

# THE YALE LAW JOURNAL

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## The One and Only Substantive Due Process Clause

**ABSTRACT.** The nature and scope of the rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments are among the most debated topics in all of constitutional law. At the core of this debate is the question of whether these clauses should be understood to protect only “procedural” rights, such as notice and the opportunity for a hearing, or whether the due process guarantee should be understood to encompass certain “substantive” protections as well. An important though little explored assumption shared by participants on both sides of this debate is that the answer to the substantive due process question must be the same for both provisions. This Article questions that assumption by separately examining the historical evidence regarding the original public meaning of the Due Process Clauses of both the Fifth and Fourteenth Amendments with a single question in mind: did the original meaning of each clause, at the time of its enactment, encompass a recognizable form of substantive due process? At the time of the Fifth Amendment’s ratification in 1791, the phrase “due process of law,” and the closely related phrase “law of the land,” were widely understood to refer primarily to matters relating to judicial procedure, with the second phrase having a somewhat broader connotation referring to existing positive law. Neither of these meanings was broad enough to encompass something that would today be recognized as “substantive due process.” Between 1791 and the Fourteenth Amendment’s enactment in 1868, due process concepts evolved dramatically, through judicial decisions at the state and federal levels and through the invocation of due process concepts by both proslavery and abolitionist forces in the course of constitutional arguments over the expansion of slavery. By 1868, a recognizable form of substantive due process had been embraced by courts in at least twenty of the thirty-seven then-existing states as well as by the United States Supreme Court and the authors of the leading treatises on constitutional law. As a result, this Article concludes that the original meaning of one, and only one, of the two Due Process Clauses—the Due Process Clause of the Fourteenth Amendment—was broad enough to encompass a recognizable form of substantive due process.

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**INTRODUCTION**

Critics of substantive due process have condemned the doctrine as, among other things, a “contradiction in terms,”<sup>1</sup> an “oxymoron,”<sup>2</sup> a “momentous sham,”<sup>3</sup> a “made-up, atextual invention,”<sup>4</sup> and the “most anticonstitutional branch of constitutional law.”<sup>5</sup> Substantive due process has been criticized both as textually implausible<sup>6</sup> and as contrary to basic principles of democratic self-government.<sup>7</sup> But neither of these criticisms, standing alone, is sufficient to condemn the doctrine as constitutionally illegitimate. After all, even the most ardent textualists acknowledge that constitutional provisions may sometimes reflect specialized “term-of-art” meanings that are not readily apparent from the meanings of the individual words comprised therein.<sup>8</sup> And if a hypothetical constitutional provision were to embody language that was widely understood by the ratifying public to confer upon judges unfettered discretion to recognize

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1. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“[W]e apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms – sort of like ‘green, pastel redness.’”).
  2. *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (“If I thought that ‘substantive due process’ were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation.”).
  3. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990).
  4. Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 897 (2009).
  5. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004).
  6. See, e.g., ELY, *supra* note 1, at 18; John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 552 (1997); see also *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) (“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”).
  7. See, e.g., BORK, *supra* note 3, at 31 (contending that substantive due process has been used “countless times . . . by judges who want to write their personal beliefs into a document that, most inconveniently, does not contain those beliefs”).
  8. See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (“[A]scribing a term-of-art meaning is consistent with, indeed required by, an approach that faithfully seeks to read the Constitution as a legal text that was set forth as a whole within a particular legal and political milieu in which particular words, phrases, or structures had a well understood even if non-literal meaning.”).

and enforce unenumerated rights, the exercise of such discretion could hardly be condemned as constitutionally illegitimate.<sup>9</sup>

It is therefore unsurprising that, from an early date, criticism of substantive due process has focused principally on the contention that the doctrine is inconsistent with the original meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>10</sup> Beginning in the early twentieth century, legal scholars seeking to undermine support for the Supreme Court's then-prevailing *Lochner*-era substantive due process decisions<sup>11</sup> constructed a convincing historical narrative designed to demonstrate that the substantive conception of due process rights reflected in those decisions was a recent judicial innovation unsupported by the text or pre-ratification history of the Due Process Clauses themselves.<sup>12</sup> This historical critique proved remarkably effective—so much so that by 1985, even the United States Supreme Court, in a unanimous opinion, was prepared to concede that its expanding body of post-*Lochner* substantive due process decisions was “suggested neither by [the] language nor by [the] preconstitutional history” of the Due Process Clauses themselves and was “nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.”<sup>13</sup>

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9. Cf. Gary Lawson, *Conservative or Constitutionalist?*, 1 GEO. J.L. & PUB. POL'Y, 81, 82-83 (2002) (“[I]f the Constitution said, ‘Despite anything else in this document, judges can also do whatever they happen to think is a good idea at the time,’ . . . one could not argue that aggressive judicial policymaking . . . was constitutionally suspect.”).
  10. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . .”); *id.* amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”).
  11. Cf. *Lochner v. New York*, 198 U.S. 45 (1905) (finding legislation setting maximum hours for bakers unconstitutional under the Fourteenth Amendment Due Process Clause).
  12. See, e.g., Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911); 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); Charles M. Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218, 222-28 (1919); Robert P. Reeder, *The Due Process Clauses and “The Substance of Individual Rights,”* 58 U. PA. L. REV. 191, 217 (1910); Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440-41 (1926). For more recent works expressing a similar critique, see, for example, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221-39 (2d ed. 1997) [hereinafter BERGER, GOVERNMENT BY JUDICIARY]; Raoul Berger, *“Law of the Land” Reconsidered*, 74 NW. U. L. REV. 1 (1979); and Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95-100.
  13. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting)).

The historical critique of substantive due process that predominated for most of the twentieth century was concisely summarized by Professor John Hart Ely, writing in 1980:

There is general agreement that the [Fifth Amendment Due Process Clause] had been understood at the time of its inclusion to refer only to lawful *procedures*. . . . Despite the procedural intentment of the original Due Process Clause, a couple of pre-Civil War decisions had construed the concept more broadly, as precluding certain substantive outcomes. . . . I am by no means suggesting that with these decisions the path of the law had been altered, that by the time of the Fourteenth Amendment due process had come generally to be understood as possessing a substantive component. Quite the contrary: [these decisions] were aberrations, neither preceded nor destined to become precedents themselves.<sup>14</sup>

But as Professor Ely himself acknowledged, “Things are seldom so simple . . . particularly where the intent of the Framers of the Fourteenth Amendment is concerned.”<sup>15</sup> Within a few years after the publication of the statement quoted above, several works appeared questioning whether the pre-Civil War support for substantive due process was really as sparse as the doctrine’s critics had long maintained.<sup>16</sup> In more recent years, this historical skepticism has been extended backwards as a growing body of scholarship has begun to question the long-standing consensus that the Fifth Amendment Due Process Clause was originally understood to encompass only procedural and not substantive rights.<sup>17</sup> Critics of substantive due process have paid little attention to this

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14. ELY, *supra* note 1, at 15-16.

15. *Id.* at 15.

16. See, e.g., Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 325 (1985); Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 AM. J. LEGAL HIST. 305, 317-20 (1988); Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 485-92 (1985); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 793 (1981).

17. See, e.g., James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320-27 (1999); 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); Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 476-80 (2005); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 401-04 (1994); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941; see

more recent generation of revisionist scholarship, continuing to condemn the doctrine as historically unsupported and constitutionally illegitimate.<sup>18</sup> As a result, the original meaning of the Fifth and Fourteenth Amendment Due Process Clauses is arguably more widely disputed today than at any time since the late 1930s.

It is therefore as auspicious a time as any to reexamine one of the central premises underlying nearly all modern discussions of substantive due process—the assumption that resolution of the substantive due process question, as a matter of the original meaning of the Fifth and Fourteenth Amendment Due Process Clauses, will be the same for both provisions. Though the Supreme Court has, at times, flirted with the notion that the two Clauses, having been “engrafted upon the Constitution at different times and in widely different circumstances of our national life,” might be susceptible to “different constructions and applications,”<sup>19</sup> the general attitude toward this “divergent meanings” hypothesis is better summarized by Justice Frankfurter’s terse rejection of the proposition in *Malinski v. New York*: “To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.”<sup>20</sup> Academic

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*also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3090 (2010) (Stevens, J., dissenting) (asserting that “the historical evidence suggests that, at least by the time of the Civil War if not much earlier, the phrase ‘due process of law’ had acquired substantive content as a term of art within the legal community”).

18. See, e.g., Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531 (2008) (“For me as an originalist, the very notion of substantive due process is an oxymoron.”); Andrew Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 10-23 (2005); Lund & McGinnis, *supra* note 5, at 1557-73; Michael W. McConnell, *The Right To Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 692; see also McDonald, 130 S. Ct. at 3050 (Scalia, J., concurring) (expressing “misgivings about Substantive Due Process as an original matter”); *id.* at 3062 (Thomas, J., concurring) (asserting that “[t]his Court’s substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption”).
19. *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901); see also *Wight v. Davidson*, 181 U.S. 371, 384 (1901) (“[I]t by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment, and maintaining the validity of the acts of Congress . . . is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation.”).
20. 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring); see also *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (“It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth.”); *Carroll v. Greenwich Ins. Co. of N.Y.*, 199 U.S. 401, 410 (1905) (“While we need not affirm that in no instance could a distinction be taken, ordinarily if an Act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth.”).

commentary has tended to be similarly dismissive.<sup>21</sup> Indeed, the proposition that substantive due process might be consistent with the original meaning of one, but not both, of the two Due Process Clauses has received remarkably little serious scholarly attention.<sup>22</sup>

This Article seeks to fill this gap in the existing due process literature by reexamining the original meanings of both the Fifth and Fourteenth Amendment Due Process Clauses with a single question in mind: did the original meaning of each Clause, at the time of its enactment, encompass something that today would be recognized as “substantive due process”? My conclusion, after separately examining the textual and historical evidence regarding the original meaning of each Clause, is that one, and only one, of the two Clauses—the Fourteenth Amendment Due Process Clause—encompassed a recognizable form of substantive due process.

This Article proceeds in five parts. Part I deals with two preliminary matters intended to clarify my approach to the inquiry: (1) an examination of the precise contours of the modern conceptual distinction between substantive and procedural due process, and (2) a taxonomy of the various interpretations that have historically been applied to the two Due Process Clauses with a view to categorizing each as either procedural or substantive in nature.

Parts II and III, which compose the bulk of the Article, examine the textual and historical evidence regarding the original meanings of the Fifth and Fourteenth Amendment Due Process Clauses at the time of each Clause’s

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21. See, e.g., Easterbrook, *supra* note 12, at 102 n.48 (“[T]here is no serious argument that Congress intended the Due Process Clause [of the Fourteenth Amendment] to secure against the states rights more extensive than those secured by the Bill of Rights against the federal government.”); Riggs, *supra* note 17, at 943 n.12 (“[T]here is general agreement that fourteenth amendment due process was intended to mirror fifth amendment due process.”).
  22. I am aware of only a handful of works containing a detailed examination of due process concepts as they existed at the time of both the Fifth and Fourteenth Amendments’ enactments. See BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 214-44; Ely, *supra* note 17, at 322-45; Whitten, *supra* note 16, at 754-55, 792-95. Of these, only Professor Whitten has expressed sympathy for the view that substantive due process may be consistent with the original meaning of the Fourteenth Amendment but not the Fifth Amendment. See Whitten, *supra* note 16, at 754, 793 (concluding that “due process of law” in 1791 “probably was a requirement of a regular judicial proceeding with an opportunity to be heard in defense” but that by 1868 the concept had developed “substantive implications”). A few additional scholars have mentioned the theoretical possibility that the two Due Process Clauses may have had differing original meanings without detailed consideration of the historical evidence bearing on the question. See, e.g., Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 75 (2006); Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1097 (1989).

respective enactment.<sup>23</sup> Briefly, the pre-constitutional and Founding-era evidence regarding the meaning of “due process of law” strongly suggests that that phrase most likely would have been viewed in 1791, at the time of the Fifth Amendment’s ratification, as guaranteeing either that duly enacted law would be followed or that certain requisite procedures would be observed in connection with criminal or civil proceedings.<sup>24</sup> Between 1791 and 1868, when the Fourteenth Amendment was ratified, due process concepts evolved dramatically through judicial elaboration of due process and similar provisions in state constitutions, and through invocations of substantive due process arguments by both proslavery and abolitionist forces in connection with debates concerning the expansion of slavery in the federal territories.<sup>25</sup> As a result, by 1868 “due process of law” had developed additional, well-established substantive connotations as both a prohibition of legislative interference with vested rights and as a guarantee of general and impartial laws.<sup>26</sup>

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23. More specifically, the interpretive focus of this Article is on how the language used in the two Due Process Clauses “would have been understood by an ordinary, reasonably well-informed user of the language, in context, at the time, within the relevant political community that adopted them.” Kesavan & Paulsen, *supra* note 8, at 1144-45 (footnote omitted). This focus on the original public meaning of the constitutional text, rather than the original intentions or understandings of the drafters or ratifiers, is the approach endorsed by the large majority of self-described “originalist” constitutional scholars. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92-117 (2004); BORK, *supra* note 3, at 143-60; Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 550-59 (1994); Lawson & Seidman, *supra* note 22, at 55-67. This Article takes no position on the controversial normative claim that original meaning should be treated as the sole, or even the primary, consideration in constitutional interpretation. Cf. Kesavan & Paulsen, *supra* note 8, at 1129-30 (characterizing originalist textualism as the “single, ‘true’ method of constitutional interpretation”). For present purposes, it is sufficient to observe that “[m]ost interpretive methods start with the text and original meanings and purposes of the constitutional provision at issue, even if they ultimately move beyond those moorings and make additional interpretive moves.” J. Andrew Kent, *Congress’s Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 858 (2007). Thus, even if one rejects the normative premises of originalism, evidence regarding the original public meanings of the Fifth and Fourteenth Amendment Due Process Clauses may nonetheless prove helpful in determining how those provisions should be applied today. See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1798-99 (1997) (“Blinding oneself to [a constitutional] provision’s original context may impoverish the modern interpreter’s understanding of the value it protects [while] knowledge of [its] original meaning . . . will enable the nonoriginalist interpreter to construct the best, most coherent account of the provision.”).
24. See *infra* Part II.
25. See *infra* Sections III.A-B.
26. See *infra* Section III.D.

Part IV considers two potential alternatives to the divergent meanings hypothesis proposed in this Article, both of which are grounded in notions of “constitutional synthesis.”<sup>27</sup> The first alternative, which I refer to as the blind incorporation model, views the original meaning of the earlier-ratified Fifth Amendment Due Process Clause as conclusive evidence of the original meaning of the nearly identical Clause in the Fourteenth Amendment. Conversely, the second alternative, which I refer to as the reverse incorporation model, treats the understandings of the generation that ratified the later-enacted Fourteenth Amendment as controlling the meaning of the Fifth Amendment Due Process Clause. Though each of these alternative models bears some surface plausibility, I find neither to be sufficiently convincing to warrant attributing to either Clause a meaning different from the meaning that most likely would have been attributed to it by a reasonable member of the ratifying public at the time of enactment.

The last part concludes with some tentative thoughts on why the divergent meanings model of the Fifth and Fourteenth Amendment Due Process Clauses has failed to attract more scholarly and judicial support than it has thus far received.

## **I. “SUBSTANTIVE” AND “PROCEDURAL” DUE PROCESS: TERMINOLOGY AND TAXONOMY**

### *A. Terminology: “Substance” and “Procedure”*

A major obstacle in attempting to analyze original understandings of the rights protected by the Fifth and Fourteenth Amendment Due Process Clauses using the categories of substantive and procedural due process is that a distinction between the two concepts was not generally recognized until the early twentieth century.<sup>28</sup> As Professor John Harrison observes, “Although the Court that decided *Roe v. Wade* knew that there was something called substantive due process, the one that decided *Dred Scott v. Sandford* almost certainly did not.”<sup>29</sup> A second major obstacle to such a project is the well-recognized fact that the conceptually distinct categories of substance and

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27. See *infra* note 422 and accompanying text (describing the concept of “constitutional synthesis”).

28. See, e.g., Ely, *supra* note 17, at 319 (“It bears emphasis that the phrase ‘substantive due process’ is anachronistic when used to describe decisions rendered during the nineteenth and early twentieth centuries.”).

29. Harrison, *supra* note 6, at 496 (footnotes omitted).

procedure are, in practice, often closely intertwined.<sup>30</sup> This complicates efforts to derive a functional distinction between the two concepts that can be used to classify historical interpretations that predate the introduction of contemporary due process terminology.

A clue to a possible functional distinction between modern conceptions of substantive and procedural due process may be found in the dissenting opinion of Justice Owen Roberts in *Snyder v. Massachusetts*, the first U.S. Supreme Court opinion in which the phrase “procedural due process” appeared.<sup>31</sup> According to Justice Roberts, “[p]rocedural due process has to do with the manner of the trial [and] dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed.”<sup>32</sup> The connection that Justice Roberts’s opinion draws between procedural due process and the “manner of the trial” tracks a similar connection that Professor Lawrence Solum has drawn between conceptual notions of procedure and adjudication-related conduct: “The idealization of a pure rule of procedure assumes that procedural rules regulate the sphere of adjudicative institutions. Similarly, the idealization of a pure rule of substance posits that the function of the substantive law is to regulate primary conduct—the whole of human activity outside adjudicative contexts.”<sup>33</sup> Professor Solum’s distinction is intuitively plausible and mirrors the way in which we normally think of the conceptual distinction between procedure and substance.<sup>34</sup> Even if we accept that in the real world attempts to

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30. See, e.g., *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) (“Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible.”); Walter Wheeler Cook, “Substance” and “Procedure” in the Conflict of Laws, 42 YALE L.J. 333, 335-36 (1933) (“[O]ur problem turns out to be not to discover the location of a pre-existing ‘line’ [between substance and procedure] but to decide where to draw a line . . .”).

31. 291 U.S. 97, 137 (1934) (Roberts, J., dissenting). It would be another fourteen years before the phrase “substantive due process” made its first appearance in a Supreme Court opinion. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).

32. 291 U.S. at 137.

33. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 215-16 (2004).

34. See, e.g., Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1474-75 (1984) (defining as “substantive” rules those that are “concerned principally with policies extrinsic to litigation” while defining “procedural” rules as those designed “to enhance the fairness, reliability, or efficiency of the litigation process”); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 46 n.200 (1985) (“Substantive rules . . . guide the conduct of persons outside of the courtroom, before they are drawn into litigation. By negative implication, ‘procedural’ rules are those that would not affect behavior in . . .

classify a given rule or entitlement as substantive or procedural may often prove difficult, the distinction between adjudication-related conduct and non-adjudication-related conduct is sufficiently distinct to serve as a useful dividing line for distinguishing between substantive and procedural rights.<sup>35</sup>

Under the dichotomy sketched above, an interpretation of the Due Process Clauses can be categorized as “procedural due process” if it imposes no constraints on governmental deprivations of “life, liberty, or property” that do not relate to the form of adjudication that must be provided in connection with such deprivations and the procedures that must be observed in connection with such adjudication.<sup>36</sup> By contrast, an interpretation of the Due Process Clauses can be classified as “substantive due process” if, and only if, it would prohibit governmental actors, in at least some circumstances, from depriving individuals of life, liberty, or property even if those individuals receive an adjudication in which “even the fairest possible procedure[s]” are observed.<sup>37</sup>

*B. Taxonomy: Categorizing Interpretations of the Due Process Clauses and Similar Provisions*

As noted above, because the distinction between substantive and procedural due process was not expressly recognized prior to the twentieth century, it is not always readily apparent whether a particular eighteenth- or nineteenth-century discussion of due process rights is best characterized as reflecting a substantive or procedural understanding. In order to facilitate discussion of the historical evidence examined in Parts II and III, this Section

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“everyday prelitigation life.” (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954))).

35. See Solum, *supra* note 33, at 205 (“[W]hen we speak of litigation-related conduct, we are not begging the substance-procedure question. Rather, we are appealing to relatively certain usages that do not depend directly on the answer to the substance-procedure question.”).
36. Though “substantive due process” and “procedural due process” appear to be twentieth-century neologisms, see *supra* notes 28-29 and accompanying text, the distinction between due process rights affecting the conduct of judicial proceedings and due process rights affecting other realms of conduct is considerably older. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (“Whatever difficulty may be experienced in giving to those terms [due process of law] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings.”).
37. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (“Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.”).

sets forth a brief summary of the various readings of the two Due Process Clauses (and parallel state constitutional provisions) that have been proposed and applied with a view to categorizing each as either procedural or substantive in nature. This taxonomy will provide a framework and vocabulary that will be used to categorize and describe the historical understandings of the two Due Process Clauses and related provisions discussed in the remainder of this Article.<sup>38</sup>

1. *Procedural Due Process*

a. *“Positivist” Due Process*

At their most basic level, the Due Process Clauses may require nothing more than that judges and executive officers act in accordance with duly established law, as set forth in legislative enactments and in other provisions of the Constitution. This positivist interpretation of the Due Process Clauses reads the due process requirement to mean only whatever “process” is “owed according to positive law.”<sup>39</sup> Though never embraced by a majority of the Supreme Court, this interpretation of the Due Process Clauses was strongly endorsed by Justice Hugo Black<sup>40</sup> and has received the support of numerous academic critics of substantive due process.<sup>41</sup>

A positivist conception of the Due Process Clauses would require government officials to comply with substantive as well as procedural aspects of duly enacted law. But this feature alone does not bring the interpretation within the definition of “substantive due process” as that term is defined above, because there is no set of circumstances under which the government would be prevented from depriving individuals of life, liberty, or property if

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38. Unfortunately, there is no generally agreed-upon nomenclature for describing the various interpretations that have historically been applied to the Due Process Clauses and related provisions, and thus my labels do not necessarily correspond to the terminology that other authors have used to describe similar concepts. Cf. Harrison, *supra* note 6, at 552 (referring to what I describe as “positivist” due process as the “rule of law” interpretation).

39. Hyman, *supra* note 18, at 1.

40. See *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) (“For me the only correct meaning of [due process of law] is that our Government must proceed according to the ‘law of the land’—that is, according to written constitutional and statutory provisions as interpreted by court decisions.”).

41. See, e.g., BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 193-200; DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, at 272 (1985); Calabresi, *supra* note 18, at 1531-32; Easterbrook, *supra* note 12, at 95-100; Harrison, *supra* note 6, at 542 n.132; Hyman, *supra* note 18, at 10-23.

the requisite procedural protections (that is, those required by existing law) are observed.<sup>42</sup>

b. “*Judicial Intervention*” Due Process

An alternative, and slightly broader, interpretation of the Due Process Clauses would read those provisions to require that any deprivation of life, liberty, or property be preceded by an adjudication before a court or other appropriate adjudicative institution.<sup>43</sup> Unlike positivist due process, this interpretation would impose at least some minimal restraint on the legislature, which would be prohibited from enacting any laws that would dispense with the requirement of some form of adjudication before an impartial and independent decisionmaker in connection with any deprivation of life, liberty, or property. Under this interpretation, the Due Process Clauses entitle individuals to nothing more than a judicial pronouncement of the consequences of applying the substantive law—as prescribed by the legislature—to the facts of a particular case in accordance with any applicable procedural rules the legislature may choose to prescribe. The procedural nature of this interpretation is self-evident, as the rights that it protects relate solely to individuals’ interests in the adjudicative process; indeed, the *only* right that it protects is that there be an adjudication.

c. “*Fair Procedures*” Due Process

A third potential procedural interpretation of the Due Process Clauses would not only require compliance with duly enacted law and the formality of an adjudication but would further require that the judicial procedures applied in connection with such an adjudication satisfy some normative conception of fairness as well. This interpretation is the most familiar procedural

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42. See *supra* notes 36-37 and accompanying text; cf. Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 984 (2006) (“[The] require[ment] that the government act by means of valid laws [involves] substance, but of a minimal sort. It converts the idea of substantive due process from oxymoron to pleonasm . . .”).

43. See, e.g., *Cohen v. Wright*, 22 Cal. 293, 318 (1863) (“The terms ‘due process of law’ have a distinct legal signification, clearly securing to every person . . . a judicial trial, according to the established rules of law, before he can be deprived of life, liberty, or property.”); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986) (“[T]he participation of an independent adjudicator is at least a *necessary* condition, and may even constitute a *sufficient* condition, for satisfying the requirements of due process.”).

interpretation of the Due Process Clauses and the interpretation that most accurately characterizes the Supreme Court's current framework for dealing with procedural due process questions. The Court's modern approach to implementing the procedural aspects of the Due Process Clauses focuses on the three-factor balancing test set forth in *Mathews v. Eldridge*,<sup>44</sup> which demands that courts balance: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>45</sup>

d. "Common Law Procedures" Due Process

A final procedural interpretation of the Due Process Clauses would define the process "due" to individuals by reference to historical common law practices.<sup>46</sup> This approach, though never officially adopted as a standard of decision by the U.S. Supreme Court, was strongly hinted at in *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>47</sup> the Court's first decision to address at length the meaning of the Fifth Amendment Due Process Clause.<sup>48</sup> The Supreme Court, however, soon backed away from the historically defined standard described in *Murray's Lessee*, and this interpretation has not played a significant role in the subsequent development of procedural due process.<sup>49</sup>

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44. 424 U.S. 319 (1976).

45. *Id.* at 335; see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-29 (2004) ("The ordinary mechanism that we use . . . for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' is the test that we articulated in *Mathews v. Eldridge*.").

46. See Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 12-28 (2007) (discussing potential implications of such a "frozen-in-amber" interpretation of the Due Process Clauses).

47. 59 U.S. (18 How.) 272 (1855).

