other persons similarly situated, is so foreign to our concepts of law that it is difficult to think of it as law at all, though it bears the stamp of legislative enactment. If a legislature refuses to define the conduct which it desires to punish, if done by A, in such terms that B and C and D will be equally punishable if they do it, but instead merely provides that A shall be punished if he does it, the legislature engages, not in law making, but in arbitrary action.[657]

3. Statutes That Are Void for Vagueness

Since at least the mid-1920s, the Supreme Court has invalidated vague criminal statutes as a failure of due process of law, based on some combination of insufficient notice and the danger of arbitrary or discriminatory enforcement.[658] Considerations of separation of powers help us to understand this doctrine. Vague statutes have the effect of delegating lawmaking authority to the executive. The enforcement of vague statutes may seem arbitrary, but it is more likely that any individual enforcement decision will be based on a construction of the statute that accords with the executive's unstated policy goals, filling the gaps of the legislature's policy goals. The legislature may of course delegate the filling of gaps to executive agencies. But for reasons already discussed,[659] the delegation must be express and the gaps must be guided by clear legislative directives. As Madison commented in his Report on the Virginia Resolutions in the Alien and Sedition Act controversy:

> Details to a certain degree, are essential to the nature and character of a law; and on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations

657. Lovett v. United States, 66 F. Supp. 142, 151-52 (Ct. Cl. 1945) (Madden, J., concurring in the result).

658. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

659. *See supra* Subsection III.B.2.

> might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.[660]

CONCLUSION

"Due process of law" is the oldest phrase and the oldest idea in our Constitution, but it may be the most unrecognizable in modern interpretation. Due process was not at all about judicial creation of fundamental rights outside the reach of legislative amendment, and only secondarily about notice and the opportunity to be heard. Fundamentally, it was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies, and that legislatures would not be able to step beyond their properly legislative roles of enacting general rules for governance of future behavior. Due process both undergirded and gained its definition from the emerging separation of powers first in Britain and then in America. It is ironic that the courts, starting in the late nineteenth century, seized upon this principle to subvert the separation of powers by giving themselves a super-legislative power to change rather than interpret and enforce the law. There may be reasons to think this revisionary judicial authority is desirable, and there may be other provisions of the Constitution more suited to supporting it, but the Due Process Clauses, as originally understood in 1791 and 1868, meant no such thing.

660. James Madison, *The Report of 1800*, *in* 14 THE PAPERS OF JAMES MADISON, *supra* note 295, at 307, 324.