48. *Id.* at 276-77 ("To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? . . . [W]e must look to those settled usages and 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."). The *Murray's Lessee* case is further discussed below at text accompanying notes 261 through 270.

49. See *Hurtado v. California*, 110 U.S. 516, 528 (1884) ("[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of

## 2. *Substantive Due Process*

### a. “Vested Rights” Due Process

The branch of substantive due process most closely related to the procedural protections described above is that concerned with protecting “vested rights” from legislative expropriation.<sup>50</sup> The vested rights doctrine, the origins of which lie in natural law concepts that predate the doctrine’s association with due process,<sup>51</sup> held that once particular rights became “vested” in individuals, the legislature was without power to rescind those rights.<sup>52</sup> This doctrine, which focused almost exclusively upon the protection of property rights, became associated with due process through a series of state court decisions in the early decades of the nineteenth century.<sup>53</sup> The vested rights conception of due process prohibited two closely related forms of legislative interference with private property: (1) depriving persons of property for use by the public without compensation and (2) transferring property from person A to person B, either with or without compensation.<sup>54</sup>

The key to understanding the link between the protection of vested rights and the procedural aspects of due process lies in the analogy of a “legislative

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settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law.”); *see also* Rosenthal, *supra* note 46, at 24 (“The view that courts should construe the Due Process Clause to forbid all procedural innovation that deprives a litigant of a procedural right recognized at the time of the Fourteenth Amendment’s framing is so unattractive that no originalist of whom I am aware dares to embrace it.”).

50. *See generally* Harrison, *supra* note 6, at 506-20 (summarizing this “vested rights” interpretation of the Due Process Clauses and its role in nineteenth-century jurisprudence).
51. For the historical development of “vested rights” concepts in the early nineteenth century, *see, for example*, JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 59-82 (3d ed. 2008), and Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421 (1999).
52. *See, e.g.*, ALEXANDER HAMILTON, *The Examination No. XII*, N.Y. EVENING POST, Feb. 23, 1802, *reprinted in* 25 *THE PAPERS OF ALEXANDER HAMILTON* 529, 533 (Harold C. Syrett ed., 1977) (“The proposition, that a power to do, includes virtually, a power to undo, as applied to a legislative body, is generally but not universally true. All *vested rights* form an exception to the rule.”).
53. *See infra* Subsection III.A.1; *see also* Ely, *supra* note 17, at 329-35.
54. *See, e.g.*, Ely, *supra* note 17, at 329-35. The hypothetical statute “taking property from A and giving it to B” provided a paradigm example of unconstitutional legislation throughout the nineteenth century. *See, e.g.*, Harrison, *supra* note 6, at 506-07; John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 339-40 (1997).

sentence.”<sup>55</sup> By transferring person A’s property to person B, the legislature acts as if it were a court adjudicating a dispute between private parties.<sup>56</sup> Under this reading, the “due process” concept retains the judicial connotations implicit in the procedural readings but with an additional substantive dimension requiring that rights may be deprived only by a court acting under preexisting law, rather than by a legislative intervention that alters the scope of existing rights.<sup>57</sup> As Professor Harrison observes, this “vested rights” reading, which is closely related to structural principles regarding the separation of legislative and judicial powers,<sup>58</sup> “underlies much of [substantive] due process doctrine as it developed in the nineteenth century,” though the importance of this reading receded in the latter half of that century as broader versions of substantive due process doctrine gradually gained ascendance.<sup>59</sup>

b. “General Law” Due Process

The assumption implicit in the vested rights reading of the Due Process Clauses – that legislatures can only exercise power through general, prospective enactments rather than through retrospective and special (that is, quasi-

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55. See, e.g., *Nat’l Metro. Bank of Wash. v. Hitz*, 12 D.C. (1 Mackey) 111, 121 (1881) (referring to “[t]he general principle that a statute which attempts to confiscate the property of a citizen, or surrender it to another, without trial or judgment, is rather a sentence than a law”); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 12-13 (1833) (“[W]here a right of property is acknowledged to have been in one person at one time, and is held to cease in 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*.”).
56. See Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 127 (1956) (“[M]easures of special rather than general, and retrospective rather than prospective, application smack of the judicial decree. . . . In disturbing vested rights they would be procedurally vulnerable for taking property by improper process, being among other things a repudiation of trial by jury and in effect bills of pains and penalties.”).
57. See Harrison, *supra* note 6, at 518; see also *Wynehamer v. People*, 13 N.Y. 378, 393 (1856) (Comstock, J.) (“The true interpretation of [due process of law] is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him – not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state.”).
58. See, e.g., Nathan N. Frost, Rachel Beth Klein-Levine & Thomas B. McAfee, *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.”); Mendelson, *supra* note 56, at 126-27.
59. Harrison, *supra* note 6, at 511, 519-20.

judicial) means—was made explicit in a second, broader reading, which placed particular emphasis on the word “law.”<sup>60</sup> The classic formulation of this reading was provided by Daniel Webster’s exposition of the New Hampshire Constitution’s law-of-the-land provision during his oral argument before the United States Supreme Court in *Trustees of Dartmouth College v. Woodward* in 1819:

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 should 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.<sup>61</sup>

As elaborated by courts in the early decades of the nineteenth century, this general law conception interpreted due process to require general and impartial laws rather than “special” or “class” legislation that imposed particular burdens upon, or accorded special benefits to, particular persons or particular segments of society.<sup>62</sup> This conception of due process as a guarantee of equal and impartial laws bears some resemblance to modern doctrine under the Fourteenth Amendment’s Equal Protection Clause and is still observable in cases applying equal protection concepts to the federal government through the Due Process Clause of the Fifth Amendment.<sup>63</sup>

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60. See, e.g., *Hurtado v. California*, 110 U.S. 516, 535-36 (1884) (“It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. . . . [and] due process of law . . . [thus excludes] special, partial and arbitrary exertions of power under the forms of legislation.”); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1066 n.9 (1980) (“[T]he words that follow ‘due process’ are ‘of law,’ and the word ‘law’ seems to have been the textual point of departure for substantive due process.”).
61. 17 U.S. (4 Wheat.) 518, 581 (1819); see also *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (“The due process clause requires that every man shall have . . . the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.” (citing *Hurtado*, 110 U.S. at 535)).
62. See *infra* notes 245-247, 249-251 and accompanying text; see also Ely, *supra* note 17, at 336-38; Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 HASTINGS CONST. L.Q. 851, 870-78 (1982).
63. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating racial segregation in Washington, D.C. public schools for violating the Fifth Amendment Due Process Clause); see also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 282-83

c. “Police Powers” Due Process

The version of substantive due process that predominated during the *Lochner* era is distinguishable from both the vested rights and general law interpretations described above. Unlike those interpretations, which focused principally upon the formal characteristics of the law at issue—that is, whether it interfered with preexisting rights or was addressed to benefiting or burdening particular groups—the *Lochner*-era Court focused principally on the reasonableness of challenged legislation and whether such legislation fell within the legitimate scope of the legislature’s authority. It did so most commonly through references to the traditional police powers of state governments.<sup>64</sup> The *Lochner*-era Court’s application of the Due Process Clauses encompassed review of both the ends that the legislature sought to achieve and the means employed to achieve such ends; if the Court determined that either the ends or means chosen exceeded the legislature’s legitimate authority, the law was condemned as a violation of due process.<sup>65</sup> This more flexible conception of due process allowed for legislation to be upheld even if it interfered with preexisting rights or affected identifiable interests in different ways, so long as the government could point to some legitimate justification for the legislature’s decision.<sup>66</sup> Conversely, legislation that fell outside the scope of the state’s traditional police powers could be invalidated even if it did not deprive individuals of preexisting property rights and did not operate unequally.<sup>67</sup> The *Lochner*-era police powers cases also differed from the earlier

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(1998) (finding similar reasoning in *Bolling* and Daniel Webster’s argument in the *Dartmouth College* case).

64. See Harrison, *supra* note 6, at 499.

65. See, e.g., *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330, 347 n.5 (1935) (“When the question is whether legislative action transcends the limits of due process . . . [the] decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.”).

66. See, e.g., *N.Y. ex rel. Silz v. Hesterberg*, 211 U.S. 31, 39-40 (1908) (upholding the constitutionality of a statute outlawing possession of certain types of game birds as a reasonable exercise of the police power, even as applied to birds that had been lawfully acquired outside the state); *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (upholding legislation challenged under the Due Process Clause on a ground of inequality because it reflected an “exercise of a reasonable discretion” by the legislature and not a “mere excuse” for arbitrary discrimination).

67. See generally David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 21-51 (2003) (describing the expansion of due process concepts during the *Lochner* era). The protection of property rights and the idea that laws should operate generally continued to play an important role in the

property-focused vested rights and general law interpretations by placing principal emphasis on the protection of individual “liberty” rather than “property.”<sup>68</sup>

*d. “Fundamental Rights” Due Process*

With the Supreme Court’s retreat from its *Lochner*-era substantive due process jurisprudence in the late 1930s, substantive due process entered an era of uncertainty in which the continued viability of the doctrine was placed in some doubt.<sup>69</sup> Gradually, however, a new paradigm of substantive due process decisionmaking began to emerge in cases such as *Griswold v. Connecticut*,<sup>70</sup> *Shapiro v. Thompson*,<sup>71</sup> and *Roe v. Wade*.<sup>72</sup> This new approach, which is the Court’s currently prevailing framework for dealing with substantive due process claims, places principal emphasis on identifying a narrow category of liberty interests that are deemed sufficiently “fundamental” to warrant heightened scrutiny and “forbids the government to infringe . . . ‘fundamental’ liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>73</sup> Rights not deemed sufficiently fundamental to warrant heightened scrutiny are generally treated under a far more relaxed standard requiring only that there be some rational basis for the legislature’s decision.<sup>74</sup>

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jurisprudence of the *Lochner* era. See, e.g., Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 998-1000 (2005) (describing the pervasiveness of “the principle of neutrality, and particularly the prohibition on taking from A and giving to B,” in *Lochner*-era decisions). But the protection of “vested rights” and the requirement that laws be “general” in operation fail to account for several significant aspects of *Lochner*-era jurisprudence. See, e.g., Bernstein, *supra*, at 13-31; Cushman, *supra*, at 998-1000.

68. See, e.g., Harrison, *supra* note 6, at 519 (“By the time of *Lochner*, substantive due process doctrine tended to discuss deprivations of liberty more than property.”).
69. See Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 218-19 (1987) (“[W]hen the Supreme Court abandoned *Lochner* in the 1930’s, it was widely understood that the Court was abandoning substantive due process generally, and not merely the use of substantive due process in the protection of economic rights.”).
70. 381 U.S. 479 (1965).
71. 394 U.S. 618 (1969).
72. 410 U.S. 113 (1973).
73. *Reno v. Flores*, 507 U.S. 292, 302 (1993); see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283-97 (2007); see also Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 752 (2009) (“Today, fundamental rights trump the general welfare, whereas in 1905, under the police power of the state, the general welfare trumped rights.”).
74. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 487-89 (1955).

## II. “DUE PROCESS OF LAW” IN 1791

### A. *The English Background: Magna Carta, Coke, and Blackstone*

At the time of the Fifth Amendment’s ratification, the concept of “due process of law” was already many centuries old. In order to understand the meaning that the Fifth Amendment’s Due Process Clause would have conveyed to a reasonable member of the American public in 1791, it is therefore necessary to have some understanding of the English-law origins of due process concepts and how such concepts were described and invoked by the two most widely read and respected authorities on English common law in late-eighteenth-century America—Sir Edward Coke and Sir William Blackstone.<sup>75</sup>

Scholars have traced the origin of the phrase “due process of law” to a statute enacted in 1354, which declared “[t]hat 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.”<sup>76</sup> This statute, in turn, was an elaboration of the thirty-ninth chapter of Magna Carta, enacted more than a century earlier in 1215. Chapter 39 of Magna Carta declared that no freeman was to be “taken,” “imprisoned,” “disseised,” “exiled or in any way destroyed,” “*nisi per legale iudicium parium suorum vel per legem terre*” (“except by the lawful judgment of his peers or [and] by the law of the land”).<sup>77</sup>

The connection between “due process” and “law of the land” was further solidified by the seventeenth-century writings of Sir Edward Coke.<sup>78</sup> In the

75. For the influence of Coke and Blackstone on late-eighteenth-century American political and legal thought, see, for example, BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1967); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 118-119, 268-71 (1968); and Donald S. Lutz, *The Intellectual Background to the American Founding*, 21 *TEX. TECH L. REV.* 2327, 2335-36 (1990).

76. 28 Edw. 3, c. 3 (1354) (Eng.), reprinted in 1 *THE STATUTES OF THE REALM* 345 (1810); see also Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 *AM. J. LEGAL HIST.* 265, 266 (1975).

77. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 375 (2d ed. 1914) (alteration in original). The word “*vel*” in Chapter 39 can be translated as either “and” or “or” and the context of Chapter 39 is ambiguous as to which of these two meanings was intended. See *id.* at 381.

78. Coke was a leading figure in seventeenth-century English law and politics, having served, among other capacities, as member of Parliament, attorney general, chief justice of the Court of Common Pleas, and lord chief justice. See CATHERINE DRINKER BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552-1634)* (1957); see also Lutz, *supra* note 75, at 2335 (characterizing Coke’s *Institutes of the Lawes of England* as “the

Second Part of his famous *Institutes of the Lawes of England*, published posthumously in 1642, Coke declared that the phrase “due process of law” provided the “true sense and exposition” of the “law-of-the-land” provision in the Magna Carta:

*Nisi per Legem terrae.* But by the law of the land. For the true sense and exposition of these words, see the statute of 37 E. 3. cap. 8. where the words, by the law of the land, are rend[er]ed, without due proces[s] of Law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without process of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ original of the common law.<sup>79</sup>

Though doubts have been expressed as to whether Coke was correct to equate “due process of law” with “law of the land,”<sup>80</sup> the general view has been that Coke’s influence on American legal thought during the Founding era was such that the question of whether or not he correctly characterized the seventeenth-century English law on the question is largely irrelevant for purposes of interpreting the Due Process Clause of the U.S. Constitution.<sup>81</sup> A more difficult question is whether Coke is best interpreted as saying that “due process of law” and “law of the land” should be viewed as synonymous for all purposes. Though the passage quoted above is certainly susceptible to such a reading, certain of Coke’s statements in the *Institutes* seem to imply a distinction between the two concepts.<sup>82</sup> In view of such passages, Professor Jurow

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standard work” on the common law “for more than a century” and observing that “those with legal training in the [American] colonies were familiar with Coke”).

79. EDWARD COKE, 2 *INSTITUTES OF THE LAWES OF ENGLAND* 50 (The Lawbook Exchange, Ltd. 2002) (1642).
80. See Corwin, *supra* note 12, at 368; Jurow, *supra* note 76, at 276-77.
81. See, e.g., Ely, *supra* note 17, at 321 (“Whether Coke correctly interpreted Chapter 39 is a matter of historical debate, but the crucial point is that his views were widely accepted as authoritative and markedly influenced constitutional development in the American colonies.”).
82. For example, a few pages after the passage quoted in the text, Coke states “that no man can be taken, arrested, attached, or imprisoned but by due processe of law, *and* according to the law of the land.” COKE, *supra* note 79, at 52 (emphasis added). Similarly, in the same section of his treatise, Coke describes a case in which a “commission . . . made . . . to take I.N. (a notorious felon) and to sei[z]e his lands . . . was resolved to be against the law of the land, *unlesse* he had been endicted, or appealed by the party, *or by other due Processe of Law.*” *Id.* at 54 (emphasis added). These passages suggest that Coke might best be understood as saying that the “law of the land” required “due process of law” without necessarily implying an equivalence between the two concepts for all purposes.

contends that “[w]hen we peruse [Coke’s] commentary as a whole, . . . it becomes doubtful that Coke was simply equating ‘per legem terrae’ with ‘due process of law.’”<sup>83</sup> If Coke did intend a distinction between the two concepts, it would appear that he viewed “due process of law” as having a relatively more precise and determinate meaning, such that “due process of law” could be used to provide the “true sense and exposition” of the (presumably more amorphous) “law-of-the-land” provision.<sup>84</sup>

Coke’s linkage of “due process of law” with “law of the land” has been considered particularly important to those seeking to defend substantive due process as a matter of the Fifth Amendment’s original meaning. For example, in separate articles seeking to establish the historical validity of substantive due process, Professors Robert Riggs, Wayne McCormack, Frederick Mark Gedicks, and James Ely all refer to Coke’s apparent equation of “due process of law” and “law of the land” in the passage quoted above and to an earlier passage in the first volume of Coke’s *Institutes* declaring that monopolies are “against the liberty, and freedom of the Subject . . . and consequently against this great Charter” as evidence that early understandings of due process of law and law of the land imposed substantive as well as procedural restrictions upon the legislature.<sup>85</sup> But Coke’s usage of “law of the land” in the earlier passage is ambiguous. English courts had long held monopolies granted by the Crown without Parliament’s approval to be prohibited by the common law,<sup>86</sup> and such grants were formally prohibited by the Statute of Monopolies enacted by Parliament in 1624—four years before the first volume of Coke’s *Institutes* appeared.<sup>87</sup> Coke’s characterization of monopolies as contrary to the law of the

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83. Jurow, *supra* note 76, at 277; see also Riggs, *supra* note 17, at 959 (speculating that “[p]erhaps Coke only meant to say that ‘due process of law’ and the ‘law of the land’ were synonymous with respect to certain matters of procedure”).

84. See *supra* text accompanying note 79.

85. See Ely, *supra* note 17, at 321; Gedicks, *supra* note 17, at 608 (“The violation of Chapter 29 [according to Coke] lies not in the fact that monopolies deprive individuals of life or property without trial by jury or other legal process, but in the fact that monopolies effect such deprivations at all.”); McCormack, *supra* note 17, at 401; Riggs, *supra* note 17, at 960.

86. See, e.g., *The Case of Monopolies*, (1602) 77 Eng. Rep. 1260 (Q.B.); 11 Co. Rep. 84b. See generally Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1333–36 (2005).

87. An Act Concerning Monopolies and Dispensations with Penall Laws, and the Forfeiture thereof (Statute of Monopolies), 21 Jam., c. 3 (1624) (“[A]ll Monopolies . . . are altogether contrary to the Laws of this Realm, and so are and shall be utterly void and of none Effect, and in no wise to be put in Use or Execution.”), reprinted in Jay Dratler, Jr., *Does Lord Darcy Yet Live? The Case Against Software and Business-Method Patents*, 43 SANTA CLARA L. REV. 823, 825 n.9 (2003).

land may thus have signified nothing more than that monopolies granted as a matter of royal prerogative were contrary to then-existing English common law and statute law, without implying any substantive limits on the authority of Parliament itself. Such an interpretation seems far more consistent with the actual practice of seventeenth- and eighteenth-century English courts, which routinely upheld exclusive trade privileges conferred by Parliament.<sup>88</sup> Indeed, Coke himself tacitly acknowledged as much when he observed that “the power and jurisdiction of the parliament, for making of laws . . . is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.”<sup>89</sup>

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88. See Nachbar, *supra* note 86, at 1334 (“[E]xclusive trade privileges based in custom or confirmed by statute were routinely up-held by common-law courts. . . . I have yet to find a case striking a trade privilege supported by statute.”); see also 2 FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND: WITH A COMMENTARY ON MAGNA CHARTA AND ILLUSTRATIONS OF MANY OF THE ENGLISH STATUTES 271 (Portland, Me., Thomas B. Wait & Co. 1805) (endorsing the proposition that “all monopolies” are against “this branch of *Magna Charta*” (that is, the law-of-the-land provision) but cautioning that “[w]e must, however, except such monopolies as are erected by act of parliament, or by the king’s patents, pursuing the directions of an act made for that purpose”).
89. 4 COKE, *supra* note 79, at 36. Coke’s view regarding the scope of Parliament’s authority is a subject of debate among historians and legal scholars. In a famous 1610 opinion, Coke refused to interpret a statute authorizing the Royal College of Physicians to recover fines in a manner that would effectively have allowed the College to act as a judge in its own case, stating that “when 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.” *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 638 (C.P.) 652; 8 Co. Rep. 107a, 118a. This statement has been variously interpreted as either supporting a nascent form of judicial review authorizing the judiciary to invalidate legislation that conflicted with “common right and reason” or, alternatively, as reflecting a mere rule of construction directing that statutes be interpreted in a reasonable manner. Compare R.H. Helmholz, *Bonham’s Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 337-46 (2009) (interpreting *Bonham* as reflecting a rule of construction), with John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONST. COMMENT. 33, 33-36 (1999) (interpreting *Bonham* as supporting judicial review). Certain proponents of substantive due process have attempted to link Coke’s *Bonham* dictum with his separate statements regarding *Magna Carta*, which Coke did not mention in that decision, to show that the law-of-the-land provision was itself viewed as a limitation on Parliament. See, e.g., Gedicks, *supra* note 17, at 594, 600, 602-11. But Coke’s own invocations of due process and law-of-the-land concepts were limited to situations where either the king or a municipal corporation attempted to deprive persons of their rights without statutory authorization. See, e.g., *James Bagg’s Case*, (1615) 77 Eng. Rep. 1271 (K.B.) 1279; 11 Co. Rep. 93 b, 99 a (holding *Magna Carta*’s law-of-the-land provision to require that “no freeman of any [municipal] corporation can be disfranchised by the corporation, unless they have authority to do it either by the express words of the charter, or by prescription”); *Prohibitions Del Roy*, (1607) 77 Eng. Rep. 1342 (K.B.) 1342; 12 Co. Rep. 64 (invoking “due process” in arguing “that the King in his own person cannot

Moreover, as Professor Riggs observes, “[m]uch of Coke’s discussion of chapter 39 in his *Second Institute* deals with judicial procedure” and Coke’s “[a]llusions to process” in that work “appear exclusively in a procedural context.”<sup>90</sup> More specifically, Coke’s references to “due process of law” all appear in a context that relates to the manner by which an accused can be brought to answer before a court.<sup>91</sup> The exclusively procedural focus of this discussion is difficult to reconcile with understanding due process of law as a broad guarantee of substantive individual rights.

The connection between “due process of law” and the method by which an accused is brought to answer before a court is also apparent in Sir William Blackstone’s *Commentaries on the Laws of England*,<sup>92</sup> which, along with Coke’s *Institutes*, was among the most frequently cited works in late eighteenth-century America.<sup>93</sup> For example, in a chapter devoted to process upon an indictment, Blackstone remarked that if an indictment is issued against a person not already in custody:

the process must issue to bring him into court; for the indictment cannot be tried unless he personally appears: according to the rules of equity in all cases and the express provision of the statute, 28 Edw. III, ch. 3, in capital ones that no man shall be put to death, without being brought to answer by due process of law.<sup>94</sup>

Similarly, in an earlier chapter, Blackstone, after remarking that the English “constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law,” noted that it had been:

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adjudge any case, either criminal . . . or betwixt party and party”). Coke never claimed that Magna Carta, which was itself a statute, could control later acts of Parliament. *See, e.g.,* Berger, *Law of the Land*, *supra* note 12, at 5 (finding no connection between Coke’s *Bonham dictum* and his statements relating to Magna Carta); B. Abbott Goldberg, “*Interpretation of ‘Due Process of Law’—A Study in Irrelevance of Legislative History*,” 12 PAC. L.J. 621, 636-38 (1981) (same).

90. Riggs, *supra* note 17, at 959-60.

91. *See* 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, 51 (2007) (“Coke did not treat ‘process’ in ‘due process’ as a general term for ‘procedure’; rather he used ‘process’ in the more specific sense of a ‘writ original’ or an ‘indictment or presentment’ by a grand jury—that is, as a term for the written authority for a civil lawsuit for damages or a criminal prosecution.”).

92. WILLIAM BLACKSTONE, *COMMENTARIES* (Clarendon Press 1765).

93. *See* Riggs, *supra* note 17, at 971, 992 (discussing evidence regarding the relative influence of Blackstone and Coke in Founding-era America).

94. 4 BLACKSTONE, *supra* note 92, at \*318.

enacted by statute 5 Edw. III, c. 9, that no man shall be forejudged of life or limb contrary to the great charter and the law of the land: and again by statute 28 Edw. III c. 3, that no man shall be put to death, without being brought to answer by due process of law.<sup>95</sup>

As with Coke, scholars attempting to identify a pre-Fifth Amendment basis for substantive due process have looked to certain statements by Blackstone describing the law-of-the-land provision of Magna Carta Chapter 39 as support for their thesis.<sup>96</sup> But as was the case with Coke, Blackstone's statements regarding the law of the land are consistent with interpreting that phrase to mean duly enacted positive law, which would include an Act of Parliament. Indeed, Blackstone was an outspoken supporter of parliamentary supremacy<sup>97</sup> and explicitly acknowledged in his treatise that changes to the law of the land lay within the exclusive authority of Parliament:

It were endless to enumerate all the *affirmative* acts of parliament, wherein justice is directed to be done according to *the law of the land*; and what that law is every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, *unless by authority of parliament*.<sup>98</sup>

Further support for the proposition that neither the law of the land nor due process of law was viewed as a restriction on parliamentary authority under English law can be found in the 1704 decision of the Queen's Bench in *Regina v. Paty*.<sup>99</sup> *Paty* involved a petition for habeas corpus filed on behalf of five citizens imprisoned by authority of the House of Commons for a purported breach of parliamentary privilege. The petitioners claimed that their imprisonment violated the law-of-the-land provision of Magna Carta.<sup>100</sup> Three

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95. 1 BLACKSTONE, *supra* note 92, at \*133-34.

96. See Ely, *supra* note 17, at 322-23 (interpreting Blackstone's characterization of property as an "absolute right" that is not subject to any "control or diminution, save only by the laws of the land" as suggesting substantive limits on Parliament's lawmaking authority under Chapter 39 of Magna Carta); Riggs, *supra* note 17, at 971-73 (arguing that "[t]o the extent that Blackstone's *Commentaries* influenced legal and political thought in America, it would have encouraged a broad reading of the concept").

97. See 1 BLACKSTONE, *supra* note 92, at \*161 ("[Parliament] can, in short, do everything that is not naturally impossible. . . . True it is, that what [they] do[], no authority . . . can undo.").

98. *Id.* at \*141-42 (second and third emphasis added).

99. (1704) 92 Eng. Rep. 232 (Q.B.).

100. The imprisonment of the *Paty* petitioners was not authorized by statute but rather had been authorized by the House of Commons pursuant to the *lex parliamenti*, the "body of law dealing with issues internal to Parliament," including "each House's composition, its

of the four presiding justices rejected the petitioners' claim, holding that the law of the land did not constrain Parliament in the lawful exercise of its privileges.<sup>101</sup> The opinion of Justice Powys, which linked the law-of-the-land provision with "due process of law," is particularly illuminating:

By the 28 Ed. 3, c. 3, there the words *lex terrae*, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority. And the law of Parliament is as mu[c]h a law as any; nay, if there be any superiority, this is a superior law.<sup>102</sup>

The lone dissenter, Chief Justice Holt, would have granted the writ. In his view, the actions for which the petitioners were imprisoned did not constitute a breach of Parliament's customary privileges and punishment for such actions would therefore require a change in existing law, which was beyond the authority of the House of Commons, acting alone, to effect.<sup>103</sup> None of the justices suggested that Magna Carta placed any restriction upon Parliament's authority either to enact legislation or to exercise its legitimate customary privileges.

The remarks of Coke and Blackstone and the opinions of the justices in the *Paty* case strongly suggest that an eighteenth-century reader well-versed in English law would likely have understood both the law of the land and due process of law to require only compliance with duly enacted positive law, with the latter concept having a somewhat more limited connotation relating specifically to judicial proceedings. This positivist conception of due process rights<sup>104</sup> is consistent with the dominant conception of Parliament under late eighteenth-century English law as a supreme lawmaker unconstrained by any external limitations.<sup>105</sup>

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organization, [and] its privileges." JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW* 27 (2007). The *Paty* case implicated a recurring question under English law regarding the relationship between the *lex parliamenti* and the general common law and the extent to which common law courts could review decisions by the respective Houses of Parliament regarding the nature and scope of their own customary privileges. See generally *id.* at 27-36.

101. See *Paty* (1704) 92 Eng. Rep. at 232-33 (opinion of Gould, J.); *id.* at 233-35 (opinion of Powys, J.); *id.* at 235-36 (opinion of Powell, J.).

102. *Id.* at 234.

103. *Id.* at 236-37 (opinion of Holt, C.J.).

104. See *supra* Subsection I.B.1 (describing a positivist conception of due process rights).

105. See, e.g., GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 347-51 (2d ed. 1998). But cf. *infra* note 221 (discussing how the Coke and Blackstone conceptions of due process might have been translated in the context of an American bill of rights).

*B. Pre-Ratification American Background*

*1. Colonial-Era Declarations of Rights*

By the end of the seventeenth century, some version of the Magna Carta law-of-the-land formulation had been incorporated into the fundamental laws of the majority of English colonies in America.<sup>106</sup> For the most part, these enactments did not copy from Chapter 39 verbatim but rather paraphrased “law of the land” to refer specifically to the duly enacted law of the colony itself. For example, the Massachusetts Body of Liberties, enacted in 1641, provided that individuals could not be deprived of “life” or “honour or good name,” or arrested or deprived of various other rights, except “by vertue of equitie of some expresse law of the Country warranting the same.”<sup>107</sup> New York’s 1683 Charter of Liberties and Privileges similarly provided in paragraph 13:

That Noe freeman shall be taken and imprisoned or be disseized of his Freehold or Libertye or Free Customes or be outlawed or Exiled or any other wayes destroyed nor shall be passed upon adjudged or condemned But by the Lawfull Judgment of his peers and *by the Law of this province*.<sup>108</sup>

The 1683 New York Charter also guaranteed, in a separate provision, “[t]hat Noe man of what Estate or Condicon soever shall be putt out of his Lands or Tenements, nor taken, nor imprisoned, nor disinherited, nor banished nor any wayes destroyed without being brought to Answer *by due Course of Law*.”<sup>109</sup> This formulation, combining both a “law[] of this province” provision and a “due course of law” provision, was paralleled in a 1698 declaration of the “Rights and Priviledges” of the inhabitants of East New Jersey.<sup>110</sup> A 1692

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<sup>106.</sup> Riggs, *supra* note 17, at 963.

<sup>107.</sup> MASSACHUSETTS BODY OF LIBERTIES ¶ 1 (1641), *reprinted in* SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES CONSTITUTION AND BILL OF RIGHTS 148, 148 (Richard L. Perry ed., 1959).

<sup>108.</sup> THE NEW YORK CHARTER OF LIBERTIES AND PRIVILEGES ¶ 13 (1683), *reprinted in* ROOTS OF THE REPUBLIC: AMERICAN FOUNDING DOCUMENTS INTERPRETED 66, 69 (Stephen L. Schechter, Richard B. Bernstein & Donald S. Lutz eds., 1990) (emphasis added).

<sup>109.</sup> *Id.* ¶ 15 (emphasis added).

<sup>110.</sup> AN ACT DECLARING WHAT ARE THE RIGHTS AND PRIVILEGES, OF HIS MAJESTY’S SUBJECTS, INHABITING WITHIN THIS PROVINCE OF EAST NEW JERSEY (1698), *reprinted in* THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW JERSEY 368, 371-72 (Aaron Leaming & Jacob Spicer eds.) (The Lawbook Exchange, Ltd. 2002) (1881) (declaring

Massachusetts Bay Declaration of Principles likewise combined a “law of this province” provision with a separate guarantee concerning the method by which the accused could be brought to “answer.”<sup>111</sup> In the Massachusetts enactment, however, the “due course of law” formulation that appeared in both the New York and East New Jersey enactments was replaced with the phrase “due process of law.”<sup>112</sup>

Taken together, the paraphrase of “law of the land” in the New York, East New Jersey, and Massachusetts enactments to refer to a law (or laws) of the province, along with similar language in earlier declarations of rights from Maryland, Connecticut, and Rhode Island,<sup>113</sup> suggests that the law-of-the-land formulation from Magna Carta was viewed in the American colonies in the late seventeenth and early eighteenth centuries as equivalent to established law (either statute or customary). This formulation further supports the conclusion that “law of the land” was understood under seventeenth- and eighteenth-

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in one provision that certain punishments could only be inflicted on a person “by the lawful judgment of his peers, and by the *laws of this Province*” with a separate provision guaranteeing that similar punishments could be inflicted only if the accused were “first brought to answer by due course of law”) (emphasis added).

111. WILLIAM WILLIS, A HISTORY OF THE LAW, THE COURTS, AND THE LAWYERS OF MAINE, FROM ITS FIRST COLONIZATION TO THE EARLY PART OF THE PRESENT CENTURY 37 (The Lawbook Exchange, Ltd. 2006) (1863) (quoting 1692 Massachusetts Declaration of Principles).
112. *Id.* (“No man of what state or condition soever, shall be put out of his lands or tenements, nor taken nor imprisoned, nor disinherited nor banished, \* \* without being brought to answer by due process of law.”) (alteration in original).
113. See 1639 MARYLAND ACT FOR THE LIBERTIES OF THE PEOPLE (providing that free inhabitants of the province “[s]hall not be imprisoned nor disseised or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the *Laws of this province*”), available at <http://www.msa.md.gov/megafile/msa/speccol/sc2900/sc2908/000001/000001/am1-41.html> (last visited Sept. 11, 2010) (emphasis added); ACTS AND ORDERS MADE AT THE GENERAL COURT OF ELECTION, May 19-21, 1647, reprinted in 1 AMERICA’S FOUNDING CHARTERS: PRIMARY DOCUMENTS OF COLONIAL AND REVOLUTIONARY ERA GOVERNANCE 148, 150 (Jon L. Wakelyn ed., 2006) (“[N]o person in this colony shall be taken or imprisoned or be disseized of his lands or liberties . . . but by the lawful judgement of his peers, or by *some known law*, and according to the letter of it, ratified and confirmed by the major part of general assembly lawfully met and orderly managed.”) (emphasis added); ARTICLES OF CONFEDERATION BETWIXT THE PLANTATIONS UNDER THE GOVERNMENT OF THE MASACHUSETS, THE PLANTATIONS UNDER THE GOVERNMENT OF PLIMOUTH, THE PLANTATIONS UNDER THE GOVERNMENT OF CONNECTICUT, AND THE GOVERNMENT OF NEW HAVEN, WITH THE PLANTATIONS IN COMBINATION THEREWITH (1655), reprinted in RECORDS OF THE COLONY OR JURISDICTION OF NEW HAVEN, FROM MAY, 1653, TO THE UNION 562, 572 (Charles J. Hoadly ed., Case, Lockwood & Co. 1858) (providing that no man could be deprived of certain rights and privileges “under colour of Law, or Countenance of Authority, unlesse it be by vertue, or equity of *some expresse Law of this Jurisdiction* . . . [or] by the word of God”) (emphasis added).

century English law in a primarily positivist manner.<sup>114</sup> The separate “due process of law” provision in the Massachusetts declaration and the “due course of law” provisions in the New York and New Jersey enactments suggest that the protections provided by these provisions may have been viewed as conceptually distinct from those offered by the provisions paraphrasing Magna Carta Chapter 39.<sup>115</sup> To the extent that such a distinction was recognized, the connection between “due process of law” (or “due course of law”) and the right to “answer” in all three enactments suggests that these concepts may have been more closely linked with the form of judicial proceeding to which an accused would be entitled and may thus reflect a somewhat broader, procedural understanding of due process.<sup>116</sup>

## 2. *Early State Constitutions and Statutes*

On May 4, 1776, Rhode Island became the first American colony formally to sever its ties with England; the remaining American colonies rapidly followed suit and formally reconstituted their governments as separate and independent states.<sup>117</sup> Eleven of the thirteen newly independent American states (as well as Vermont, which claimed the powers of a state) adopted new constitutions designed to specify the powers and duties of their newly independent governments.<sup>118</sup> Ten of these new state constitutions—those of Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia—included law-of-the-land provisions.<sup>119</sup>

Three of the states that adopted law-of-the-land provisions—Pennsylvania, Vermont, and Virginia—limited the protections provided by the provision to

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114. See *supra* Section II.A.

115. Cf. Riggs, *supra* note 17, at 965 (“[E]nactments treating ‘law of the land’ and ‘due process (or course) of law’ as separate protections suggest that in those colonies, at least, the lawmakers understood ‘law of the land’ and ‘due process (or course) of law’ to mean different things.”).

116. See *supra* Subsection I.B.1 (describing alternative “procedural” understandings of due process concepts).

117. WOOD, *supra* note 105, at 131-33.

118. *Id.* at 133. The two exceptions were Rhode Island and Connecticut, each of which continued to accord legal force to their pre-Revolution colonial charters. *Id.* As Professor Amar observes, because these state constitutions preceded the adoption of the federal Constitution and influenced its design, such constitutions “can provide rich insights into the federal document.” AMAR, *supra* note 63, at 29 n. \*.

119. Riggs, *supra* note 17, at 974-75. The remaining two states—Georgia and New Jersey—did not adopt a law-of-the-land provision as part of their respective constitutions. *Id.*

criminal matters and bundled the law-of-the-land language from Magna Carta with procedural protections for criminal defendants, such as the right to confront witnesses, the right to a jury trial, and the privilege against self-incrimination.<sup>120</sup> Massachusetts and New Hampshire likewise conjoined the Magna Carta Chapter 39 language with procedural protections in criminal cases but did not explicitly limit the protections of their respective law-of-the-land provisions to criminal defendants.<sup>121</sup> Maryland, New York, North Carolina, and South Carolina all adopted freestanding law-of-the-land provisions that closely tracked the language of Magna Carta Chapter 39.<sup>122</sup> The Maryland Constitution also contained a second, unusual provision declaring that every freeman ought to have a remedy for any injury “by the course of the law of the land, and ought to have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay,

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120. See PA. CONST. of 1776, Declaration of Rights, art. IX (“That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country . . . nor can he be compelled to give evidence against himself; *nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.*”) (emphasis added); VT. CONST. of 1777, ch. 1, art. X. (substantially the same as PA. CONST. of 1776, art. IX, *supra*); VA. BILL OF RIGHTS of 1776, § 8 (“That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage . . . nor be compelled to give evidence against himself; *that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.*”) (emphasis added).
121. See MASS. CONST. pt. I, art. XII (1780) (“No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself . . . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.”); N.H. CONST. of 1784, art. I, § 15 (substantially the same as Massachusetts).
122. MD. CONST. of 1776, Declaration and Charter of Rights, art. 21 (“That no freeman ought to be taken, or imprisoned, or disseised 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 lawful judgment of his peers, or by the law of the land.”); N.Y. CONST. of 1777, art. XIII (“[N]o member of this state shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers.”); N.C. CONST. of 1776, DECLARATION OF RIGHTS, art. XII (“That no freeman ought to be taken, imprisoned, or disseised 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.”); S.C. CONST. of 1778, art. XLI (“That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, 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.”).

according to the law of the land.”<sup>123</sup> A nearly identical provision appeared in the Declaration of Rights of Delaware, which did not adopt a separate provision mirroring the language of Magna Carta Chapter 39.<sup>124</sup>

Although the early state constitutions did not follow the colonial era practice of paraphrasing Chapter 39 by substituting a reference to local law for “law of the land,”<sup>125</sup> other references in these documents to the “law of the land” (or, in some cases, the “laws of the land”) suggest a continued equivalence, at least for some purposes, between the “law of the land” and the positive law of the state. For example, the Pennsylvania Constitution of 1776 declared that “representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land.”<sup>126</sup> This provision clearly seems to equate the “law of the land” with duly enacted positive law, which could be altered by the “majority of the people” acting through their representatives in the state legislature. Similarly, the constitutions of Delaware and New York included articles addressing the impeachment of public officials, which declared that trials in impeachment proceedings (in the case of Delaware) and in post-impeachment prosecutions (in the case of New York) were to be conducted “according to the laws of the land.”<sup>127</sup> And both the Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 contained multiple references to the “laws of the land” in contexts where the phrase clearly referred to existing positive law, including an explicit declaration in the Massachusetts Constitution that the constitution itself was to “be a part of the laws of the land.”<sup>128</sup>

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123. MD. CONST. of 1776, Declaration and Charter of Rights, art. 17.

124. DEL. DECLARATION OF RIGHTS of 1776, § 12.

125. Cf. *supra* notes 107-14 and accompanying text (quoting provisions from various colonial era charters paraphrasing “law of the land” to refer to laws of the colony).

126. PA. CONST. of 1776, § 17.

127. DEL. CONST. of 1776, art. 23 (providing that impeachments are to be “prosecuted by the attorney-general, or such other person or persons as the house of assembly may appoint, according to the laws of the land”); N.Y. CONST. of 1777, art. XXXIII (“[The] party so convicted [of impeachment] shall be, nevertheless, liable and subject to indictment, trial, judgment, and punishment, according to the laws of the land.”).

128. MASS. CONST. pt. 2, ch. VI, art. XI (1780); see also *id.* pt. 2, ch. II, § 1, art. VII (declaring that the governor shall exercise the powers of commander in chief and captain general of the militia “agreeably to the rules and regulations of the constitution, and the laws of the land, and not otherwise.”); N.H. CONST. of 1784, pt. II (same, but omitting the phrase “and not otherwise”). In addition, the Preamble of the South Carolina Constitution of 1776, which did not include a law-of-the-land provision (one was included in the state’s subsequent constitution of 1778), set forth a list of claimed abuses by the colonial governor of the state

The incorporation of the Magna Carta Chapter 39 language into provisions dealing primarily with arrest and trial procedures in the constitutions of Massachusetts, New Hampshire, Pennsylvania, Vermont, and Virginia further suggests that the drafters of those constitutions may have viewed “law of the land” as closely related to criminal procedure—an interpretation consistent with Coke’s discussion of Chapter 39 in his *Second Institutes*, which dealt almost exclusively with arrest and trial procedures.<sup>129</sup> The provisions of the Maryland Constitution and Delaware Declaration of Rights guaranteeing every injured party a “remedy . . . according to the law of the land” suggest a similar procedural connotation in connection with civil matters.<sup>130</sup>

By contrast, there is little support on the face of the early state constitutions for interpreting “law of the land” as a reference to some freestanding body of common law or natural law principles, or as a general prohibition of retrospective or targeted legislation. Such a reading would, in many instances, render the law-of-the-land provisions duplicative of other provisions, which addressed such issues more directly and concretely. For example, five of the ten state constitutions that included law-of-the-land provisions also included separate provisions specifically forbidding “retrospective” or “*ex post facto*” laws or punishments.<sup>131</sup> Similarly, the constitutions of Massachusetts, Virginia, and Pennsylvania, each of which contained a law-of-the-land provision, also contained separate provisions declaring that the citizens of those states possessed inherent natural rights, including rights to life, to liberty, and to

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during the period of English rule, including a charge that the governor had “dispensed with the law of the land, and substituted the law martial in its stead”—a formulation in which “law of the land” seems to refer to a preexisting body of positive law within the state for which the “law martial” could be “substituted.” S.C. CONST. of 1776, pmbl.

129. See *supra* notes 79-82 and accompanying text.

130. See MD. CONST. of 1776, Declaration of Rights, art. 17; DEL. DECLARATION OF RIGHTS of 1776, § 12; see also *supra* text accompanying notes 123-24.

131. See DEL. DECLARATION OF RIGHTS OF 1776, § 11 (“That retrospective laws, punishing offences committed before the existence of such laws, are oppressive and unjust, and ought not to be made.”); MD. CONST. of 1776, DECLARATION OF RIGHTS, art. XIII (“That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared to be criminal, are oppressive, unjust, and incompatible with liberty; therefore no *ex post facto* law ought to be made.”); N.H. CONST. of 1784, BILL OF RIGHTS, § XXIII (“Retrospective 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.”); N.C. CONST. of 1776 § XXIV (same); see also MASS. CONST. pt. 1, art. X (1780) (guaranteeing citizens the right to protection of life, liberty, and property “according to standing laws.”).

acquire and possess private property.<sup>132</sup> If substantive protection of such rights was widely understood to have been inherent in the law-of-the-land concept borrowed from Magna Carta, as several scholars have suggested,<sup>133</sup> then these additional specific constitutional safeguards would seem to be unnecessary or, at the very least, redundant.

The phrase “due process of law” did not appear in any of the early state constitutions but did appear in a handful of early state statutes, the most prominent example of which was a statutory bill of rights enacted by the New York Legislature in 1787. The New York statutory bill of rights paraphrased the Magna Carta Chapter 39 formulation but with “due process of law” substituted for “law of the land” in multiple, parallel provisions.<sup>134</sup> These statutory provisions supplemented the similarly worded law-of-the-land provision that appeared in the constitution adopted by the state ten years earlier in 1777.<sup>135</sup> At

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132. See MASS. CONST. pt. 1, art. I (1780) (“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”); PA. CONST. of 1776, Declaration of Rights, art. I (“That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); VA. BILL OF RIGHTS OF 1776, § 1 (“That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”).

133. See, e.g., Gedicks, *supra* note 17, at 593-96; Ely, *supra* note 17, at 322-27; Riggs, *supra* note 17, at 999-1005.

134. 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 and lawful Men of the same Neighbourhood 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.

Rosenthal, *supra* note 46, at 29 n.117 (quoting An Act Concerning the Rights of the Citizens of This State, 1787 N.Y. Laws, 5-6) (emphasis added).

135. See N.Y. CONST. of 1777, art. XIII.

least some historical evidence suggests that the statutory due process provisions were designed to counteract a positivist interpretation of the New York Constitution's law-of-the-land provision, which would have equated the phrase "law of the land" with the state's existing law.<sup>136</sup> In a 1787 speech before the New York Assembly, Alexander Hamilton objected to the positivist interpretation of the constitutional law-of-the-land provision and invoked both that provision and the "due process of law" provisions of the statutory bill of rights in arguing against the constitutionality of a proposed bill to strip former privateers of their right to vote. After quoting from the constitution's law-of-the-land provision, Hamilton declared:

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.

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?<sup>137</sup>

Hamilton's meaning in this speech is somewhat unclear, and both advocates and critics of substantive due process have claimed that his remarks

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136. As evidence of this interpretation of the constitutional law of the land provision, Professor Davies quotes the following excerpt from a contemporaneous newspaper commentary:

[T]he true import of the words "law of the land" . . . is an act of supreme legislative authority; and that this construction is justified by the most approved law authorities, and by the practice of the Kingdom of Great Britain, of whose constitution, as well as of this state, the above clause is a fundamental article.

Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 409 n.575 (2002) (quoting Whig Society Meeting Minutes, N.Y. J. & STATE GAZETTE, June 10, 1784, at 2).

137. *New York Assembly. Remarks on an Act for Regulating Elections*, THE DAILY ADVERTISER, Feb. 8, 1787, reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 34, 35-36 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

support their respective positions.<sup>138</sup> It is not possible to determine conclusively, based solely on the surviving record of this one speech, which, if any, of the competing interpretations that have been attributed to these remarks accurately reflects Hamilton's actual views.<sup>139</sup> Based on certain of his writings, however, there is at least some reason to doubt that Hamilton adopted the broad substantive conception of due process rights that some have attributed to him.<sup>140</sup> In *Federalist No. 84*, published the year after his speech in the New York Assembly, Hamilton argued in support of the proposed federal Constitution by declaring that certain rights enshrined in that document, including the prohibition of ex post facto criminal laws, "have no corresponding provisions in [New York's] constitution."<sup>141</sup> Hamilton's statement in this passage clearly implies that the law-of-the-land provision of New York's constitution and, by extension, the due-process-of-law provisions of the statutory bill of rights (which Hamilton claimed were synonymous),<sup>142</sup> did not prohibit ex post facto criminal punishments.<sup>143</sup>

The phrase "due process of law" also appeared in several early state statutes that did not paraphrase Magna Carta Chapter 39. In these statutes, the phrase was used almost exclusively to refer to judicial process and proceedings. For example, Virginia's first statute of frauds, enacted in 1785, established a

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138. Compare Easterbrook, *supra* note 12, at 98-99 n.35 (interpreting Hamilton's position as being that "although legislatures may well commit wrongs . . . the 'due process' language describes [only] the business of courts"), with Douglas Laycock, *Due Process and Separation of Powers: The Effort To Make the Due Process Clauses Nonjusticiable*, 60 TEX. L. REV. 875, 891 (1982) (interpreting Hamilton as "saying that legislatures cannot enact statutes depriving persons of rights, because only courts can deprive persons of rights").

139. Cf. Ely, *supra* note 17, at 326 ("[I]t is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations about Hamilton's thinking, much less for conclusions about the dominant opinion of the founding generation.").

140. See, e.g., Laycock, *supra* note 138, at 891 (characterizing Hamilton's speech as "substantive due process with a vengeance"); Riggs, *supra* note 17, at 990 (characterizing Hamilton's speech as "the very essence of substantive due process").

141. THE FEDERALIST NO. 84 (Alexander Hamilton).

142. See *supra* text accompanying note 137.

143. Similarly, in an anonymous public letter written in 1784—three years before his speech in the New York Assembly—Hamilton, writing under the pseudonym "Phocion," suggested that the law-of-the-land provision of the New York Constitution would allow the legislature to enact a bill of attainder that would act upon individuals "by name" but contended that the legislature lacked the constitutional authority to enact similar legislation targeting individuals by "general descriptions" because such a practice was unknown to English law. ALEXANDER HAMILTON, 1 *Letters from Phocion* (1784), in 4 THE WORKS OF ALEXANDER HAMILTON 230, 231-32 (Henry Cabot Lodge ed., 1904).

limitation period precluding actions on a purported loan where the alleged debtor had remained in possession for longer than five years “without demand made and pursued by due process of law, on the part of the pretended lender.”<sup>144</sup> A similar usage appeared in a 1797 Massachusetts statute, which provided that if the heir to a presumed intestate whose property had escheated to the state should “appear and make out his right to the same, and shall, *in due process of law*, recover the same against the commonwealth,” such person would be liable for the costs of any improvements to the property incurred while the land was in the state’s possession.<sup>145</sup> Likewise, a 1797 Vermont statute provided that:

Persons in Jail on mesne process, in any civil action, or upon execution, founded on any proper action of debt, shall be admitted to the liberties of the yard, provided they give bond to the sheriff of the county, with one or more sufficient sureties, &c., not to pass such limits until discharged by the creditor *or by due process of law*.<sup>146</sup>

In each of these statutes, the word “process” appears to have been used in its specifically legal sense to refer to judicial process. This specifically legal sense of “process” was defined in Noah Webster’s 1828 American Dictionary of the English Language as “the whole course of proceedings, in a cause, real or personal, civil or criminal, from the original writ to the end of the suit.”<sup>147</sup> The phrase “due process of law” in these statutes can thus be seen as a shorthand reference to a hearing or other appropriate judicial proceeding. A similar usage of the shortened form “due process” appears in a number of early federal

144. Act of Jan. 1, 1787 (VA), *reprinted in* 7 NATHAN DANE, A GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 424 (Boston, Cummings, Hilliard & Co. 1824).

145. Act of 1793 (MA), *reprinted in* 2 WILLIAM CHARLES WHITE, A COMPENDIUM AND DIGEST OF THE LAWS OF MASSACHUSETTS 748 (Boston, Thomas B. Wait & Co. 1810), *available at* [http://books.google.com/books?id=CnYDAAAQAAJ&printsec=frontcover&source=gbs\\_navlinks\\_s#v=onepage&q=&f=false](http://books.google.com/books?id=CnYDAAAQAAJ&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false) (last visited Jan. 7, 2010) (emphasis added).

146. Act of March 2, 1797 (VT), *reprinted in* FIRST ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE PRISON DISCIPLINE SOCIETY 372 (Boston, T.R. Marvin 5th ed. 1827), *available at* [http://books.google.com/books?id=DAYTAAAIAAJ&printsec=frontcover&source=gbs\\_navlinks\\_s#v=onepage&q=&f=false](http://books.google.com/books?id=DAYTAAAIAAJ&printsec=frontcover&source=gbs_navlinks_s#v=onepage&q=&f=false) (last visited Jan. 7, 2010) (emphasis added).

147. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see also* 2 RICHARD BURN, A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE, AS WELL AS FOR GENTLEMEN OF THE PROFESSION 245 (London, A. Strahan & W. Woodfall 1792) (defining “Process” as “that which *proceedeth* or goeth out upon former matter, either *original* or *judicial*: and this in causes either *civil* or *criminal*”); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Edinburgh, Brown, Ross & Symington, 11th ed. 1797) (defining “Process” as “Course of law”).

statutes and treaties adopted during the years after the Constitution's enactment.<sup>148</sup>

*C. The Legislative History of the Fifth Amendment*

The drafting and ratification history of the Fifth Amendment is notoriously sparse.<sup>149</sup> Like other provisions of the Bill of Rights, the Amendment originated with calls from the state ratifying conventions that approved the original Constitution of 1787.<sup>150</sup> Four states—New York, North Carolina, Pennsylvania, and Virginia—proposed amendments to the Constitution rooted in the “law of the land” language from Magna Carta.<sup>151</sup> The New York proposal is notable for its substitution of the phrase “due process of law” in the place where “law of the land” ordinarily would have been expected to appear.<sup>152</sup> Little is known about the circumstances surrounding the drafting of the New York proposal or why James Madison, the Fifth Amendment’s principal drafter, chose the “due process” language over the more familiar “law of the land” formulation proposed by the North Carolina, Pennsylvania, and Virginia ratifying conventions.<sup>153</sup> One possibility is that Madison chose the “due process” language to avoid the potentially positivist connotations associated with the “law of the land” formulation.<sup>154</sup> Madison also may have wished to avoid redundancy with the Supremacy Clause of Article VI, which referred to

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148. See, e.g., An Act To Protect the Commerce of the United States, and Punish the Crime of Piracy (Mar. 3, 1819), ch. 77, § 4, 3 Stat. 510, 513 (providing that “whenever any vessel or boat, from which any piratical aggression . . . shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after *due process and trial*, in any court having admiralty jurisdiction” (emphasis added)); An Act To Authorize the Defense of the Merchant Vessels of the United States Against French Depredations (June 25, 1798), ch. 60, § 2, 1 Stat. 572, 572 (providing that any French vessels initiating hostilities against American ships that were subsequently captured by American merchant seamen “may be adjudged and condemned to their use, after *due process and trial*, in any court of the United States having admiralty jurisdiction” (emphasis added)).

149. See, e.g., Ely, *supra* note 17, at 325 (noting that the drafting and ratification history of the Bill of Rights is “remarkably skimpy” and that “a good deal must rest upon historical conjecture”); Riggs, *supra* note 17, at 947 (“The legislative history of the 1791 due process clause is especially sterile.”).

150. Davies, *supra* note 91, at 131-38.

151. See Riggs, *supra* note 17, at 987.

152. *Id.* at 988-89.

153. See, e.g., Ely, *supra* note 17, at 325 (acknowledging that “[t]he reasons for Madison’s change in wording are unclear”); Riggs, *supra* note 17, at 991.

154. See Davies, *supra* note 91, at 146-48 (speculating that this may have been Madison’s motive).

the Constitution, federal statutes, and treaties as the “supreme Law of the Land.”<sup>155</sup>

Madison introduced the proposed amendment containing the “due process” provision during a speech in the House of Representatives on June 8, 1789.<sup>156</sup> This proposed amendment was reported out of the House, with minor variations, on August 24, 1789 and, following additional revisions in the Senate and in a joint conference committee, was approved by Congress and reported to the states in a form identical to the present Fifth Amendment on September 28, 1789.<sup>157</sup> On December 15, 1791, the Secretary of State proclaimed the Amendment ratified.<sup>158</sup> At no point during this process was the text that would eventually become the Due Process Clause altered in any substantive way, and no commentary or debate interpreting or remarking on the meaning of the proposed “due process” language was recorded in the reported debates of either the House or the Senate.<sup>159</sup>

#### *D. Post-Ratification Interpretive Evidence*

##### *1. Evidence from Early Judicial Decisions*

Arguments seeking to ground support for substantive due process in the original meaning of the Fifth Amendment rely heavily on three early state court opinions issued within the first two decades after the Fifth Amendment’s

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155. U.S. CONST. art. VI.

156. The full text of Madison’s proto-Fifth Amendment read as follows:

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

1 ANNALS OF CONG. 434 (1789). The immediate inspiration for Madison’s proposal was most likely Article II of the Northwest Ordinance, which had been adopted by Congress in 1787 and which similarly bundled a law-of-the-land provision with protections for defendants in criminal cases and a prohibition on uncompensated takings of private property. See Ordinance of 1787: The Northwest Territorial Government, U.S.C. LV, LVI (2006) (providing, among other things, that “[n]o man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should 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”).

157. Gedicks, *supra* note 17, at 641.

158. *Id.*

159. Davies, *supra* note 91, at 151-52.

adoption, each of which suggests support for a “substantive” interpretation of state constitutional law-of-the-land provisions—*Zylstra v. Corporation of the City of Charleston*,<sup>160</sup> *Lindsay v. Commissioners*,<sup>161</sup> and *Trustees of the University of North Carolina v. Foy & Bishop*.<sup>162</sup> Two of these opinions—*Zylstra* and *Lindsay*—were issued by the same judge, Judge Thomas Waties of the South Carolina Court of General Sessions and Common Pleas. Waties’s opinion in the *Zylstra* case, decided in 1794, interpreted the law-of-the-land provision of South Carolina’s constitution to require trial by jury.<sup>163</sup> Though *Zylstra* dealt solely with a matter of judicial procedure, Waties’s interpretation of “law of the land,” which equated that concept with the “common law or acts of parliament, down to the time of Edw. II, which are considered as part of the common law,” was broad enough to encompass substantive as well as procedural rights.<sup>164</sup>

The substantive nature of Waties’s interpretation of the law-of-the-land provision was made clear two years later in *Lindsay* where Waties, invoking his earlier opinion in *Zylstra*, interpreted the law-of-the-land provision to require compensation for governmental takings of private property for the purpose of building a road.<sup>165</sup> Two of his fellow judges—Judges Grimke and Bay—rejected Waties’s broad substantive interpretation of the law-of-the-land provision, finding no conflict between that provision and the “high and important privilege of the legislature, in laying off highways,” which they held encompassed the power to condemn private land without paying compensation.<sup>166</sup>

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160. 1 S.C.L. (1 Bay) 382 (Ct. Com. Pl. 1794).

161. 2 S.C.L. (2 Bay) 38 (Ct. App. 1796).

162. 5 N.C. (1 Mur.) 58 (1805); 3 N.C. (2 Hayw.) 310, 320-24 (1804) (reporting the argument of the trustees’ counsel, John Haywood); see, e.g., Ely, *supra* note 17, at 329-34 (citing *Lindsay* and *Foy* as examples of early support for substantive due process); Gedicks, *supra* note 17, at 647-48 (same); Riggs, *supra* note 17, at 980-84 (same); Shaman, *supra* note 17, at 481-82 (same).

163. *Zylstra*, 1 S.C.L. (1 Bay) at 384. *Zylstra* involved a challenge to a fine imposed by the Charleston Court of Wardens for violation of a municipal ordinance prohibiting the keeping of a tallow-chandler’s shop within the city limits of Charleston on the grounds that the fine exceeded the Court of Wardens’ authority and violated the state constitution’s law-of-the-land and jury trial provisions. *Id.* at 382-83.

164. *Id.* at 391. Judge Bay, who spoke after Waties, “declared himself of the same opinion.” *Id.* at 398.

165. *Lindsay*, 2 S.C.L. (2 Bay) at 59.

166. *Id.* at 57. A fourth judge, Judge Burke, believed that compensation should be paid but did not explain his reasoning and the statute’s constitutionality was thus sustained by an equally divided court. *Id.* at 58, 62.

The third of the early state court decisions to endorse a substantive interpretation of a state law-of-the-land provision came in the 1805 decision of the North Carolina Superior Court in *Trustees of the University of North Carolina v. Foy*,<sup>167</sup> where the court interpreted the law-of-the-land provision as a guarantee that neither members of a corporation nor individuals could be “deprived of their liberties or properties, 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.”<sup>168</sup> Based on this interpretation, the court struck down a statute purporting to deprive the trustees of the University of North Carolina of property granted to them under a prior statute.<sup>169</sup>

Though these three opinions clearly indicate the existence of at least some support for a substantive understanding of state constitutional law-of-the-land provisions during the early years after the Fifth Amendment’s enactment, there is substantial reason to doubt that the views expressed in these opinions reflected the general public understanding of “law of the land” and “due process of law.” During this period, state and federal courts routinely ignored available law-of-the-land provisions in state constitutions in the course of striking down statutes that interfered with vested property rights, basing their decisions instead on natural law arguments or on other more specific provisions in state constitutions or in the federal Constitution.<sup>170</sup> Had law-of-

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167. 5 N.C. (1 Mur.) 58 (1805). The *Foy* case involved a challenge to a statute purporting to divest the trustees of the University of North Carolina of property they had acquired under an earlier statute granting the trustees all escheated property within the state. *Id.* at 58-59.

168. *Id.* at 88.

169. *Id.*

170. See, e.g., *Polk’s Lessee v. Wendal*, 13 U.S. (9 Cranch) 87, 99-102 (1815) (holding on the authority of “general principles” that a legislative grant by the state of Tennessee could not repeal an earlier alleged grant of the same land to a different person because “a grant is absolutely void” when “the state has no title to the thing granted”); *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.) (invalidating New Hampshire statute requiring a owner of land to compensate former tenants for any improvements on the basis of natural law arguments and state constitutional provision prohibiting “retrospective” laws); *Holden v. James*, 11 Mass. (9 Tyng) 396, 404 (1814) (invalidating statute suspending statute of limitations with respect to claims of particular individuals as “manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws” despite constitutional provision authorizing legislature to “suspend” laws); *Merrill v. Sherburne*, 1 N.H. 199, 216-17 (1818) (invalidating legislation purporting to grant a new trial to a litigant who had a judgment entered against him in a prior case as a violation of the separation-of-powers provision in New Hampshire’s constitution); *Dash v. Van Kleeck*, 7 Johns (N.Y.) 477, 505 (1811) (Kent, C.J.) (condemning retrospective legislation as a violation of natural individual rights without “pretend[ing] that we have any express constitutional provision on the

the-land provisions been widely viewed at this time as a source of protection for vested rights, it is difficult to understand why courts would not have at least mentioned such provisions where doing so would have provided additional textual support to the outcomes reached in these cases. Rather, as Professor Alfred Hill has observed, it is likely that in cases such as these “resort to the [law-of-the-land] clause did not even suggest itself” to the courts “as a foundation for invalidating legislative action, since, in Britain . . . the clause operated only against the executive, Parliament being supreme.”<sup>171</sup>

Support for this thesis can be found in the report of an oral argument before the North Carolina Superior Court in *State v. — —*,<sup>172</sup> one of the earliest reported judicial decisions to address the meaning of a state constitutional law-of-the-land provision. This case—decided eleven years before the North Carolina Supreme Court’s 1805 decision in *Foy*<sup>173</sup>—addressed the constitutionality of a recently enacted statute authorizing the state’s attorney general to obtain delinquency judgments against receivers of public money without notice to the defendant.<sup>174</sup> Judge Williams of the Superior Court, acting *sua sponte*, denied a motion filed by Attorney General John Haywood seeking to enforce the statute against several unnamed defendants, finding the statute to be in violation of the state constitution’s law-of-the-land provision.<sup>175</sup> Judge Williams interpreted that provision to require a trial “according to the course of the common law; which always required the party to be cited, and to have a day in Court upon which he might appear and defend himself.”<sup>176</sup>

On reargument the next day, Attorney General Haywood argued that the phrase “law of the land,” as used in the state’s constitution, did not carry the meaning Judge Williams had attributed to it but rather meant only “a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature” as opposed to “foreign legislation,”

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subject”). In each of these cases, the court omitted mention of a state constitutional law-of-the-land provision that could have served as possible additional support for the court’s decision, had the provision been viewed as relevant. *See also* MASS. CONST. pt. I, art. XII (1780); N.H. CONST. of 1784, art. I, § XV; N.Y. CONST. of 1777, art. XIII; TENN. CONST. of 1796, art. XI, § 8.

171. Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1306-07 (1990).

172. 2 N.C. (1 Hayw.) 38 (1794).

173. *See supra* notes 167-169 and accompanying text.

174. 2 N.C. (1 Hayw.) at 38-39.

175. *Id.* at 39.

176. *Id.* at 39.

“royal or executive prerogative” or “usurped power.”<sup>177</sup> The law-of-the-land provision, according to Attorney General Haywood, thus “could not be intended as a restraint upon the Legislature.”<sup>178</sup> Though Judge Williams “adhered to his opinion” of the previous day, Haywood’s arguments were sufficient to persuade a different panel of the same court to enforce the statute against the defendants.<sup>179</sup>

The positivist interpretation of the law-of-the-land provision advocated by Attorney General Haywood in *State v.* — — — survived well into the early nineteenth century. In 1817, the New Hampshire Supreme Court decided *Mayo v. Wilson*, a case involving a challenge to the constitutionality of a statute authorizing warrantless arrests of persons traveling on the Sabbath as a violation of the state constitution’s law-of-the-land provision.<sup>180</sup> Following Coke, the petitioners, who had been detained pursuant to the statute, argued that such warrantless arrests were contrary to the law of the land and thus unconstitutional.<sup>181</sup> The New Hampshire court rejected the petitioners’ argument, interpreting the law-of-the-land provision to mean that “the people of this state are contro[l]lable only by the constitution, by the common and statute laws adopted by the constitution and not altered, and by the laws made by the [legislature] in pursuance of the constitution.”<sup>182</sup> The court thus held that the provision “was not intended to abridge the power of the legislature, but to assert the right of every citizen to be secure from all arrests not warranted by law.”<sup>183</sup>

Usage of the phrase “due process of law” in the early American case reports is relatively infrequent and almost always appears in discussions relating to the process and proceedings of the courts. For example, in a 1787 argument before the General Court of Maryland, counsel for a slave invoked Coke in asserting that “due process of law” and “law of the realm” required conviction pursuant to the “common law mode of trial by Jury” before an English subject could be

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177. *Id.* at 43.

178. *Id.* at 40.

179. The report of the decision states only that Judge Ashe delivered the opinion of the court on behalf of himself and Judge Macay and that Judge Ashe stated “that for him[s]elf he had very considerable doubts, but that Judge Macay was very clear in his opinion that the judgments might be taken, and had given such strong reasons, that his (Judge Ashe’s) objections were vanquished, and therefore that the Attorney General might proceed—but that yet he did not very well like it.” *Id.* at 50.

180. 1 N.H. 53 (1817).

181. *Id.* at 54.

182. *Id.* at 58.

183. *Id.* at 57.

sentenced to slavery as punishment for a crime.<sup>184</sup> In an 1808 decision involving a controversy over which of two individuals was entitled to a position as clerk of a particular court, Judge Henry St. George Tucker of the Virginia Court of Appeals rejected an argument that granting a mandamus petition awarding the position to the plaintiff would deprive the existing clerk of his office “without that due process of law, which the Constitution and the acts [of the legislature] prescribe” because the existing clerk had received adequate notice of the proceeding.<sup>185</sup>

The first reported usage of the phrase “due process of law” in an argument of counsel before the U.S. Supreme Court came in the 1808 argument of Charles Lee in *United States v. Schooner Betsey*.<sup>186</sup> In the course of arguing against the constitutionality of a statute authorizing maritime condemnation proceedings before a court of admiralty without the participation of a jury, Lee equated the Fifth Amendment’s guarantee of “due process of law” with the right to a trial by jury.<sup>187</sup> Another illuminating invocation of the Fifth Amendment Due Process Clause appears in the report of counsel’s arguments in the 1815 Supreme Court case *United States v. Bryan & Woodcock*.<sup>188</sup> In the course of arguing against the constitutionality of a statute that gave the United States priority in bankruptcy proceedings, counsel for plaintiff contended that retroactive application of the statute would “impair the obligation of contracts” and “would be *virtually* taking away private ‘property’ without ‘*due process of law*.’”<sup>189</sup> The inability of counsel to assert directly that retrospective application of the statute would violate the Due Process Clause, while expressing no

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184. *Butler v. Craig*, 2 H. & McH. 214, 233-34 (Md. 1787). Professor Gedicks interprets counsel’s argument in *Butler* as being that “depriving the defendant of her freedom without a jury trial, based solely on the conviction of her parents for an unlawful marriage, violated the law of the land or due process guarantees set forth in” Magna Carta. Gedicks, *supra* note 17, at 628. The case, however, turned on a point of evidence—whether the conviction of the petitioner’s ancestor could be established by testimony or whether the person claiming ownership was required to produce the actual record of the ancestor’s conviction. See *Butler*, 2 H. & McH. at 214-15. The reference by petitioner’s counsel to Magna Carta was offered solely to establish that a judicial trial and conviction of the *ancestor* was necessary and that, without such a conviction, “she [i.e. the ancestor] could not become a slave, *nor could her issue become slaves* by virtue of [her proscribed] intermarriage.” *Id.* at 215 (emphasis added). Counsel for the petitioner never argued that the petitioner would have been entitled to her freedom even if her ancestor’s conviction been duly proven by competent evidence, and the Maryland General Court thus had no occasion to rule on that issue.

185. *Dew v. Judges of the Sweet Springs Dist. Court*, 13 Va. (3 Hen. & M.) 1, 28-29 (1808).

186. 8 U.S. 443 (1808).

187. *Id.* at 451.

188. 13 U.S. (19 Cranch) 374 (1815).

189. *Id.* at 379 (first emphasis added).

similar reservations with respect to the Contracts Clause, suggests that at least as late as 1815, the link between “due process of law” and the protection of vested property rights was still largely understood as a metaphor rather than as a literal application of the constitutional text.

## 2. *Evidence from Early Treatises*

In the decades after ratification of the Bill of Rights, at least four prominent legal commentators—Judge Henry St. George Tucker, Chancellor James Kent, William Rawle, and Justice Joseph Story—published treatises in which they expressed a view as to the meaning of the Fifth Amendment Due Process Clause. These early commentators were remarkably uniform in attributing to the Due Process Clause an exclusively procedural meaning, most commonly by reference to Coke’s equation of “due process of law” with “presentment and indictment.”<sup>190</sup>

The earliest American commentator to address the meaning of the Fifth Amendment Due Process Clause was Judge Henry St. George Tucker, a prominent Virginia lawyer and judge and a law lecturer at the College of William and Mary.<sup>191</sup> In 1803, Judge Tucker published an annotated version of Blackstone’s *Commentaries on the Laws of England*,<sup>192</sup> which contained “the first scholarly gloss on the meaning of the [United States] Constitution.”<sup>193</sup> In a lengthy footnote to a discussion of the powers of Congress under the Constitution, Tucker invoked Coke’s equation of “due process of law” with “presentment and indictment” in describing the restrictions of the Fifth Amendment Due Process Clause: “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

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190. See *supra* notes 79-91 and accompanying text.

191. See William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 520-21 (1994) (describing Tucker’s background and the influence of his treatise).

192. See BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCES, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (Henry St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter Tucker].

193. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 69 (2006); see also Treanor, *supra* note 191, at 521 (noting that “until the appearance of Kent’s *Commentaries* [in 1827] Tucker was the commentator most frequently cited by the Supreme Court and the counsel who appeared before it”).

law.”<sup>194</sup> From this, Tucker concluded that “[d]ue process of law must then be had before a judicial court, or a judicial magistrate” and that imprisoning someone for contempt of Congress without a judicial hearing would violate the Due Process Clause.<sup>195</sup> In a later discussion of the “Judicial Power of the United States,” Tucker described the federal judiciary as “that department of the government to whom the protection of the rights of the individual is by the constitution especially confided” and listed the individual rights protected by the Constitution, beginning with “due process of law,” which Tucker described as “the peculiar province of the judiciary to furnish him with.”<sup>196</sup>

In 1825, twenty-one years after the publication of Judge Tucker’s treatise, William Rawle, a prominent Philadelphia attorney, published his own treatise on the Constitution, which included a discussion of the Fifth Amendment Due Process Clause.<sup>197</sup> Unlike Tucker, who had followed Coke in equating “due process of law” with “presentment and indictment,” Rawle viewed the Due Process Clause as coextensive with the other procedural guarantees set forth in the Bill of Rights.<sup>198</sup> After listing and describing the other procedural guarantees set forth in the Fourth, Fifth, Sixth, and Eighth Amendments, Rawle stated: “It follows from all the antecedent precautions, that ‘no one’ can be deprived of life, liberty, or property, without ‘due process of law,’ and the repetition of this declaration is *only valuable* as it exhibits the summary of the whole, and the anxiety that it should never be forgotten.”<sup>199</sup> In other words, according to Rawle, the Due Process Clause had no independent force or significance other than as a summary and reiteration of the other procedural protections in the Bill of Rights.

The more traditional view of “due process of law” was endorsed by Chancellor James Kent in his *Commentaries on American Law*, published in

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194. 1 Tucker, *supra* note 192, at 203; *cf. supra* note 185 and accompanying text (discussing Tucker’s response, as a judge on the Virginia Court of Appeals, to an argument of counsel invoking “due process of law”).

195. 1 Tucker, *supra* note 192, at 203-04 n.1.

196. *Id.* at 357-58.

197. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 127-32 (H.C. Carey & I. Lea eds., Philadelphia 1825). Rawle had studied law in England from 1781 to 1782 before returning to Philadelphia, where he started a successful law practice. Rawle also served in the state’s General Assembly and as the first U.S. attorney for Pennsylvania from 1791 to 1800. *See* Kesavan & Paulsen, *supra* note 8, at 1177 n.287.

198. RAWLE, *supra* note 197, at 127-32.

199. *Id.* at 129 (emphasis added).

1827.<sup>200</sup> Like Judge Tucker, Chancellor Kent followed Coke in equating “due process of law” with the requirement of presentment and indictment: “The words, *by the law of the land*, as used in *magna carta* . . . are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words.”<sup>201</sup>

This view of the Due Process Clause was also embraced by Justice Joseph Story in his *Commentaries on the Constitution of the United States*, published in 1833.<sup>202</sup> Following Coke, as well as the earlier works of Judge Tucker and Chancellor Kent, Story interpreted “due process of law,” which he characterized as “but an enlargement of the language of *magna charta*,” to mean “due presentment or indictment, and being brought in to answer thereto by due process of the common law.”<sup>203</sup> Story concluded his brief commentary on the Due Process Clause by stating that it “in effect affirms the right of trial according to the process and proceedings of the common law.”<sup>204</sup>

### E. Conclusions

The preceding review of the historical evidence regarding the early understandings of “due process of law” is largely supportive of the traditional view that the Due Process Clause of the Fifth Amendment was originally understood either not to constrain the legislature at all, or, at most, to limit the legislature’s discretion in prescribing certain modes of judicial procedure. Evidence tending to support this view can be found in the works of Coke and Blackstone,<sup>205</sup> in the language employed in early American colonial charters and declarations of rights and in early state constitutions,<sup>206</sup> in the argument of Attorney General Haywood and the decision of the North Carolina court in

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200. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 10 (New York, O. Halsted 1827). Chancellor Kent was the first professor of law at Columbia College and a prominent jurist who spent more than twenty-five years on the courts of New York, first as a justice of the Supreme Court and later on the New York Court of Chancery. See Kesavan & Paulsen, *supra* note 8, at 1177 n.288.

201. 2 KENT, *supra* note 200, at 10.

202. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (Boston, Hilliard, Gray & Co. 1833).

203. *Id.*

204. *Id.*

205. See *supra* notes 79-98 and accompanying text.

206. See *supra* notes 106-113 and accompanying text.

*State v. — — —*,<sup>207</sup> in the New Hampshire Supreme Court’s opinion in *Mayo v. Wilson*,<sup>208</sup> and in the interpretations accorded the Due Process Clause by each of the major treatise writers to have commented on the provision’s meaning during the early years of the Republic.<sup>209</sup> By contrast, support for a substantive conception of due process rights can be found only in the opinions of Judge Waties of South Carolina in *Zylstra* and *Lindsay*,<sup>210</sup> the decision of the North Carolina Supreme Court in *Foy*,<sup>211</sup> and, arguably, in Alexander Hamilton’s comments before the New York Assembly in 1787.<sup>212</sup>

By far the most common argument advanced by supporters of a pre-Fifth Amendment basis for substantive due process is that the phrase “due process of law” was widely viewed as a synonym for “law of the land,” and that the latter phrase was widely recognized at the time of the Fifth Amendment’s enactment as a “term of art” encompassing unwritten substantive rights derived from English common law.<sup>213</sup> But as the historical evidence examined in the

207. 2 N.C. (1 Hayw.) 38, 40-43, 50 (1794).

208. 1 N.H. 53, 57-58 (1817).

209. See *supra* notes 190-204 and accompanying text.

210. *Lindsay v. Comm’rs*, 2 S.C.L. (2 Bay) 38, 59 (Ct. App. 1796); *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 391 (Ct. Com. Pl. 1794).

211. 5 N.C. (1 Mur.) 58 (1805).

212. See *supra* notes 137-143 and accompanying text.

213. See, e.g., Ely, *supra* note 17, at 322-27; Gedicks, *supra* note 17, at 594-96, 661; McCormack, *supra* note 17, at 401-04; Riggs, *supra* note 17, at 999-1005. In addition to relying on this “term-of-art” argument, Professor Gedicks also contends that the term “law” in the Fifth Amendment Due Process Clause would have been understood in a restricted, normative sense that equated “law” with a substantively just legislative enactment. See Gedicks, *supra* note 17, at 642-53; cf. *supra* Subsection I.B.2.b (describing the role of the similar normative sense of “law” in the context of the “general law” version of substantive due process). Though Professor Gedicks identifies several late-eighteenth-century legal dictionaries and judicial opinions showing that this restrictive sense of “law” was one available definition of the term in 1791, only three of the judicial opinions that he cites — Judge Waties’s opinions in *Zylstra* and *Lindsay* and the North Carolina Supreme Court’s opinion in *Foy* — involved the interpretation of a state constitutional law-of-the-land or due process provision. See Gedicks, *supra* note 17, at 654-55. These three opinions seem insufficient to impute to late-eighteenth-century interpreters an understanding of “law,” as used in the Due Process Clause, that differs markedly from the usage of that term in the remainder of the Constitution, where “law” is used exclusively to refer to duly enacted positive law. See Harrison, *supra* note 6, at 531 (“Nowhere in the 1787 document does the word ‘law’ appear in any context that suggests that it refers to some subset of legally binding commands that is defined by formal or substantive criteria.”). Professor Gedicks’s response to this textual argument depends upon “due process” and “law of the land” having been understood as terms of art, encompassing “unwritten natural and customary substantive rights, as well as

preceding Sections demonstrates, at the time of the Fifth Amendment's ratification the phrase "law of the land" was widely understood to refer to duly enacted positive law,<sup>214</sup> with a secondary connotation of appropriate judicial proceedings in the context of Magna Carta Chapter 39's formulation.<sup>215</sup> Although the opinions of Judge Waties in *Zylstra* and *Lindsay* appear to reflect a broader understanding of the phrase as a general reference to historical common law practices (including substantive aspects of the English common law), there is virtually no evidence that such understandings were shared by courts in other states or by members of the ratifying public more generally in 1791.<sup>216</sup>

Moreover, as Professor John Harrison has convincingly argued, a reading of the Due Process Clause that would derive "substantive" content by reference to the public understanding of "law of the land" is rendered "thoroughly unpersuasive" by the Constitution's declaration in the Supremacy Clause of Article VI that the Constitution itself along with "the Laws of the United States . . . and all Treaties made, or which shall be made, under the Authority of the United States" are "the supreme Law of the Land."<sup>217</sup> Because the Supremacy Clause clearly establishes that federal laws and treaties are part of the "Law of the Land," interpreting the Due Process Clause to require compliance with the "law of the land" would appear to preclude the possibility that *any* duly enacted federal law or treaty could violate the Fifth Amendment Due Process Clause.<sup>218</sup>

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procedural rights." Gedicks, *supra* note 17, at 663. For the reasons described in the remainder of this Section, I do not believe the historical evidence supports this conclusion.

214. See, e.g., *State v. — —*, 2 N.C. (1 Hayw.) 38, 43 (1794) (argument of Attorney General John Haywood) (equating "law of the land" with "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature"); *Regina v. Paty*, (1704) 92 Eng. Rep. 232, 234 (Q.B.) (Powys, J.) ("[L]ex terrae is not confined to the common law, but takes in all of the other laws, which are in force in this realm . . ."); 1 BLACKSTONE, *supra* note 92, at \*142 (stating that the "law of the land" is "unchangeable, unless by authority of parliament").
215. See, e.g., *State v. — —*, 2 N.C. (1 Hayw.) at 39 (opinion of Judge Williams) (interpreting North Carolina's "law of the land" provision to require a trial "according to the course of the common law"); COKE, *supra* note 79, at 50 (linking "law of the land" with both "due process of law" and "presentment and indictment").
216. See *supra* Subsection II.D.1.
217. U.S. CONST. art. VI, cl. 2; Harrison, *supra* note 6, at 551.
218. Harrison, *supra* note 6, at 547 (observing that the Supremacy Clause clearly implies that "[d]eprivations pursuant to [duly enacted federal law] are pursuant to the law of the land" and that "[n]o rational person" seeking to impose substantive restrictions upon the legislature "would use words that already appear in the [Constitution] and hope to give them a new meaning").

Professors Gedicks and Riggs both speculate that the use of “due process of law” in the Fifth Amendment rather than “law of the land” may have reflected a deliberate drafting choice designed to avoid the potential positivist connotations of “law of the land” and potential redundancy with the same phrase in the Supremacy Clause.<sup>219</sup> But if “due process of law” was not merely a placeholder for the more familiar “law of the land,” then the specific meaning of the former phrase takes on added significance. As shown above, contemporaneous usage indicates that “due process of law” was commonly used as a reference to judicial process and, specifically, the method by which an accused could be brought to “answer” before a court.<sup>220</sup> While this language is arguably less susceptible to a positivist interpretation than “law of the land,” it is likewise less susceptible to a “substantive” interpretation as well. Indeed, to the extent that the phrase “due process of law” was used as a synonym for “law of the land,” it was almost always used to narrow the phrase to matters relating to the process and procedures of the courts, usually by reference to Coke’s equation of that concept with “presentment” and “indictment.”<sup>221</sup> The use of

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219. See Gedicks, *supra* note 17, at 661-63; Riggs, *supra* note 17, at 990-91.

220. See *supra* text accompanying notes 79-98 (discussing usage of “due process” by Coke and Blackstone); *supra* text accompanying notes 144-148 (discussing usage of “due process” in early U.S. statutes and treaties); text accompanying notes 190-204 (discussing views of early American treatise writers).

221. See *supra* note 79 and accompanying text. As noted above, the public understanding of “due process” and “law of the land” as a matter of eighteenth-century English law is most plausibly categorized as positivist due process, requiring only that those responsible for executing the laws act in accordance with whatever requirements are established by law. See *supra* notes 104-105. It does not necessarily follow, however, that when applied to an American bill of rights, addressed to all branches of government, the “due process” concept would have been similarly understood. Coke’s connection of “due process” with “indictment or presentment,” and the similar remarks of Blackstone, could plausibly have been understood, when translated to an American context, as requiring that the legislature, as well as other branches of government, observe certain requisite procedural protections in connection with deprivations of life, liberty, or property. Though the positivist conception of due process and law-of-the-land provisions continued to enjoy at least some support during the early decades of the Republic, there is contrary evidence suggesting that at least some understood such provisions to restrain the legislature as well. Compare *Mayo v. Wilson*, 1 N.H. 53, 55 (1817) (endorsing positivist conception), and *State v. — — —*, 2 N.C. (1 Hayw.) 38, 43 (1794) (argument of Attorney General Haywood) (same), with *United States v. Schooner Betsey*, 8 U.S. 443, 451 (1808) (argument of Charles Lee) (interpreting the Due Process Clause as a restraint upon Congress), and Tucker, *supra* note 192, at 203-04 (same). Given the difficulty of translating the English concept of “due process” to an American context, it is not clear which of the various procedural interpretations of “due process of law” best characterizes the public understanding of the Fifth Amendment Due Process Clause in 1791. Cf. Rosenthal, *supra* note 46, at 33-34 (noting that “English common law offered no reliable guideposts for assessing the meaning of the Fifth Amendment’s Due

the specific idiom “due process of law” as a reference to unenumerated, substantive common law rights finds virtually no support in the available evidence of that phrase at the time of the Fifth Amendment’s ratification in 1791.

The overall structure of the Bill of Rights is similarly unhelpful to those seeking to ground support for a substantive conception of due process rights in the original meaning of the Fifth Amendment. The Fifth Amendment itself deals primarily with matters of criminal procedure—including protections from prosecution without grand jury indictment and against self-incrimination and repeated prosecution for the same offense<sup>222</sup>—and immediately precedes three amendments that also deal with matters of procedure in criminal or civil cases.<sup>223</sup> Though advocates of substantive due process rightly observe that this predominately procedural pattern is broken by the Fifth Amendment’s Takings Clause,<sup>224</sup> which follows immediately after the Due Process Clause, this single exception seems insufficient, in and of itself, to warrant imputing to the Due Process Clause a substantive meaning. The best that advocates of substantive due process can hope to achieve from structural arguments is a conclusion that the constitutional structure does not preclude a substantive reading of the Fifth Amendment Due Process Clause.<sup>225</sup> Certainly, nothing in that structure affirmatively compels such a reading, and the inferences that might be drawn from structure tend to reflect poorly on the textual plausibility of substantive due process as a matter of the Fifth Amendment’s original meaning.<sup>226</sup>

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Process Clause in a system with a written constitution which was to be treated as ‘the supreme [l]aw of the [l]and’”(alteration in original)).

222. See U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . .”).
223. See *id.* amend. VI (guaranteeing to criminal defendants the right to a speedy trial by an impartial jury of the vicinage, the right to be informed of the nature and cause of the accusation, the right to confront witnesses, and the right to a process to compel witnesses to appear); *id.* amend. VII (guaranteeing the right to a civil jury in suits at common law where the amount in controversy exceeds twenty dollars); *id.* amend. VIII (prohibiting cruel and unusual punishments and the imposition of excessive bail and fines).
224. *Id.* amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
225. Riggs, *supra* note 17, at 998 (“At this point structure flounders as a guide to interpretation. Has the due process clause a greater affinity with the procedural rules that precede it, or with the substantive limitation on takings that follows?”).
226. See, e.g., Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 213, 218-19 (Eugene W. Hickok, Jr. ed., 1991) (“There is some roughness in the organization [of the Bill of Rights]

In view of the opinions in *Zylstra*, *Lindsay*, and *Foy*, all of which were decided reasonably soon after the Fifth Amendment's ratification, it cannot be said with certainty that a substantive role for due process and law-of-the-land provisions had not yet occurred to anyone in 1791. Indeed, Hamilton's remarks to the New York Assembly in 1787 might be read as supporting just such an interpretation.<sup>227</sup> Much turns, therefore, on which side bears the burden of proof in establishing the accuracy of claims about the original meaning of the Fifth Amendment Due Process Clause and the standard of proof that should be applied to such claims.<sup>228</sup> Based on the foregoing review of the historical record, it seems likely that proponents of a purely procedural interpretation of the Fifth Amendment Due Process Clause would be able to satisfy a "best-available-alternative standard," under which "a legal interpretation is [deemed] correct if it is better than its available alternatives."<sup>229</sup> It may even be the case that evidence of a purely procedural interpretation of the Fifth Amendment Due Process Clause would be sufficient to withstand a more demanding standard, such as proof by a preponderance of the evidence or even by "clear and convincing evidence."<sup>230</sup> On the other hand, it seems doubtful that advocates of a substantive original meaning of the Fifth Amendment's Due Process Clause could support their claims based on the available historical evidence under even a relatively relaxed standard of proof. Thus, absent compelling normative considerations that would warrant subjecting opposing claims to a highly demanding standard of proof, it seems difficult to reconcile substantive due process with the original meaning of the Fifth Amendment Due Process Clause.

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... but that should not obscure the existence of a basic structure. . . . This placement [of the Due Process Clause] . . . suggests rather strongly that [Fifth Amendment] due process is a fairly limited right rather than a broad general one.").

227. See *supra* notes 137-143 and accompanying text.

228. For an interesting discussion of the importance of standards of proof in judging the truth of claims regarding legal meaning, see Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

229. *Id.* at 890. Professor Lawson contends that this "best-available-alternative standard" is the "standard [which] generally governs the legal world's acceptance of propositions of law." *Id.* at 891.

230. Though it is doubtful that a substantive original understanding of the Fifth Amendment Due Process Clause could be disproved beyond a reasonable doubt, "[i]f propositions about constitutional meaning should only be accepted if they are proved beyond a reasonable doubt, relatively few propositions deserve acceptance." Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 5 n.15.

### III. "DUE PROCESS OF LAW" IN 1868

#### A. Pre-Ratification Interpretive Evidence

##### 1. Evidence from Pre-Ratification Judicial Decisions

For decades, the definitive account of the judicial development of due process concepts during the period prior to the Fourteenth Amendment's enactment was that of Professor Edward S. Corwin, a prominent *Lochner*-era critic of substantive due process.<sup>231</sup> Though Corwin acknowledged the existence of a few pre-Civil War decisions reflecting a "substantive" application of "due process" or similar provisions, he was generally dismissive of such precedents and suggested that they were not reflective of the "general constitutional law of the era."<sup>232</sup> Modern scholars who have surveyed the pre-Civil War case law for themselves have almost uniformly concluded that support for substantive due process in the antebellum era was far stronger than Corwin and other *Lochner*-era critics of the doctrine had acknowledged.<sup>233</sup> But despite such modern reevaluations, the notion that substantive due process is inconsistent with the original meaning of the Fourteenth Amendment continues to enjoy relatively widespread support.<sup>234</sup>

As noted above, the earliest reported judicial decisions according a "substantive" interpretation to state constitutional law-of-the-land provisions were issued by courts in North and South Carolina within the first two decades

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231. See Corwin, *supra* note 12; see also Ely, *supra* note 17, at 327 ("[Corwin's work] has long influenced the historical understanding of due process in the antebellum period."). For another early account of the judicial development of due process concepts in the years leading up to the Fourteenth Amendment's adoption, see Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583 (1930).

232. See Corwin, *supra* note 12, at 471-77 (discussing public and judicial reaction to the U.S. Supreme Court's decision in *Dred Scott* and the New York Court of Appeals's 1854 decision in *Wynehamer v. People*, both of which are further discussed later in this Article at *infra* notes 255-257 and notes 271-281 and accompanying text).

233. See Ely, *supra* note 17, at 328 ("Corwin strived to place a narrow construction on state court cases interpreting law of the land or due process clauses, and to dismiss decisions invoking substantive due process as anomalous."); see also Benedict, *supra* note 16, at 325-31; Shaman, *supra* note 17, at 480-86; Whitten, *supra* note 16, at 755-93.

234. See, e.g., Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 473 (2006) (contending that "few if any scholars argue that the doctrine of substantive due process is faithful to the original meaning of the Fourteenth Amendment's Due Process Clause"); see also *supra* note 18.

after ratification of the Fifth Amendment in 1791.<sup>235</sup> Though courts in each of those states continued to accord substantive effect to their respective law-of-the-land provisions in the following years,<sup>236</sup> they appear to have been the only courts to have done so within the first three decades after the Fifth Amendment's ratification. The most influential law-of-the-land decision to emerge from either of these states was Judge Thomas Ruffin's 1833 decision for the North Carolina Supreme Court in *Hoke v. Henderson*.<sup>237</sup> *Hoke* involved a challenge to a statute calling for the replacement of existing court clerks who had been appointed under a prior statute to serve during "good behavior" in office.<sup>238</sup> The North Carolina court held that the statute unconstitutionally deprived the petitioner of a property interest in his office in violation of the North Carolina Constitution's law-of-the-land provision, which Judge Ruffin interpreted to prohibit "such legislative acts as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested."<sup>239</sup> Chancellor James Kent, who, as noted above, had described the Fifth Amendment Due Process Clause in the initial edition of his highly influential 1827 treatise in exclusively procedural terms,<sup>240</sup> added a footnote discussing *Hoke* to later editions, which endorsed Judge Ruffin's "elaborate opinion" as "replete with sound constitutional doctrines."<sup>241</sup>

The earliest reported judicial decision to arise outside the Carolinas in which a state constitutional law-of-the-land provision was accorded a substantive interpretation appears to have been the 1821 decision of the Tennessee Supreme Court of Errors and Appeals in *Townsend v. Townsend*.<sup>242</sup> The *Townsend* court invalidated a statute designed to compel creditors to accept

235. See *supra* notes 160-169 and accompanying text. State court interpretations of law-of-the-land and similar provisions are significant to understanding the Fourteenth Amendment Due Process Clause because nineteenth-century courts and commentators looked to such decisions in interpreting the parallel Due Process Clause of the Fifth Amendment. See *infra* notes 263-269, 377-395 and accompanying text.

236. See, e.g., *Robinson v. Barfield*, 6 N.C. (2 Mur.) 391 (1818); *Allen v. Peden*, 4 N.C. (2 Car. L. Rep.) 442 (1816); *Dunn v. City Council*, 16 S.C.L. (Harp) 189 (1824); *State v. Allen*, 13 S.C.L. (2 McCord.) 55 (1822); *Byrne v. Stewart*, 3 S.C. Eq. (3 Des. Eq.) 466 (1812).

237. 15 N.C. (4 Dev.) 1 (1833).

238. *Id.* at 3.

239. *Id.* at 16.

240. See *supra* text accompanying notes 200-201.

241. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 12 n.b. (6th ed., New York, Alex S. Gould 1848).

242. 7 Tenn. (Peck) 1 (1821).

the notes of certain banks in satisfaction of their debts on various constitutional grounds, including that the statute violated the Tennessee Constitution's law-of-the-land provision.<sup>243</sup> The *Townsend* court interpreted that provision to mean that "[p]roperty in possession" of an individual is "secured to the owner, so that it can not be taken from him but by due course of law in a court regularly constituted and proceeding by the standing rules of law; not by [an] act of [the] Assembly depriving the owner of it for the benefit of some other individual."<sup>244</sup>

Eight years later, the Tennessee Supreme Court provided the first explicit judicial endorsement of the general law interpretation of a state constitutional law-of-the-land provision in *Vanzant v. Waddel*.<sup>245</sup> After quoting from Daniel Webster's 1819 argument in the *Dartmouth College* case, Judge John Catron (who would later serve as a Justice on the U.S. Supreme Court) held that the law-of-the-land provision in Tennessee's constitution required "a general and public law, equally binding upon every member of the community" and prohibited deprivations pursuant to special or targeted legislation that did not operate equally upon every citizen alike.<sup>246</sup> The Tennessee Supreme Court continued to expound this general law interpretation of the law-of-the-land provision over the following decade in a series of influential decisions.<sup>247</sup>

Prior to 1838, the interpretation of "law of the land" and similar provisions in state constitutions as substantive restrictions on the legislature's authority had been embraced by the highest courts of only three states—North Carolina, South Carolina, and Tennessee. Over the next two decades, however, this

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243. *Id.* at 18.

244. *Id.*

245. 10 Tenn. (2 Yer.) 259 (1829).

246. *Id.* at 270.

247. See, e.g., *Mayor of Alexandria v. Dearmon*, 34 Tenn. (2 Sneed) 103, 123 (1854) ("The act . . . does not apply to and effect all persons or officers who are or may be in the same situation and circumstances, and is, therefore, partial and limited in its operation, and consequently not the 'law of the land' in the sense of our Constitution."); *Budd v. State*, 22 Tenn. (3 Hum.) 482, 491 (1842) (characterizing the law-of-the-land provision as having been intended "in general, to protect minorities from the wrongful action of majorities"); *Jones's 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 "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); *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554, 557 (1831) (characterizing a law-of-the-land provision as having been "intended to secure to weak and unpopular minorities and individuals equal rights with the majority").

substantive conception of such provisions spread rapidly. By 1860, courts in at least eleven additional states—Alabama, Arkansas, Georgia, Illinois, Iowa, Maryland, Michigan, Mississippi, New York, Pennsylvania, and Texas—had embraced the doctrine as well.<sup>248</sup> Many of these courts embraced some version

248. See, e.g., *Sadler v. Langham*, 34 Ala. 311, 329-32 (1859) (holding that the state constitution’s “due course of law” provision prohibited “transfer of property by mere legislative edict, from one person to another” and invalidating a statute authorizing condemnation of property to build private roads); *In re Dorsey*, 7 Port. 293 (Ala. 1838) (refusing to enforce a statute requiring attorneys to take a retrospective dueling oath as inconsistent with the state constitution’s “due course of law” provision); *Ex parte Woods*, 3 Ark. 532, 536 (1841) (stating, in dicta, that the state constitution’s law-of-the-land provision requires a “general law”); *Newland v. Marsh*, 19 Ill. 2d. 376, 380-82 (1857) (upholding a limitation law that had the effect of transferring property to a new owner but stating in dicta that the state constitution’s law-of-the-land provision forbade legislative divestitures of property); *Ross v. Irving*, 14 Ill. 171, 175 (1852) (upholding a statute requiring payment to adverse possessor of property for improvements made during the period of occupancy but observing in dicta that, under the law-of-the-land provision, “the legislature has not the power to take one man’s property, either without or with compensation, and give it to another”); *Reed v. Wright*, 2 Greene 15, 23-25 (Iowa 1849) (invalidating a statute providing special procedures for settling title to particular Native American lands as a “special and limited act” violating the state constitution’s due process clause); *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365, 411-12 (Md. 1838) (invalidating a statute abolishing the Regents of the University of Maryland and vesting their property in a new entity as violation of the state constitution’s law-of-the-land provision); *Sears v. Cottrell*, 5 Mich. 251, 254 (1858) (upholding a statute authorizing treasurer to seize and sell goods in possession of delinquent taxpayer but noting that “a special Act of the Legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws” would be invalid under the state constitution’s law-of-the-land provision); *Noonan v. State*, 9 Miss. (1 S. & M.) 562, 573 (1844) (upholding an indictment for violation of a statute prohibiting sale of alcohol to slaves but observing in dicta that the state constitution’s “due course of law” provision required that criminal laws be “equal and general, not partial and particular”); *Taylor v. Porter*, 4 Hill 140, 146-48 (N.Y. Sup. Ct. 1843) (Bronson, J.) (invalidating a statute authorizing the taking of property to build private roads as violation of due process and law-of-the-land provisions in state constitution); *In re John & Cherry Streets*, 19 Wend. 659, 676-77 (N.Y. Sup. Ct. 1839) (Cowen, J.) (invalidating a statute authorizing the City of New York to take private property with compensation as violation of the state constitution’s law-of-the-land provision, which the court interpreted to require “due process of law” and, consequently, that the “legislature should have no power to deprive one of his property, and transfer it to another by enacting a bargain between them, unless it be in the hands of the latter, a trust for public use”); *Brown v. Hummel*, 6 Pa. 86, 91 (1847) (invalidating a statute divesting trustees of a charitable corporation of their offices as an unconstitutional deprivation of property in violation of the state constitution’s law-of-the-land provision); *Norman v. Heist*, 5 Watts & Sergt. 171, 173 (Pa. 1843) (invalidating retrospective application of a statute granting nonmarital child of interest in deceased mother’s estate as an unconstitutional deprivation of property belonging to mother’s other heirs in violation of a law-of-the-land provision); *Janes v. Reynolds’ Adm’rs*, 2 Tex. 250, 252 (1847) (interpreting “due course of the law of the land” provision in Texas’s constitution as requiring “general public laws, binding all the members of the community under similar

of the general law reading, often citing either Daniel Webster's *Dartmouth College* argument<sup>249</sup> or the general law decisions of the Tennessee Supreme Court<sup>250</sup> in support of their interpretations.<sup>251</sup> The vested rights reading was also well represented in these decisions. For example, in an 1843 decision, the Supreme Court of Pennsylvania interpreted the law-of-the-land provision of that state's constitution to require "a pre-existent rule of conduct, declarative of a penalty for a prohibited act; not an *ex post facto* [law] made for the occasion."<sup>252</sup> That same year, Justice Greene Bronson of the New York Supreme Court issued his famous decision in *Taylor v. Porter*, which interpreted the due process and law-of-the-land provisions of the New York Constitution to require a judicial determination that the accused had "forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him."<sup>253</sup> This vested rights

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circumstances, and not partial or private laws"); *accord* *Parham v. Justices*, 9 Ga. 341, 348-55 (1851) (concluding that even though Georgia's constitution lacked a law-of-the-land provision, the Magna Carta provision was nonetheless part of the state's fundamental law inherited from England and prohibited the legislature from taking private property without compensation).

249. See *supra* note 61 and accompanying text.

250. See *supra* notes 245-247 and accompanying text.

251. See, e.g., *Ex parte Woods*, 3 Ark. 532, 536 (1841) (paraphrasing Webster's *Dartmouth College* argument, without attribution); *Reed v. Wright*, 2 Greene 15, 23 (Iowa 1849) (same); *Sears v. Cottrell*, 5 Mich. 251, 254 (1858) ("By 'the law of the land,' we understand laws that are general in their operation, and that affect the rights of all alike; and not a special Act of the Legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws."); *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365, 412 (Md. 1838) ("An act which only affects . . . a particular person, or his rights and privileges, and has no relation to the community in general" is not "the law of the land."); *Janes v. Adm'rs of Reynolds*, 2 Tex. 250, 252 (1847) (interpreting "laws of the land" to mean "general public laws, binding all the members of the community under similar circumstances, and not partial or private laws" and citing two Tennessee cases—*Vanzant v. Waddell* and *Bank of the State v. Cooper*—in support of that interpretation).

252. *Norman v. Heist*, 5 Watts & Serg. 171, 173 (Pa. 1843).

253. *Taylor v. Porter*, 4 Hill 140, 146 (N.Y. Sup. Ct. 1843); see also *Sadler v. Langham*, 34 Ala. 311, 329 (1859) (holding that the phrase "due course of law" in the Alabama Constitution "evidently does not mean a transfer of property by mere legislative edict, from one person to another"); *Newland v. Marsh*, 19 Ill. 376, 382-83 (1857) ("The citizen cannot be deprived of his property by involuntary divestiture of his right to it, or by such transfer of it to another, except by judgment of law; and the legislature, having no judicial power, cannot impart to their enactments the force of a judicial determination."); *Brown v. Hummel*, 6 Pa. 86, 91 (1847) ("I do not . . . regard an act of [the] Assembly, by which a citizen of Pennsylvania is deprived of his lawful right, as the law of the land."). The general law and vested rights interpretations were not mutually exclusive, and some decisions can be read as consistent

interpretation was also supported by prominent contemporary legal commentators, including Theodore Sedgwick and Robert S. Blackwell.<sup>254</sup>

Among the most famous vested rights due process decisions to issue from the state courts during the antebellum era was the New York Court of Appeals's 1856 decision in *Wynehamer v. People*.<sup>255</sup> The *Wynehamer* case involved a challenge to a conviction under a state prohibition statute on the grounds that application of the statute to liquor in existence before the statute's enactment deprived the petitioner of his property against the "law of the land" and without "due process of law" in violation of the New York Constitution.<sup>256</sup> The New York Court of Appeals voided the conviction, with the justices of that court issuing *seriatim* opinions explicating the vested rights conception of the due process and law-of-the-land provisions of the New York Constitution, including the following statement from the opinion of Justice Comstock:

The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at

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with both interpretations. See, e.g., *Regents of the Univ. of Md.*, 9 G. & J. at 411-12 (finding the challenged statute constitutionally defective both because it was "a special and particular act of the legislature" and because it "transferr[ed] one person's property to another").

254. See ROBERT S. BLACKWELL, *A PRACTICAL TREATISE ON THE POWER TO SELL LAND FOR THE NON-PAYMENT OF TAXES ASSESSED THEREON* 35-36 (Chicago, D.B. Cooke & Co. 1855) ("Upon a careful review of all the authorities, it may be safely affirmed as a principle of constitutional law, that the [due process clause] requires judicial as well as legislative action, before any person can be deprived of his life, liberty or property. . . . [C]onsequently the legislature has no power, by its own mere action, to deprive any citizen of his property."); THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 677 (New York, John S. Voorhies 1857) (describing the "guarantee of the law of the land," as being that the "legislative power only is granted to [the legislature], 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," which is "merely a circuitous statement of the proposition that vested rights are sacred").

255. 13 N.Y. 378 (1856).

256. *Id.* at 392-93.

least it cannot be *created* by a legislative act which aims at their destruction.<sup>257</sup>

Support for the vested rights reading of “due process of law” can also be found in the U.S. Supreme Court’s 1852 decision in *Bloomer v. McQuewan*—the first Supreme Court decision specifically to address the meaning of the Fifth Amendment Due Process Clause.<sup>258</sup> Writing for the Court, Chief Justice Roger Taney interpreted a statute extending the term of a patent to allow prior purchasers of goods covered by the extended patents to continue using them without obtaining an additional license from the patent holder.<sup>259</sup> In dictum, Taney observed that if the statute were not so construed, then “the power of Congress to pass it would be open to serious objections” 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.”<sup>260</sup>

Two years later, the Court addressed the meaning of the Fifth Amendment Due Process Clause at greater length in *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>261</sup> Though *Murray’s Lessee* dealt solely with a matter of judicial procedure,<sup>262</sup> Justice Curtis’s opinion for the Court approvingly cited five state court decisions for the proposition that “‘due process of law’ generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.”<sup>263</sup> Each of the

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257. *Id.* at 393; *see also id.* at 420 (Johnson, J.) (“To provide for a trial to ascertain whether a man is in the enjoyment of . . . [his] rights, and then, as a consequence of finding that he is in the enjoyment of it, to deprive him of it, is doing indirectly just what is forbidden to be done directly, and reduces the constitutional [due process] provision to a nullity.”); *id.* at 434 (Selden, J.) (“[A] law which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal proceedings whatever, comes directly in conflict with the constitution.”).

258. 55 U.S. (14 How.) 539 (1852).

259. *Id.* at 550-53.

260. *Id.* at 553.

261. 59 U.S. (18 How.) 272 (1855).

262. The specific issue in *Murray’s Lessee* was the constitutionality of a statute authorizing accounting officers of the treasury to recover debts owed by customs collectors through a distress-warrant procedure that did not provide for predeprivation notice and hearing. *Id.* at 275-76. The Court ultimately upheld the statute’s constitutionality, finding the distress-warrant procedure sufficiently analogous to procedures used at common law to satisfy the requirements of due process. *Id.* at 280-82.

263. *Id.* at 280. In addition to these five state court decisions, Justice Curtis also cited his own circuit court opinion from three years earlier in which he had interpreted the law-of-the-land provision of Rhode Island’s constitution to require notice and an opportunity to appear

five state court decisions cited by Justice Curtis—*Hoke v. Henderson*,<sup>264</sup> *Taylor v. Porter*,<sup>265</sup> *Vanzant v. Waddel*,<sup>266</sup> *Bank of the State v. Cooper*,<sup>267</sup> and *Jones’ Heirs v. Perry*<sup>268</sup>—reflected an unambiguously “substantive” conception of due process rights.<sup>269</sup> Justice Curtis’s opinion for the Court also made clear that “due process of law” and “law of the land” were synonymous concepts and emphatically rejected the proposition that the Due Process Clause was not intended to restrain Congress.<sup>270</sup>

The most famous antebellum constitutional decision to embrace a “substantive” conception of due process rights is also the most notorious—Chief Justice Taney’s majority opinion for the Supreme Court in *Dred Scott v. Sanford*.<sup>271</sup> With minimal analysis or explanation, Taney announced that the prohibition of slavery in the northern U.S. territories pursuant to the Missouri Compromise of 1820 violated the Fifth Amendment’s Due Process Clause because, according to Taney:

[A]n 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 due process of law.<sup>272</sup>

Although Taney’s *Dred Scott* opinion was unquestionably controversial at the time it was issued, there is virtually no evidence to suggest that such controversy stemmed from Taney’s use of the Due Process Clause to protect vested property rights. Justice Curtis’s dissenting opinion did not take issue with Taney’s interpretation of the Due Process Clause but rather contended

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and contest charges in the context of a criminal proceeding. *See id.* (citing *Greene v. Briggs*, 10 F. Cas. 1135 (C.C.D.R.I. 1852) (No. 5,764)).

264. 15 N.C. (4 Dev.) 1 (1833).

265. 4 Hill. 140 (N.Y. Sup. Ct. 1843).

266. 10 Tenn. (2 Yer.) 260 (1829).

267. 10 Tenn. (2 Yer.) 599 (1831).

268. 18 Tenn. (10 Yer.) 59 (1836).

269. The North Carolina Supreme Court’s opinion in *Hoke* is quoted and discussed *supra* text accompanying notes 237–241. Judge Bronson’s opinion for the New York Supreme Court in *Taylor v. Porter* is quoted and discussed *supra* text accompanying note 253. The Tennessee Supreme Court’s opinions in *Vanzant*, *Bank of the State v. Cooper*, and *Jones’s Heirs v. Perry* are cited and discussed *supra* notes 245–247.

270. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855).

271. 60 U.S. (19 How.) 393 (1856).

272. *Id.* at 450.

that the manner in which Taney applied that provision in the context of the *Dred Scott* case had failed to take proper account of the peculiar “nature and incidents” of slave property, which, according to Curtis, terminated automatically whenever slave owners voluntarily carried their slaves into a jurisdiction “where no municipal laws on the subject of slavery exist.”<sup>273</sup>

Critics of substantive due process have placed exaggerated emphasis on the Supreme Court’s *Dred Scott* decision and on the New York Court of Appeals’s decision in *Wynehamer*<sup>274</sup> by suggesting that these two decisions represented the principal support for substantive due process prior to the Fourteenth Amendment’s enactment.<sup>275</sup> The exaggerated focus on these two decisions skews modern perceptions of the pre-Fourteenth Amendment status of substantive due process in two ways. First, by emphasizing cases decided in the 1850s, critics of substantive due process obscure the decades-long development of that concept at the state court level in the years preceding those decisions.<sup>276</sup> Second, emphasizing a decision that is today universally reviled (*Dred Scott*) and a case that applied due process concepts in a novel and controversial way (*Wynehamer*)<sup>277</sup> makes it appear that substantive due process was far more controversial in the antebellum era than was actually the case.<sup>278</sup> In fact, there is

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273. *Id.* at 624-25 (Curtis, J., dissenting); see also Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 74 (2007) (“What is perhaps most ironic about our present-day condemnation of *Dred Scott* as substantive due process is that Justice Curtis’s dissent agreed with the vested-rights doctrine.”); Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 59 n.315 (1991) (“Justice Curtis accepted the notion of substantive due process implicit in Taney’s opinion but exempted slave property from the normal laws of property.”).

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

275. See, e.g., BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 178 (describing *Wynehamer* as the “locus classicus of substantive due process” and suggesting that the doctrine had been “fashioned” in that case); John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 418-20 (1978) (discussing *Dred Scott* and *Wynehamer* and concluding that “it should take more than two aberrational cases to convince us that those who ratified the fourteenth amendment had some eccentric definition [of ‘due process’] in mind”).

276. See *supra* notes 235-247.

277. Cf. Howe, *supra* note 231, at 604-07 (noting the unique status of *Wynehamer*’s holding with respect to the constitutionality of prohibition statutes). Courts in other states, including states that endorsed the “vested rights” reading of due process and law of the land provisions, rejected similar challenges to prohibition legislation, finding that prohibiting sales of alcohol fell within the traditional police powers of the state. 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).

278. See, e.g., ELY, *supra* note 1, at 18 (dismissing *Wynehamer* and *Dred Scott* as “aberrations [that were] neither precedented nor destined to become precedents themselves”); Harrison, *supra*

virtually no evidence that Taney's *Dred Scott* decision had any discernible effect on the subsequent judicial development of due process concepts in the nineteenth century,<sup>279</sup> and evidence regarding the public reception of the *Wynehamer* decision is, at best, mixed.<sup>280</sup> And the vested rights interpretation implicit in both Taney's *Dred Scott* opinion and in the New York court's *Wynehamer* decision continued to be endorsed by state courts throughout the 1860s.<sup>281</sup>

By the time of the Fourteenth Amendment's ratification in 1868, courts in at least twenty of the thirty-seven then-existing states had endorsed some version of substantive due process in connection with interpreting either due process, law-of-the-land, or similar provisions in their own constitutions or the Fifth Amendment Due Process Clause.<sup>282</sup> By contrast, courts in only two

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note 6, at 554 (noting that *Dred Scott* "was loathed by the political party" that supported the Fourteenth Amendment and that the *Wynehamer* decision "had been scoffed at by at least one state's supreme court").

279. See, e.g., DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 382 (1978) ("Taney's contribution to the development of substantive due process was . . . meager and somewhat obscure.").
280. Though courts in most other states rejected the specific holding of *Wynehamer*, namely that prohibition legislation violated the due process and law-of-the-land provisions of state constitutions, see *supra* note 277, the decision itself was approvingly cited by multiple courts and constitutional treatise writers around the time of the Fourteenth Amendment's enactment. See *infra* note 281 (citing state court cases from the 1860s that approvingly cited *Wynehamer*); *infra* notes 369-395 and accompanying text (discussing constitutional treatises from the late 1860s).
281. See, e.g., *Sherman v. Buick*, 32 Cal. 241, 249-50 (1867) (interpreting the due process provision in the California Constitution to prohibit a statute authorizing governmental condemnation of property for the use of private entities); *Bd. of Cnty. Comm'rs v. Carter*, 1 Kan. 109, 123-29 (1863) (voiding a statute retroactively validating a bond measure as an unconstitutional attempt to transfer property from A to B on the authority of *Wynehamer* and other substantive due process decisions from other states); *Norris v. Doniphan*, 61 Ky. (4 Met.) 346, 357-61 (1863) (finding that a federal statute emancipating family members of former slaves who enlisted in the Union army unconstitutionally deprived slaveholders of property without due process of law in violation of the Fifth Amendment); *Denny v. Mattoon*, 84 Mass. 361, 382 (1861) ("It is by the law in its due and orderly administration through appropriate tribunals, and not by force of an act of legislation only, that the subject can be deprived of his property in the true sense of that clause of the Constitution which secures to him the protection of the 'law of the land.'"); *Adams v. Palmer*, 51 Me. 480, 490-91 (1863) (interpreting a law-of-the-land provision in Maine's constitution to prohibit retroactive application of a statute when the effect would be to interfere with vested property rights); *Baker v. Kelley*, 11 Minn. 358, 374-75 (1865) (invalidating a statute precluding the use of certain evidence as proof of title to land and adopting the definition of "due process" and "law of the land" set forth in Justice Comstock's *Wynehamer* opinion).
282. Decisions from courts in North Carolina, South Carolina, and Tennessee are cited *supra* notes 236-239 and 242-247. Decisions from courts in Alabama, Arkansas, Georgia, Illinois,

states—New Hampshire and Rhode Island—had explicitly rejected a substantive role for such provisions. The New Hampshire precedents, which interpreted “law of the land” as a reference to duly enacted law, dated from 1817 and had not been substantially revisited or elaborated upon in the following decades.<sup>283</sup> The Rhode Island decisions, which followed shortly after the New York Court of Appeals’s decision in *Wynehamer* and which similarly addressed a challenge to the constitutionality of state prohibition legislation, interpreted that state’s law-of-the-land provision to be exclusively a guarantee of procedural protections in criminal cases.<sup>284</sup> The Rhode Island decisions have been cited by critics of substantive due process as support for the proposition that *Wynehamer* “was not a typical case,” and that “state courts usually reached the opposite conclusion” with respect to the meaning of due process and law-of-the-land provisions.<sup>285</sup> But in view of the many decisions from other states endorsing a substantive role for due process and law-of-the-land provisions, this conclusion seems difficult to square with the historical record.<sup>286</sup>

## 2. Evidence from Antebellum Political Arguments Concerning Slavery

Though evidence for a substantive conception of due process rights in pre-Fourteenth Amendment judicial decisions is quite strong, exclusive focus on this category of interpretative evidence would significantly understate the extent to which substantive due process had come to be recognized and accepted in the years leading up to the Amendment’s adoption. The antebellum political debates between abolitionist and proslavery forces over recognition of

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Iowa, Maryland, Michigan, Mississippi, New York, Pennsylvania, and Texas are cited *supra* notes 248, 251-253 and 255. Decisions from courts in California, Kansas, Kentucky, Maine, Massachusetts, and Minnesota are cited *supra* note 281.

283. See *Mayo v. Wilson*, 1 N.H. 53, 58 (1817) (discussed *supra* text accompanying notes 180-83); see also *Dartmouth Coll. v. Woodward*, 1 N.H. 111, 129 (1817).

284. See *State v. Keeran*, 5 R.I. 497, 505 (1858) (holding that the law-of-the-land provision in Rhode Island’s constitution “is no vague declaration concerning the rights of property” but rather “an intensely practical, and somewhat minute provision, guarding the rights of persons *accused of crime* . . . when pursued or on trial”); *State v. Paul*, 5 R.I. 185, 197 (1858) (finding that an objection to a statute’s constitutionality under a law-of-the-land provision “confounds the power of the assembly to create and define an offence, with the rights of the accused to trial by jury and due process of law”).

285. See Hyman, *supra* note 18, at 25 n.57; see also BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 12, at 278-79; ELY, *supra* note 1, at 16, 190 n.18; Corwin, *supra* note 12, at 378 n.51; Harrison, *supra* note 6, at 554 & n.173.

286. See Whitten, *supra* note 62, at 892 n.195 (“[g]iven the number of decisions supporting the *Wynehamer* position” on due process and similar provisions, it “seems doubtful” that the Rhode Island decisions support the conclusion that *Wynehamer* “was aberrational”).

slavery in the federal territories nurtured a variety of creative constitutional arguments from participants on both sides of the debate, and substantive interpretations of the Fifth Amendment Due Process Clause figured prominently in the constitutional theories of both sides.<sup>287</sup>

As early as 1820, Representatives Alexander Smyth of Virginia and John Scott of the Missouri Territory, in arguments that prefigured the substantive due process aspects of Justice Taney's *Dred Scott* opinion, each contended that restriction of slavery in federal territories pursuant to the then-proposed Missouri Compromise would unconstitutionally deprive slaveholders of their property in violation of the Fifth Amendment Due Process Clause.<sup>288</sup> In connection with debates surrounding an 1836 proposal to ban Congress from accepting petitions from abolitionists seeking a prohibition of slavery in the District of Columbia, proslavery Senators John Calhoun and Robert Walker and Representative Henry Pinckney each invoked the Fifth Amendment Due Process Clause as a limitation on Congress's apparently plenary legislative authority over the District, contending that such authority did not encompass the ability to extinguish slaveholders' existing property rights.<sup>289</sup>

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287. For the general background of abolitionist and proslavery constitutional theories in the antebellum period, see Maltz, *supra* note 16, at 317-18. For a discussion of the specific role due process played in the theories of both sides, see *id.* at 317-20.

288. See 35 ANNALS OF CONG. 992, 998 (1820) (statement of Rep. Smyth) (“[T]he adoption of the proposition on your table, which goes to emancipate all children of slaves hereafter born in Missouri, would be a direct violation of the Constitution, which provides that ‘no person shall be deprived of property without due process of law; nor shall private property be taken for public use without just compensation.’”); *id.* at 1521 (statement of Rep. Scott) (“Let the restriction become a law, and the emigrant would stand attainted and convicted of a crime that operated a forfeiture of his property, if he removed to the State of Missouri, and took his slaves with him; and that amendment to the 5th article of the Constitution which declared that no person could be deprived of life, liberty, or property, without due course of law, became inoperative, and the citizen was divested of his property without Constitution, or law, or judge, or jury.”).

289. 12 REG. DEB. 97 (1836) (statement of Sen. Calhoun) (“The fifth amendment to the constitution offers an insuperable barrier, which provides, among other things, that ‘no person shall be deprived of life, liberty, or property, without due process of law . . .’ Are not slaves property? and if so, how can Congress any more take away the property of a master in his slave, in this District, than it could his life and liberty?”); *id.* at 693-94 (statement of Sen. Walker) (“There are, however, other clauses in the constitution which limit and restrict this power as regards this District, especially the provision which forbids Congress to deprive any citizen of his ‘property’ ‘without due process of law;’ and further declares ‘nor shall private property be taken for public use without just compensation.’”); 12 REG. DEB. app. 110 (1836) (report of Rep. Pinckney) (“The right to legislate [for the District of Columbia] . . . is evidently qualified by the provision that ‘no man shall be deprived of life, liberty, or property, without due process of law,’ and various others of similar character.”).

In response to such invocations of the Due Process Clause by proslavery forces, abolitionists developed their own theories of substantive due process that replaced the proslavery emphasis on property with a focus on liberty.<sup>290</sup> At the fourth meeting of the American Anti-Slavery Society, held at New York in May 1837, the Reverend Orange Scott of Massachusetts proposed a resolution condemning slavery as “a violation of that section of the United States’ Constitution, which provides that, ‘No person shall be deprived of life, liberty, or property, without due process of law.’”<sup>291</sup> In support of this resolution, Scott argued in terms that unmistakably demonstrated the substantive conception of due process rights upon which his proposal was premised: “Suppose Massachusetts or New York, should pass laws, giving to the strong the right to take away from the weak their rights of property, their purse or their person at pleasure, would that be a process of law?”<sup>292</sup>

The following year, Theodore Dwight Weld, a prominent Ohio abolitionist, published a monograph attacking slavery in the District of Columbia. In that monograph, Weld turned the due process arguments that had been offered by proslavery Congressmen during the 1836 debates over efforts to ban petitions seeking abolition of slavery in the District against the proslavery position by demonstrating that those same arguments could be used to support an abolitionist theory of the Due Process Clause:

The [Fifth Amendment] is alleged to withhold from Congress the power to abolish slavery in the District. . . . All the slaves in the District have been “deprived of liberty” by legislative acts. Now, these legislative acts “depriving” them “of liberty,” were either “due process of law,” or they were *not*. If they *were*, then a legislative act, taking from the master that “property” which is the identical “liberty” previously taken from the slave, would be “due process of law” *also*, and of course

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290. For an interesting recent account of the constitutional theories of several influential abolitionists, including the role of due process in their respective theories, see Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment* (Georgetown Pub. Law Research Paper No. 10-06, 2010), available at <http://ssrn.com/abstract=1538862>.

291. Orange Scott, Reverend, Methodist Episcopal Church, Lowell, Mass., Remarks at a Meeting of the Society for Business (May 9, 1837), in *AMERICAN ANTI-SLAVERY SOCIETY, FOURTH ANNUAL REPORT OF THE AMERICAN ANTI-SLAVERY SOCIETY: WITH THE SPEECHES DELIVERED AT THE ANNIVERSARY MEETING HELD IN THE CITY OF NEW YORK, ON THE 9TH MAY, 1837: AND THE MINUTES OF THE MEETINGS OF THE SOCIETY FOR BUSINESS 16* (New York, William S. Dorr 1837), available at <http://digital.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery&cc=mayantislavery&idno=02817510&frm=frameset&view=image&seq=16>.

292. *Id.*

a *constitutional* act; but if the legislative acts “depriving” them of “liberty” were *not* “due process of law,” then the slaves were deprived of liberty *unconstitutionally*, and these acts were *void*. In that case the *constitution emancipates them*.<sup>293</sup>

Other leading abolitionist figures, including Salmon P. Chase, Charles Dexter Cleveland, and Cassius Marcellus Clay endorsed similarly substantive conceptions of due process rights.<sup>294</sup>

The abolitionist interpretation of the Due Process Clause soon found expression in congressional debates concerning the expansion of slavery in territories subject to federal control. In 1844, Representative Luther Severance of Maine, responding to proslavery arguments invoking the Fifth Amendment’s Takings Clause, argued that “the same constitution declared that no person should be deprived of life, liberty, or property” and that, under that provision, “every slave was entitled to his liberty.”<sup>295</sup> In 1849, Senator John Niles of Connecticut argued that extension of slavery to the newly acquired territories of California and New Mexico would violate the Due Process Clause, which “necessarily exclude[s] the idea that slavery could exist” in areas

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293. THEODORE DWIGHT WELD, *THE POWER OF CONGRESS OVER THE DISTRICT OF COLUMBIA* 37 (4th ed., New York, The American Anti-Slavery Society 1838), available at <http://digital.library.cornell.edu/cgi/t/text/pagevieweridx?c=mayantislaavery;cc=mayantislaavery;q1=due%20process;rgn=full%20text;idno=02817701;didno=02817701;view=image;seq=37>.

294. CASSIUS M. CLAY, *SPEECH OF CASSIUS M. CLAY, AGAINST THE ANNEXATION OF TEXAS TO THE UNITED STATES OF AMERICA IN REPLY TO COL. R. M. JOHNSON AND OTHERS, IN A MASS MEETING OF CITIZENS OF THE EIGHTH CONGRESSIONAL DISTRICT, AT THE WHITE SULPHUR SPRINGS, SCOTT COUNTY, KY., ON SATURDAY, DEC. 30, 1843*, at 10 n.\* (New York, Harper & Bros. Publishers 1844) (“I take it for granted that blacks are ‘persons,’ for even black slaves are so called in other parts of the Constitution; and that ‘without due process of law’ means without some *offence*, which shall be ascertained by law . . . . Whether, then, Congress be the organ of a sovereign, or of a limited will—the Constitution—it cannot, in either case, make a slave.”); Salmon Chase, *The Address of the Southern and Western Liberty Convention Held at Cincinnati, June 11 and 12, 1845, to the People of the United States, with Notes by a Citizen of Pennsylvania*, in SALMON PORTLAND CHASE & CHARLES DEXTER CLEVELAND, *ANTI-SLAVERY ADDRESSES OF 1844 AND 1845*, at 75, 86 (Philadelphia, J.A. Bancroft & Co. 1867) (“[T]he [Due Process] [C]lause prohibits the General Government from sanctioning slaveholding, and renders the continuance of slavery . . . in any place of exclusive national jurisdiction, impossible.”); Charles Dexter Cleveland, *Address of the Liberty Party of Pennsylvania to the People of the State*, in CHASE & CLEVELAND, *supra*, at 11, 17 (arguing on the authority of the Preamble and the Due Process Clause that “[t]he act of Congress . . . that was framed to introduce slavery into the District of Columbia, was a plain, open, total violation of the constitution”).

295. CONG. GLOBE, 28TH CONG., 1ST SESS. 287 (1844).

controlled by the federal government.<sup>296</sup> 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,<sup>297</sup> which had embraced a vested rights reading of the due process and law-of-the-land provisions in the New York Constitution,<sup>298</sup> in arguing that if the Due Process Clause were allowed "free course," it would "put[] an end to American slavery."<sup>299</sup>

The proposition that the Fifth Amendment Due Process Clause prohibited slavery in areas subject to federal control was so central to mid-nineteenth-century abolitionist political thought that the argument was expressly endorsed in the national political party platforms of each of the major abolitionist political parties, including the Republican Party Platform of 1860, which provided:

[T]hat as our Republican fathers . . . ordained that 'no person shall be deprived of life, liberty or property without due process of law' . . . we deny the authority of the Congress, of a Territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States.<sup>300</sup>

Unlike proslavery due process theories, which closely tracked the judicially endorsed vested rights reading,<sup>301</sup> abolitionist theories were more diverse and more difficult to match to interpretations reflected in the pre-Civil War case

296. CONG. GLOBE, 30TH CONG., 2D SESS. app. 307 (1849).

297. See *supra* note 253 and accompanying text.

298. *Id.*

299. CONG. GLOBE, 33D CONG., 1ST SESS. app. 524 (1854); see also CONG. GLOBE, 31ST CONG., 1ST SESS. 1146 (1850) (statement of Sen. Salmon Chase) ("For my own part, so long as the Constitution retains unaltered, the provision which denies to Congress all power to deprive any person of liberty without due process of law, I shall not believe that any person can be held in the territories as a slave without a violation of that instrument."); CONG. GLOBE, 28TH CONG., 2D SESS. app. 377 (1845) (statement of Rep. Edward S. Hamlin) (arguing that the Framers of the Constitution "expressly guarded against" the extension of slavery to federal territories "by providing that no person shall be deprived his liberty except by due process of law"); *infra* note 310 (discussing statements by Congressman John Bingham of Ohio).

300. *Republican Platform of 1856*, reprinted in J.M.H. FREDERICK, NATIONAL PARTY PLATFORMS OF THE UNITED STATES 28 (1896); see also *Buffalo Platform of 1848*, reprinted in FREDERICK, *supra*, at 19-20; *Free Soil Platform of 1852*, reprinted in FREDERICK, *supra*, at 22-23; *Liberty Platform of 1844*, reprinted in FREDERICK, *supra*, at 15; *Republican Platform of 1860*, reprinted in FREDERICK, *supra*, at 30.

301. See *supra* text accompanying notes 288-289 (describing proslavery invocations of the Due Process Clause); cf. *supra* Subsection I.B.2.a (describing the "vested rights" reading of due process and similar provisions).

law. Theoretically, the case for abolition could have been premised on an exclusively procedural interpretation of the Due Process Clause, based on the fact that slaves received no trial or other judicial process before being deprived of their liberty;<sup>302</sup> these procedural aspects of due process featured prominently in many abolitionists' arguments.<sup>303</sup> But most abolitionists who invoked such procedural arguments also recognized at least some substantive aspects of due process rights as well. For example, abolitionist lawyer Alvan Stewart, who followed Coke in equating "due process" with indictment and trial by jury,<sup>304</sup> also argued that being "deprived of the right to learn to read, or write" and "[t]he separation by sale of husband from wife" could not be "the due process of law, named in the Constitution of the United States."<sup>305</sup> Similarly, abolitionists Joel Tiffany and William Goodell both published treatises seeking to establish the unconstitutionality of slavery in which they equated "due process" with judicial process<sup>306</sup> and simultaneously invoked Justice Bronson's 1843 decision in *Taylor v. Porter*<sup>307</sup> as support for the proposition that due process restricted the legislature's ability to deprive persons of liberty except as punishment for a crime.<sup>308</sup>

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302. Cf. AMAR, *supra* note 63, at 270-71 (discussing the role of jury trial rights in abolitionist arguments seeking to establish the unconstitutionality of slavery). An exclusively procedural due process argument against slavery would have faced at least two significant hurdles. First, as reflected in the Supreme Court's *Murray's Lessee* decision, a plausible interpretation of the procedural aspects of the Due Process Clause was that the provision only protected rights that had existed at common law and which had been brought with the American colonists from England. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276-77 (1856). A credible argument might therefore have been made that the existence of slavery from the earliest days of the American colonies indicated that African slavery was exempted from traditional requirements of procedural due process applicable to free persons. Second, even if the Constitution did require that slaves be given *some* process by which they could challenge their confinement, it is likely that few, if any, such challenges could have succeeded absent some substantive limits on the authority of states and territories to authorize slavery.

303. See, e.g., Barnett, *supra* note 290, at 81; Maltz, *supra* note 16, at 317-18.

304. WRITINGS AND SPEECHES OF ALVAN STEWART, ON SLAVERY 331 (Luther Rawson Marsh ed., New York, A.B. Burdick 1860).

305. *Id.* at 331-32.

306. WILLIAM GOODELL, OUR NATIONAL CHARTERS: FOR THE MILLIONS 74-76 (New York, J.W. Alden 1863); JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 120-23 (Cleveland, J. Calyer 1849).

307. 4 Hill 140 (N.Y. Sup. Ct. 1843).

308. See GOODELL, *supra* note 306, at 74; TIFFANY, *supra* note 306, at 41; see also CLAY, *supra* note 294, at 10 n.\* (declaring "that 'without due process of law' means without some *offense*, which shall be ascertained by law").

At least three distinct but complementary strains of substantive due process theories are observable in the antebellum constitutional arguments of abolitionists. The first, and most common, theory followed *Taylor v. Porter* and other vested rights decisions in arguing that the due process guarantee protects individuals against deprivations of rights except as punishment for a crime.<sup>309</sup> The second theory, which was endorsed on multiple occasions by Congressman John Bingham of Ohio, the principal author of Section One of the Fourteenth Amendment, focused on the Fifth Amendment's use of the expansive term "person" (rather than the more limited term "freemen") to argue that the Due Process Clause reflected a broad commitment to constitutional equality.<sup>310</sup> This theory was similar in substance (though not necessarily in reasoning) to the general law interpretation embraced by many state courts, which similarly viewed due process and related provisions as protecting against unequal legislation.<sup>311</sup> The third theory, which had no clear

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309. See *supra* notes 304-308 and accompanying text; see also Harrison, *supra* note 6, at 512 (linking the vested rights reading with the constitutional theories of Alvan Stewart and other abolitionists). Because abolishing slavery would have deprived slaveholders of their property rights, the liberty-focused abolitionist due process arguments stood in tension with the more traditional property-focused vested rights reading. For moderate abolitionists who sought only to preclude slavery in the federal territories, this tension posed little difficulty because, as Justice Curtis argued in his *Dred Scott* dissent, due process did not require protection of the right to carry particular property into a jurisdiction that did not recognize the right to own such property. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 626-28 (1857) (Curtis, J., dissenting). More radical abolitionists, who argued that the Due Process Clause prohibited slavery within the states, seem to have simply assumed that slaveholders' purported property interests should be subordinated to the more important liberty interests of the slaves themselves. See generally Barnett, *supra* note 290, at 18-19 (describing the distinction between moderate and radical abolitionists with respect to the constitutionality of slavery within the states). The entitlement of slaveholders to compensation for their emancipated slaves remained an open issue until the adoption of the Fourteenth Amendment, which expressly prohibited such compensation. See U.S. CONST. amend. XIV, § 4 ("[N]either the United States nor any State shall assume or pay . . . any claim for the loss or emancipation of any slave . . .").

310. See, e.g., CONG. GLOBE, 37TH CONG., 2D SESS. 1638 (1862) (statement of Rep. Bingham) (characterizing the Fifth Amendment Due Process Clause as a "new Magna Carta to mankind," which "declares the rights of all to life and liberty and property are equal before the law"); CONG. GLOBE, 34TH CONG., 3D SESS. app. 140 (1857) (statement of Rep. Bingham) ("The Constitution provides . . . that *no person* shall be deprived of life, liberty, or property, without due process of law. It makes no distinction either on account of complexion or birth . . . This is equality."); see also *infra* text accompanying notes 328-329 (discussing Bingham's linkage of "due process" and "equal protection" concepts).

311. See, e.g., *supra* notes 245-247, 251 (citing cases endorsing the general law interpretation). Unlike the abolitionist version of the equality argument, which focused specifically on the Fifth Amendment's use of the term "person," the general law interpretation focused on the

analogue in the pre-Civil War case law and which was reflected in only a handful of statements, connected due process with an abstract and nonspecific guarantee of liberty, suggesting that any interference with natural rights would violate due process.<sup>312</sup> In this respect, this third abolitionist theory bears some resemblance to the modern fundamental rights version of substantive due process.<sup>313</sup>

*B. The Legislative History of the Fourteenth Amendment*

Unlike the sparse drafting and ratification history of the Fifth Amendment, the records of the legislative debates preceding the adoption of the Fourteenth Amendment are fairly extensive.<sup>314</sup> Though references to the Due Process Clause in the course of these debates were relatively uncommon,<sup>315</sup> sufficient evidence exists to form a view as to the specific version of due process rights envisioned by at least some of the individuals who played a role in framing the Amendment.<sup>316</sup>

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normative sense of the word “law” to argue that legislative enactments interfering with rights must be general and impartial. *See supra* Section I.B.2.b.

312. *See, e.g.*, CONG. GLOBE, 34TH CONG., 1ST SESS. app. 124 (1856) (statement of Rep. Bingham) (objecting to statute passed by proslavery territorial legislature of Kansas punishing abolitionist speech on the ground that it “abridges the freedom of speech and of the press, and deprives persons of liberty without due process of law”) (emphasis added); *supra* text accompanying notes 304-305 (discussing argument of Alvan Stewart linking “due process” with right to educate slaves and the right of slaves to marry); *accord* CONG. GLOBE, 39TH CONG., 1ST SESS. 340 (1866) (statement of Sen. Cowan) (citing the Fifth Amendment Due Process Clause for the proposition that “the rights of . . . no man not a slave, can be infringed in so far as regards the great principles of English and American liberty”).
313. *Cf. supra* Subsection I.B.2.d (describing modern “fundamental rights” conception of substantive due process rights).
314. For more detailed accounts of the Fourteenth Amendment’s drafting and ratification history, see, for example, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57-153 (1986), HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 55-209 (1908), and EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869, at 79-120 (1990).
315. *See, e.g.*, BERGER, GOVERNMENT BY JUDICIARY, *supra* note 12, at 228 (“In light of the prominence to which the due process clause has been elevated by the Supreme Court, it is surprising how scant were the allusions to the clause in the debates of the 39th Congress.”); Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 YALE L.J. 371, 385 (1938) (“Hundreds of pages of speeches in the *Congressional Globe* contain only the scantest of references to due process and equal protection.”).
316. *Cf. Saikrishna B. Prakash*, Book Review, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529, 537 (1998) (“[T]he framers’ or ratifiers’ comments about a particular phrase

There is general agreement that one of Congress's principal goals in proposing Section One of the Fourteenth Amendment was to provide undisputable constitutional authority for the Civil Rights Act of 1866, which mandated that state governments accord equal treatment to black and white citizens with respect to a variety of specific civil rights; this included the rights to "make and enforce contracts, to sue, be parties, and give evidence" in judicial proceedings and to "inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>317</sup> During debates preceding that statute's enactment, certain members of Congress, including Bingham, questioned its constitutionality.<sup>318</sup> Though Bingham supported the policy of the proposed civil rights bill, he denied that Congress possessed the authority to impose the restrictions set forth in the bill absent a constitutional amendment.<sup>319</sup> In response to Bingham's objection, Representative James Wilson of Iowa, one of the bill's sponsors and the chairman of the House Judiciary Committee, invoked the Fifth Amendment Due Process Clause as a source for such authority:

I find in the bill of rights which [Rep. Bingham] desires to have enforced by an amendment to the Constitution that "no person shall be deprived of life, liberty, or property without due process of law." I understand that these constitute the civil rights belonging to the citizens in connection with those which are necessary for the protection and maintenance and perfect enjoyment of the rights thus specifically named, and these are the rights to which this bill relates, having

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or provision are often a fairly good reflection of what that phrase or provision commonly was understood to mean.").

317. Act of Apr. 9, 1866, ch. 31 § 1, 14 Stat. 27; see also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1389 (1992) ("Virtually everyone agrees that Section 1 of the Fourteenth Amendment was intended at least to empower Congress to pass the Civil Rights Act of 1866."); Siegan, *supra* note 16, at 455 ("While opinion is divergent as to the full meaning of section 1, commentators agree that at the least, it was intended to authorize passage of . . . the Civil Rights Act of 1866 . . .").

318. See CONG. GLOBE, 39TH CONG., 1ST SESS. 1291-93 (1866) (statement of Rep. Bingham); see also *id.* at 476 (statement of Sen. Saulsbury); *id.* at 499-500 (statement of Sen. Cowan); *id.* at 1268 (statement of Rep. Kerr).

319. *Id.* at 1291 (statement of Rep. Bingham) ("The Constitution does not delegate to the United States the power to punish offenses against the life, liberty, or property of the citizen in the States, nor does it prohibit that power to the States, but leaves it as the reserved power of the States, to be by them exercised.").

nothing to do with subjects submitted to the control of the several States.<sup>320</sup>

Bingham did not dispute Wilson's expansive interpretation of the Due Process Clause as a source of substantive civil rights but merely denied that the Bill of Rights conferred upon Congress any implied power to enforce its restrictions against the states.<sup>321</sup> Indeed, in earlier sessions of Congress, Bingham had frequently invoked the Fifth Amendment Due Process Clause as a source of substantive restrictions on both the federal government and on territorial governments subject to federal control.<sup>322</sup>

Bingham's most extended comments on due process of law during the 1866 legislative debates were made during a speech before the House on February 28 in support of an early version of his proposal for the Amendment's language. This early proposal, which differed significantly from the final wording of Section One, would have given Congress the power "to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property."<sup>323</sup> Bingham claimed that the "equal protection" component of his proposal was equivalent to the Fifth Amendment's reference to "due process of law,"<sup>324</sup> prompting the following exchange with Representative Andrew Rogers of New Jersey:

M. ROGERS. Will the gentleman yield to me?

M. BINGHAM. The gentleman must excuse me.

M. ROGERS. Only for a question. I only wish to know what you mean by "due process of law."

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320. *Id.* at 1294 (statement of Rep. Wilson).

321. *See id.* at 1291 (statement of Rep. Bingham) ("I do not oppose any legislation which is authorized by the Constitution . . . to enforce . . . the bill of rights . . . . But I feel that I am justified in saying, in view of the text of the Constitution of my country, in view of all its past interpretations, [and] in view of the manifest and declared intent of the men who framed it, the enforcement of the bill of rights . . . is [one] of the reserved powers of the States . . .").

322. *See supra* note 310; *see also* Barnett, *supra* note 290, at 76-79 (discussing Bingham's invocations of the Fifth Amendment Due Process Clause in multiple pre-Civil War speeches).

323. CONG. GLOBE, 39TH CONG., 1ST SESS. 1088-94 (1866).

324. *Id.* at 1088-89.

M. BINGHAM. I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions.<sup>325</sup>

Bingham's terse deflection of Rogers' inquiry has led some critics of substantive due process to conclude that Bingham meant to endorse the orthodox view of due process rights, which, for most of the twentieth century, was presumed to be exclusively procedural in nature.<sup>326</sup> As shown above, however, the orthodox view of due process rights in 1866, as evidenced by judicial decisions at both the state and federal level, would almost certainly have included at least the vested rights version of substantive due process and most likely the general law reading as well.<sup>327</sup>

Speculation on this point is unnecessary, however, because Bingham clarified his own conception of due process rights later in the same speech:

Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right; that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.<sup>328</sup>

Bingham's rhetoric in this passage, which equates "due process of law" with "law in its highest sense" and "impartial, equal, exact justice," echoes Daniel Webster's *Dartmouth College* argument and, along with Bingham's

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325. *Id.* at 1089.

326. See, e.g., BERGER, GOVERNMENT BY JUDICIARY, *supra* note 12, at 230 (asserting that Bingham's response to Rogers demonstrates that "Bingham gave due process the customary meaning recognized by the courts," which "was all but universally procedural"); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L.J. 643, 738-39 (2000) (assuming that Bingham's response most likely referred to the Supreme Court's decision in *Murray's Lessee* and therefore implied an exclusively procedural understanding of due process).

327. See *supra* Subsection III.A.1.

328. CONG. GLOBE, 39TH CONG., 1ST SESS. 1094 (1866). Later in the same session of Congress, in discussing the proposed civil rights bill, Bingham similarly asserted that the framers had, through the Fifth Amendment Due Process Clause, "declared the equality of all men" with respect to life, liberty, and property and "forbade the Government of the United States from making any discrimination." *Id.* at 1292.

apparent equation of “due process of law” with “equal protection,” suggests a substantial degree of overlap between Bingham’s conception of due process and the general law reading endorsed by numerous courts in the pre-Civil War era.<sup>329</sup>

Bingham’s February 28 speech and Representative Wilson’s remarks, quoted above, in support of the civil rights bill represent the most thorough and extended discussion of “due process of law” in the legislative debates preceding the Fourteenth Amendment’s enactment. Both of these speeches were made before the phrase “due process of law” was first proposed to be included in Section One, a revision that Bingham proposed to the Joint Committee on Reconstruction (the committee tasked by Congress with approving proposed language for the Amendment) on April 21, 1866, and which the Committee approved seven days later on April 28, 1866.<sup>330</sup> Statements touching on “due process of law” after the phrase had been added to the text of the proposed Amendment either lumped the Due Process Clause together with one or more of the other provisions in Section One in a manner that makes it unclear which particular provision is being discussed<sup>331</sup> or were so general and vague as to provide no meaningful guidance as to what the speaker believed the Due Process Clause would accomplish.<sup>332</sup>

As support for substantive due process, the evidentiary value of the 1866 legislative debates is largely negative in character: no member of the Thirty-

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329. See *supra* Subsection I.B.2.b (describing the general law reading of due process and similar provisions).

330. See MALTZ, *supra* note 314, at 86-91.

331. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 2459 (1866) (statement of Rep. Stevens) (stating that the Due Process, Equal Protection, and Privileges or Immunities Clauses were “all asserted, in some form or other, in our DECLARATION or organic law” and contending that Section One as a whole would allow Congress “to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all”); *id.* at 2766 (statement of Sen. Howard) (referring to “[t]he last two clauses of the first section of the amendment” (the Due Process and Equal Protection Clauses) and stating that “[t]his abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another”).

332. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS., app. at 256 (1866) (statement of Rep. Baker) (observing that the federal government was already prohibited by the Fifth Amendment from depriving any person of life, liberty, or property without due process of law and noting that the proposed amendment merely declared “that no *State* shall do it—a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue”); *id.* at 2511 (statement of Rep. Eliot) (“[I]f, under the Constitution as it now stands, Congress has not the power to prohibit State legislation . . . depriving any persons of life, liberty, or property without due process of law . . . then, in my judgment, such power should be distinctly conferred.”).

Ninth Congress (so far as I have found) expressed support for a purely procedural interpretation of the Due Process Clause and, with the exception of the single question posed to Bingham by Representative Rogers,<sup>333</sup> no member of Congress appears to have expressed any doubt or uncertainty as to the provision's meaning.<sup>334</sup> On the other hand, at least a few members of the Thirty-Ninth Congress, including both Bingham and Representative Wilson, expressed clear support for a substantive conception of due process rights.<sup>335</sup> The 1866 Congressional debates thus provide some evidence tending to support, and no evidence tending to undermine, the substantive understanding of due process of law reflected in both the pre-Fourteenth Amendment case law and in the constitutional theories of both abolitionist and proslavery forces prior to the Civil War.

Given the relative paucity of specific legislative discussion of the Due Process Clause, it is difficult to determine precisely how the drafters of the Fourteenth Amendment understood that provision to interact with the other two principal provisions of Section One—the Privileges or Immunities and Equal Protection Clauses.<sup>336</sup> Most modern examinations of the Fourteenth Amendment's original meaning have concluded that the Privileges or Immunities Clause, rather than the Due Process Clause, was the principal vehicle through which the Amendment's framers sought to protect substantive individual rights.<sup>337</sup> The original meaning of the Privileges or Immunities Clause is a heavily debated topic that is beyond the scope of this Article.<sup>338</sup>

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333. See *supra* text accompanying note 325.

334. Rogers's expressed uncertainty as to the meaning of "due process" should not necessarily be taken at face value. Rogers was a prominent opponent of the Fourteenth Amendment, see, e.g., MALTZ, *supra* note 314, at 93, 107, and his question to Bingham may thus have been motivated by tactical considerations, such as a desire to foster uncertainty among undecided representatives or merely to disrupt the flow of Bingham's argument.

335. See *supra* text accompanying notes 320, 328.

336. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.").

337. See, e.g., AMAR, *supra* note 63, at 163-214; CURTIS, *supra* note 314, at 57-153; MALTZ, *supra* note 314, at 96-102; Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, at 4 (2010) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1561183](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1561183) ("For years, scholars have pressed the Court to revisit the issue . . . and establish the Privileges or Immunities Clause as the primary source of substantive individual rights against state action.").

338. See, e.g., BARNETT, *supra* note 23, at 60-86 (arguing that the Privileges or Immunities Clause was originally understood to protect "fundamental" natural rights); Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. (forthcoming 2011), available at

However, a conclusion that that provision was originally understood to protect substantive individual rights would not necessarily render a substantive understanding of the Due Process Clause superfluous or redundant. As Bingham and other members of the 39th Congress were careful to point out, the protections afforded by the Privileges or Immunities Clause were confined to “citizens” while the protections guaranteed by the Due Process and Equal Protection Clauses extended to all “persons,” including noncitizens.<sup>339</sup> Thus, it would have been perfectly sensible to adopt separate provisions extending separate but overlapping sets of rights (including substantive rights), to the separate but overlapping sets of individuals protected by the Due Process and Privileges or Immunities Clauses.<sup>340</sup> The distinction between “citizens” and “persons” does, however, suggest that the Privileges or Immunities Clause was likely designed to protect at least *some* rights of citizens that were not also

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1557870](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1557870) (arguing that the Privileges or Immunities Clause was originally understood only to allow Congress to enforce the Comity Clause of Article IV); Lash, *supra* note 337 (arguing that the Privileges or Immunities Clause was originally understood to protect exclusively *federal* rights).

339. See, e.g., CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866) (statement of Rep. Bingham) (“Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection in every State in this Union in the rights of life and liberty and property?”); *id.* at 2765-66 (statement of Sen. Howard) (stating that the Fourteenth Amendment would “disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State.”); AMAR, *supra* note 63, at 172-73; MALTZ, *supra* note 314, at 62-64, 96-102.
340. A more difficult question involves the relationship between the Due Process Clause and the Equal Protection Clause, both of which applied to all “persons.” Bingham himself claimed that the concept of “equal protection” was already encompassed within the Fifth Amendment’s Due Process Clause, and numerous state courts had interpreted similar provisions to prohibit discriminatory legislation during the antebellum era. See *supra* notes 245-247, 251 and accompanying text. It is thus unclear why Bingham and other members of the 39th Congress felt the need to include a separate provision explicitly guaranteeing the “equal protection of the laws.” One possibility, suggested by Professor Amar, is that Bingham and other members of the 39th Congress viewed the Equal Protection Clause as a clarifying gloss on the due process concept and included the provision to avoid any doubt that the equality of persons would be protected by the Amendment. See *infra* text accompanying note 434. Early case law interpreting the two provisions suggests that there may not have been a clear distinction between their respective legal effects until long after the Fourteenth Amendment’s ratification. See, e.g., Cushman, *supra* note 67, at 885-93 (describing overlap between due process and equal protection concepts in the late nineteenth and early twentieth centuries and observing that the Supreme Court did not draw an explicit distinction between the two until the early 1920s).

encompassed by the provisions securing due process and equal protection to all “persons.”<sup>341</sup>

### C. Post-Ratification Interpretive Evidence

#### 1. Evidence from Post-Fourteenth Amendment Supreme Court Decisions

The Supreme Court’s first commentary on the scope of due process rights following the enactment of the Fourteenth Amendment came in the context of litigation challenging the constitutionality of federal legislation under the Due Process Clause of the Fifth Amendment. In *Hepburn v. Griswold*,<sup>342</sup> the Court reviewed a challenge to a federal law that made paper currency issued by the federal government legal tender for the payment of debts.<sup>343</sup> Writing for a four-Justice majority, Chief Justice Salmon Chase held that the statute would “compel[] all those who hold contracts for the payment of gold and silver money to accept in payment a currency of inferior value,” and thus that the Fifth Amendment Due Process Clause “cannot have its full and intended effect unless construed as a direct prohibition of the legislation which we have been considering.”<sup>344</sup> The following year, after the appointment of two new Justices to the Court, the *Hepburn* decision was reversed by a 5-to-4 vote in *Knox v.*

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341. See, e.g., MALTZ, *supra* note 314, at 96-97. Many scholars believe that a principal purpose of the Privileges or Immunities Clause was to “incorporate” the Bill of Rights against state governments. See, e.g., AMAR, *supra* note 63, at 137-307; CURTIS, *supra* note 314; MALTZ, *supra* note 314, at 116-17. Several of these scholars have observed that certain “procedural” aspects of the Bill of Rights may have been protected by the Amendment’s Due Process Clause as well. See, e.g., AMAR, *supra* note 63, at 199-202; CURTIS, *supra* note 314, at 166. The pre-Fourteenth Amendment case law strongly suggests that at least certain substantive Bill of Rights guarantees, including, most prominently, the “just compensation” requirement of the Fifth Amendment’s Takings Clause, would also have been viewed as protectable through the Due Process Clause. See *supra* notes 236-249, 252-256; see also Ely, *supra* note 17, at 333-35. This interpretation would be consistent with Bingham’s expressed view that both “due process” and “just compensation” were “natural or inherent rights, which belong to all men irrespective of all conventional regulations” and were thus appropriately protected by the “broad and comprehensive word ‘person,’ as contradistinguished from the limited term citizen.” CONG. GLOBE, 35TH CONG., 2D SESS. 983 (1859) (statement of Rep. Bingham). One plausible goal of the Privileges or Immunities Clause may have been to ensure that “citizens” were entitled to other Bill of Rights guarantees, such as the First Amendment’s protections of free speech or the Second Amendment’s right to keep and bear arms, which may not have been as clearly encompassed within the concept of “due process of law.”

342. 75 U.S. (8 Wall.) 603 (1869).

343. *Id.* at 606-07.

344. *Id.* at 624.

*Lee*.<sup>345</sup> Notably, the majority in the latter case did not reject the vested rights reading implicit in Chase’s *Hepburn* opinion but rather premised its holding on its view that the Due Process Clause applied only to “direct appropriation [of private property], and not to consequential injuries resulting from the exercise of lawful power.”<sup>346</sup> Chase authored a dissenting opinion joined by Justices Nelson, Clifford, and Field, all of whom had joined in Chase’s earlier *Hepburn* opinion, contending that the legislation “violates that fundamental principle of all just legislation that the legislature shall not take the property of A. and give it to B.” and was consequently “a manifest violation of” the Due Process Clause.<sup>347</sup>

The Supreme Court’s first encounter with the Due Process Clause of the Fourteenth Amendment came in its infamous 1873 decision in the *Slaughterhouse Cases*.<sup>348</sup> The petitioners in that case—independent butchers whose livelihoods were threatened by a Louisiana statute conferring a de facto monopoly on a single company—challenged the constitutionality of the statute as a violation of the Fourteenth Amendment’s Privileges or Immunities Clause, Due Process Clause, and Equal Protection Clause.<sup>349</sup> Though most of the discussion in both the majority opinion and the dissenting opinions focused on the meaning of the Privileges or Immunities Clause, the majority and two of the three dissenters addressed the petitioners’ due process arguments as well. Writing for the five-Justice majority, Justice Miller rejected the due process argument with minimal analysis:

We are not without judicial interpretation . . . both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana

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345. 79 U.S. 457 (1870).

346. *Id.* at 551.

347. *Id.* at 580 (Chase, C.J., dissenting). Chase’s *Knox* dissent conjoined “due process” and “just compensation” concepts without clearly distinguishing the respective roles of the Fifth Amendment’s Takings and Due Process Clauses in the argument. *See id.* But given the similarity of issues presented and the overlap of Justices joining in the two opinions, it is reasonable to conclude that the conception of due process at work in Chase’s *Knox* dissent was identical to the one reflected in his earlier *Hepburn* decision, which explicitly distinguished between the Due Process and Takings Clauses. *See Hepburn*, 75 U.S. at 623–24.

348. 83 U.S. 36 (1873).

349. *Id.* at 66–67.

upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.<sup>350</sup>

In dissent, Justice Bradley, with whom Justice Swayne concurred, disagreed with Miller's conclusion, declaring that "[i]n my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law."<sup>351</sup> Interestingly, both Bradley and Swayne had been part of the five-Justice majority that had rejected the substantive due process challenge to federal paper currency legislation two years earlier in *Knox v. Lee*.<sup>352</sup> And one member of the *Slaughterhouse* majority, Justice Clifford, had joined Chief Justice Chase's dissenting opinion in *Knox*, as had Justice Field, who wrote a separate dissenting opinion in *Slaughterhouse* that did not address the petitioners' due process arguments.<sup>353</sup> Thus, by 1873—five years after the Fourteenth Amendment's ratification—at least five of the Supreme Court's nine members (Chief Justice Chase and Justices Bradley, Swayne, Clifford, and Field) had joined in opinions clearly endorsing a substantive conception of due process rights.<sup>354</sup>

In the same year that *Slaughterhouse* was decided, Justice Miller authored a second majority opinion that rejected a constitutional challenge to state legislation—this time, an Iowa prohibition statute—based on the Fourteenth Amendment's Due Process Clause.<sup>355</sup> But unlike his *Slaughterhouse* opinion, which had offhandedly rejected the due process argument with minimal

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350. *Id.* at 80-81.

351. *Id.* at 122 (Bradley, J., dissenting). Swayne wrote a separate dissent in which he observed that "[d]ue process of law' is the application of the law as it exists in the fair and regular course of administrative procedure" but did not separately speak to the constitutionality of the challenged legislation "remit[ting] . . . to the opinions of my brethren, Mr. Justice Field and Mr. Justice Bradley" for the answers to questions regarding the statute's constitutionality. *Id.* at 127-28 (Swayne, J., dissenting). The principal dissenting opinion of Justice Field, which was joined by Justices Bradley and Swayne and by Chief Justice Chase, did not address the petitioners' due process argument. *Id.* at 83-111 (Field, J., dissenting).

352. See Siegan, *supra* note 16, at 489.

353. *Id.* at 490.

354. The remaining four members of the Supreme Court in 1872 were Justice Hunt, a member of the *Slaughterhouse* majority who joined the Court after *Knox v. Lee* was decided, and Justices Miller, Davis, and Strong, all of whom were among the majority in both *Slaughterhouse* and *Knox v. Lee*. Justice Hunt took the place of Justice Nelson, who had been among the *Knox* dissenters and in the majority in *Hepburn*. Thus, six of the ten Justices who served on the Court during the period from 1870 to 1873 had joined in one or more opinions embracing a substantive conception of due process rights.

355. *Bartemeyer v. Iowa*, 85 U.S. 129 (1873).

analysis, Miller's opinion in *Bartemeyer v. Iowa* took the petitioners' due process claims more seriously, suggesting in dictum that if the record had shown that the prohibition statute applied to alcohol possessed by the petitioner prior to the statute's enactment (the factual situation presented to the New York Court of Appeals in *Wynehamer*),<sup>356</sup> then

two very grave questions would arise, namely: . . . Whether this would be a statute depriving him of his property without due process of law; and secondly, whether if it were so, it would be so far a violation of the fourteenth amendment in that regard as would call for judicial action by this court?<sup>357</sup>

The concurring opinions of Justices Field and Bradley went further, suggesting that if the statute had been so applied, they each would have had no hesitation in finding the statute to be an unconstitutional deprivation of the petitioner's property in violation of the Fourteenth Amendment.<sup>358</sup>

Justice Miller again addressed the meaning of the Fourteenth Amendment Due Process Clause in his 1877 opinion for the Court in *Davidson v. New Orleans*.<sup>359</sup> Miller began his opinion by conceding that "due process of law" remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights."<sup>360</sup> Though he declined the opportunity to attempt such a definition, preferring to leave "the ascertaining of the intent and application of such an important phrase . . . [to] the gradual process of judicial inclusion and exclusion,"<sup>361</sup> Miller felt comfortable in declaring that "a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."<sup>362</sup> But only a few pages later, Miller declared:

[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it,

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356. See *supra* notes 255-257 and accompanying text.

357. 85 U.S. at 133.

358. See *id.* at 136-37 (Bradley, J., concurring); *id.* at 137-38 (Field, J., concurring).

359. 96 U.S. 97 (1877).

360. *Id.* at 101-02.

361. *Id.* at 104.

362. *Id.* at 102.

he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.”<sup>363</sup>

The seemingly contradictory nature of these two statements—that the Due Process Clause prohibits states from enacting A-to-B transfer laws and that the Clause could not be violated so long as defendants received a fair trial—has long baffled constitutional scholars seeking to understand Justice Miller’s opinion in *Davidson*.<sup>364</sup>

The evidence from the early post-Fourteenth Amendment Supreme Court decisions is somewhat ambiguous. On the one hand, by tabulating the dissenting votes in *Knox v. Lee* and the *Slaughterhouse Cases*, it appears that, at least as of 1873, a majority of the Justices on the Court were prepared to endorse some version of substantive due process, even though the members of this hypothetical majority failed to agree on how the doctrine should apply to the facts presented in those two cases. On the other hand, certain dictum in Miller’s *Davidson* opinion (contradicted by other dictum in the same opinion) and in two earlier opinions by Chief Justice Waite<sup>365</sup> seems to suggest that the

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363. *Id.* at 105.

364. See, e.g., Harrison, *supra* note 6, at 516 (“One of the great riddles concerning the origins of substantive due process is posed by *Davidson v. New Orleans*, in which Justice Miller seemed both to affirm and deny the doctrine’s existence.” (footnote omitted)); Lund & McGinnis, *supra* note 5, at 1563 n.29 (“Unfortunately, the absence of explanation for the cryptic comment about transferring title from A to B makes guesswork of any effort to say just what limits Miller thought that due process puts on legislative discretion.”).

365. The first of these two cases, *Kennard v. Louisiana ex rel. Morgan*, 92 U.S. 480 (1875), involved a challenge to the constitutionality of certain procedures the State of Louisiana had authorized for resolving disputes concerning title to judicial office. At the outset of his opinion for the Court, Waite observed that counsel for the petitioner had “substantially admitted” that the Fourteenth Amendment Due Process Clause would be satisfied if he had been deprived of office “in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights” and that “[w]e accept this as a sufficient definition of the term ‘due process of law,’ for the purposes of the present case.” *Id.* at 481. In view of the narrow procedural issue raised by the *Kennard* case and the concession by counsel, this statement provides relatively little guidance in assessing the Justices’ views as to the viability of substantive due process more generally. The second opinion, *Walker v. Sawinet*, 92 U.S. 90 (1875), involved a challenge to a state statute authorizing certain factual matters to be decided by the court rather than by a jury. Rather than limit his holding to a conclusion that the Due Process Clause did not require a jury trial in all cases, Waite went further, declaring that “[d]ue process of law is process due according to the law of the land” and that “[t]his process in the States is regulated by the law of the State,” which would not be disturbed unless in conflict with the federal Constitution or federal statutes or treaties. *Id.* at 93. Waite’s effort to equate “due process” with the “law of the state” was inconsistent with the Court’s earlier interpretation of the Fifth Amendment Due Process Clause in *Murray’s Lessee*, where the Clause was clearly

Fourteenth Amendment Due Process Clause might require nothing more than a fair trial according to the laws of the state. Moreover, despite repeated urging from a handful of dissenters,<sup>366</sup> the Court refused to strike down any state legislation on substantive due process grounds for more than two decades after the Fourteenth Amendment's ratification.<sup>367</sup> The reluctance to strike down state legislation, however, may be better explained as the result of the Court's discomfort with the new role thrust upon it by passage of the Fourteenth Amendment rather than a conceptual disagreement with viewing the newly enacted Due Process Clause as a source of substantive rights. In light of the near-consensus view that the Court adopted an artificially narrow and constrained approach to certain of the Amendment's provisions (particularly the Privileges or Immunities Clause) in order to avoid unduly interfering with the sovereign rights of the states,<sup>368</sup> it seems inadvisable to place too much weight on the Court's similarly constrained approach to the Fourteenth Amendment Due Process Clause as a reliable indicator of that provision's original meaning.

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identified as "a restraint on the legislative as well as on the executive and judicial powers of the government." 59 U.S. (18 How.) 272, 276 (1855). The more mainstream view of due process as a restraint on the legislature was affirmed with respect to the Fourteenth Amendment Due Process Clause in Justice Miller's subsequent opinion for the Court in *Davidson v. New Orleans*. See 96 U.S. 97, 102 (1878) (considering and rejecting the proposition that "a State [can] make anything due process of law which, by its own legislation, it chooses to declare such").

366. In addition to the dissenting opinions in *Slaughterhouse* and *Bartemeyer* discussed above, Justice Field urged the Court to strike down state legislation that he viewed as unreasonable and arbitrary under a police powers interpretation of the Fourteenth Amendment's Due Process Clause in a series of opinions in the 1870s and 1880s. See, e.g., *Powell v. Pennsylvania*, 127 U.S. 678, 690-92 (1888) (Field, J., dissenting); *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 519-20 (1885); *Munn v. Illinois*, 94 U.S. 113, 136-54 (1877) (Field, J., dissenting). Professor David Currie has observed that "[a]fter *Davidson*," although the Court continued to uphold state legislation against due process challenges, "it made no more efforts to establish that [the Fourteenth Amendment Due Process Clause] had nothing to do with 'the merits of . . . legislation,'" and instead "began to speak in Justice Field's police-power terms without even explaining what they had to do with the fourteenth amendment." CURRIE, *supra* note 41, at 375.
367. See *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (invalidating a state statute requiring a railroad to surrender a portion of its property to third parties for the purpose of constructing a grain elevator as a violation of the Fourteenth Amendment's Due Process Clause).
368. See, e.g., Michael Les Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39, 56-57 (arguing that the post-Civil War Supreme Court adopted a narrow reading of the Reconstruction Amendments out of a belief that a "desire to protect [individual] rights was at war with [a] desire to preserve federalism").

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2. *Evidence from Early Post-Fourteenth Amendment Constitutional Treatises*

During the years surrounding the Fourteenth Amendment's enactment, at least four prominent legal commentators published constitutional treatises commenting upon the meaning of "due process of law"—Judge Timothy Farrar, Judge George W. Paschal, Dean John Norton Pomeroy, and Justice Thomas McIntyre Cooley.<sup>369</sup> Without exception, these commentators expressed support for a substantive theory of due process rights and, by implication, of the Due Process Clause of the Fourteenth Amendment, ratification of which was nearly contemporaneous with publication of their respective treatises.<sup>370</sup>

Timothy Farrar, a former law partner of Daniel Webster and judge on the New Hampshire Court of Common Pleas, published his *Manual of the Constitution of the United States* in 1867, after the proposed Fourteenth Amendment had been approved by Congress and while its ratification was pending before the states.<sup>371</sup> Though Farrar's treatise contains relatively little discussion of the Fifth Amendment Due Process Clause and no specific discussion of the equivalent Clause in the proposed Fourteenth Amendment, his few remarks on the subject of due process rights clearly reflect the influence of abolitionist substantive due process theories.<sup>372</sup> For example, Farrar argued that even before the Civil War, slavery had been prohibited by the Constitution because, among other reasons, "[t]he Constitution . . . declares that 'no person shall be deprived of . . . liberty . . . without due process of law'" and thus there "never was, and never can be, a person legally held in slavery under our Constitution."<sup>373</sup> Elsewhere in his treatise, Farrar contrasted deprivations of life, liberty, or property by "due process of law" with deprivations by "arbitrary

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369. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 83 n.157 (1993).

370. Although Farrar, Paschal, and Pomeroy each discussed the likely effect of the proposed Fourteenth Amendment in general terms, none discussed the specific meaning of that Amendment's Due Process Clause, likely because the meaning of due process had already been discussed in separate sections of their respective treatises in connection with the equivalent Clause of the Fifth Amendment. The initial edition of Cooley's treatise, which focused principally on interpretation of state constitutions, did not discuss the Fourteenth Amendment. See *id.* at 91.

371. See TIMOTHY FARRAR, *MANUAL OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (Boston, Little, Brown & Co. 1867); Aynes, *supra* note 369, at 83-84 n.158.

372. Farrar himself had been a supporter of the abolitionist movement prior to the Civil War, and his treatise as a whole reflected the strong influence of abolitionist constitutional theories. See Aynes, *supra* note 369, at 83-85.

373. FARRAR, *supra* note 371, § 141.

edict”<sup>374</sup> and suggested that bills of attainder were unconstitutional, not only by virtue of the express prohibitions of such laws in the original Constitution,<sup>375</sup> but also because such enactments “deprive a man of life, liberty, property, and character, either or all of them, without due process of law, and without trial and judgment *per legem terrae*, or according to the general laws of the land.”<sup>376</sup>

The year after Farrar’s treatise was published, John Norton Pomeroy, dean of the Law School of the University of New York, authored a treatise titled *An Introduction to the Constitutional Law of the United States*.<sup>377</sup> Unlike Farrar, who devoted relatively little attention to the Due Process Clause, Pomeroy addressed the meaning of the provision at length. Pomeroy began his discussion of due process in exclusively procedural terms, equating “due process of law” with either “a regular course of judicial proceeding” or “those more summary measures, which are not strictly judicial, but which had long been known in the English law, and which were in familiar use when the Constitution was adopted.”<sup>378</sup> When his discussion turned to case law, however, the examples chosen by Pomeroy to illustrate the meaning of due process almost uniformly involved substantive applications of the concept. Pomeroy began by quoting Daniel Webster’s *Dartmouth College* argument equating “law of the land” with “the general law” and Justice Bronson’s opinion for the New York Supreme Court in *Taylor v. Porter* to demonstrate the meaning of “due process of law.”<sup>379</sup> Pomeroy quoted the following portion of Justice Bronson’s *Taylor* opinion to illustrate the meaning of such provisions:

The words “by the law of the land” do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The meaning of the section seems to be, that no member of the state shall be deprived of his rights and privileges, unless the matter shall be adjudged against him upon trial had

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374. *Id.* § 225.

375. See U.S. CONST. art. I, §§ 8-9.

376. FARRAR, *supra* note 371, § 476.

377. See JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES (New York, Hurd & Houghton 1868); see also Aynes, *supra* note 369, at 89-91.

378. POMEROY, *supra* note 377, at 156-57.

379. *Id.* at 157-58; see also *supra* text accompanying note 61 (quoting Webster’s *Dartmouth College* argument); text accompanying note 253 (discussing Justice Bronson’s opinion in *Taylor v. Porter*).

according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him.<sup>380</sup>

Pomeroy also quoted approvingly from the New York Court of Appeals' decision in *Wynehamer*, which Pomeroy described as having been "decided with great consideration by the court of last resort in New York."<sup>381</sup> At the conclusion of his discussion, Pomeroy off-handedly observed that "[o]f course, [the Due Process Clause] forbids any act of legislature or executive which takes one person's property and gives it to another," a remark that would appear to suggest Pomeroy's endorsement of at least the vested rights version of substantive due process.<sup>382</sup>

In 1868, Judge George W. Paschal, a prominent Texas jurist and politician who had remained loyal to the Union during the Civil War, published *The Constitution of the United States Defined and Carefully Annotated*.<sup>383</sup> Like Dean Pomeroy, Paschal illustrated his discussion of the Fifth Amendment's Due Process Clause principally by reference to the substantive due process decisions of state courts.<sup>384</sup> Closely paraphrasing Justice Comstock's opinion in *Wynehamer*, Paschal declared the true meaning of due process of law and law of

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380. POMEROY, *supra* note 377, at 158 (quoting *Taylor v. Porter*, 4 Hill. 140, 146 (N.Y. Sup. Ct. 1843)). In quoting this language, Pomeroy praised Justice Bronson as "certainly one of the ablest jurists that ever sat on the Supreme Bench of New York." *Id.*

381. *Id.* at 158-59. Though Pomeroy's discussion of *Wynehamer* was limited to that decision's holding that "due process of law" did not necessarily require a jury trial in all cases, his favorable remarks about the decision and his willingness to cite it as one of only a handful of authorities illustrating the meaning of "due process of law" cast doubt on the claims of substantive due process critics who dismiss the case as aberrational. See *supra* note 275 and accompanying text.

382. *Id.* at 160. Pomeroy cautioned, however, that "difficulty of . . . application" was likely to arise "in two classes of cases: (1) in those where a semblance of regular judicial action has been preserved, while its substance has perhaps been abandoned; and (2) in those instances where property is taken or destroyed, or persons restrained in a summary manner, and the contention is whether these acts can be fairly included among those measures of police which have been allowed by the English and American law from time immemorial." *Id.*

383. See GEORGE W. PASCHAL, *THE CONSTITUTION OF THE UNITED STATES DEFINED AND CAREFULLY ANNOTATED* (W.H. & O.H. Morrison, Law Booksellers 1868).

384. See *id.* at 260-61 (citing, *inter alia*, *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833); *Wynehamer v. People*, 13 N.Y. 378 (1856); *Taylor v. Porter*, 4 Hill. 146 (N.Y. Sup. Ct. 1843); *Norman v. Heist*, 5 Watts & Sergt. 171 (Pa. 1843); *Jones v. Heirs of Perry*, 18 Tenn. (10 Yer.) 59 (1836); *State Bank v. Cooper*, 10 Tenn. (2 Yer.) 599 (1831); *Van Zant v. Waddel*, 10 Tenn. (2 Yer.) 260 (1829)). These cases are discussed at *supra* notes 237-241, 245-247, 252-253 and 255-257 and in the accompanying text.

the land: “[W]here rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away.”<sup>385</sup> In answer to the self-posed question of what kind of “law” the Due Process Clause contemplated, Paschal, paraphrasing the Pennsylvania Supreme Court’s 1843 opinion in *Norman v. Heist*, responded that it was “[u]ndoubtedly a pre-existing rule of conduct, not an *ex post facto* law, rescript, or decree made for the occasion—the purpose of working the wrong.”<sup>386</sup>

By far the most influential of the early post-Civil War commentators to address the meaning of due process and law-of-the-land provisions was Justice Thomas McIntyre Cooley, a widely respected justice of the Michigan Supreme Court who published his treatise, titled *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, in September 1868, shortly after the Fourteenth Amendment had been declared ratified.<sup>387</sup>

Cooley began his attempt at formulating a definition of “due process of law” and “law of the land” with a candid admission that “[t]he definitions of these terms to be found in the reported cases are so various that some difficulty arises in fixing upon one which shall be accurate, complete in itself and at the same time applicable to all cases.”<sup>388</sup> Noting that “[n]o definition, perhaps, is more often quoted” than the “general law” formulation offered by Daniel Webster in his *Dartmouth College* argument,<sup>389</sup> Cooley observed that this formulation was “apt and suitable” as applied to judicial proceedings, but inadequate when applied to legislation because “[t]he necessity of ‘general rules’ . . . does not preclude the legislature from providing special rules for particular cases” and “general rules may sometimes be as obnoxious as special, when in their results they deprive parties of vested rights.”<sup>390</sup> Cooley thus

385. PASCHAL, *supra* note 383, at 260; *cf.* text accompanying *supra* note 257 (quoting Justice Comstock’s *Wynhamer* opinion).

386. PASCHAL, *supra* note 383, at 260; *see also supra* note 252 and accompanying text (discussing *Norman v. Heist*); *cf. Norman v. Heist*, 5 Watts & Serg. at 173 (interpreting the law-of-the-land provision of Pennsylvania’s constitution to require “a pre-existent rule of conduct, declarative of a penalty for a prohibited act; not an *ex post facto* [law] made for the occasion”).

387. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Little, Brown & Co. 1868); *see also* Aynes, *supra* note 369, at 91. Cooley’s treatise has recently been described as “the most influential account of constitutional law of its day.” Rosenthal, *supra* note 46, at 39-40.

388. COOLEY, *supra* note 387, at 353.

389. *See supra* note 61 and accompanying text.

390. COOLEY, *supra* note 387, at 353-55.

sought to formulate a more flexible definition focused upon the equities involved in a particular case, rather than upon “considerations of mere form”:

When the government, through its established agencies, interferes with the title to one’s property or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system of law, and not by any rules that pertain to forms of procedure merely. . . . Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.<sup>391</sup>

Though Cooley asserted that “[n]o reason of general public policy will be sufficient to protect such transfers where they operate upon existing vested rights,”<sup>392</sup> his conception of “vested rights” was sufficiently flexible to allow for a relatively wide ambit of state regulation.<sup>393</sup> Cooley’s focus on the legitimacy of the legislature’s objectives and the means pursued to attain those objectives corresponds closely with the police powers version of due process that predominated during the *Lochner* era,<sup>394</sup> and Cooley is frequently credited as one of the principal intellectual forerunners of *Lochner*-era substantive due process jurisprudence.<sup>395</sup>

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391. *Id.* at 356.

392. *Id.* at 357.

393. Cooley cautioned that, as used by the courts, the phrase “vested rights” was “not used in any narrow or technical sense, as importing a power of legal control merely, but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.” *Id.* at 358. He further observed that because “changes of circumstances and of public opinion, as well as other reasons of public policy” could “more or less affect the value and stability of private possessions” and “destroy well-founded hopes,” “many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law and many reasonable expectations, cannot be regarded as vested rights in any legal sense.” *Id.* Cooley thus maintained that there could be no vested right in, among other things, a “mere expectation,” *id.* at 359, in the continuation of the existing rules of evidence, *id.* at 367, or in “statutory privilege[s],” such as exemptions from taxation or military service, *id.* at 383.

394. *See supra* Subsection I.B.2.c.

395. *See, e.g.,* Ely, *supra* note 17, at 344 (arguing that Cooley “provided a vital link between the antebellum notion of substantive due process and the development of this doctrine in the late nineteenth century”).

*D. Conclusions*

By 1868, a recognizable form of substantive due process had been embraced by a large majority of the courts that had considered the issue, including the U.S. Supreme Court in both *Bloomer v. McQuewan* and *Dred Scott*, and by courts in at least twenty of the thirty-seven then-existing states.<sup>396</sup> Such substantive conceptions of due process rights were also reflected in the constitutional arguments of both proslavery and abolitionist forces in the decades leading up to the Civil War and were clearly embraced by Congressman John Bingham, the principal draftsman of the language in Section One of the Fourteenth Amendment.<sup>397</sup> Substantive due process was also embraced by a majority of the Justices on the Supreme Court during the years immediately following the Fourteenth Amendment's ratification (though never in the same case<sup>398</sup>) and by each of the major constitutional treatise writers during that same period.<sup>399</sup> The purely "procedural" interpretation of due process and similar provisions, on the other hand, finds little support in the historical record, beyond two decisions from the Rhode Island Supreme Court and some contradictory dicta in a few of the early Supreme Court decisions interpreting the newly enacted Fourteenth Amendment.<sup>400</sup>

The major obstacle to a substantive understanding of the Fourteenth Amendment Due Process Clause is not so much the weight of contrary historical evidence, as was the case with the equivalent provision in the Fifth Amendment, but rather the constitutional text itself, which on its face appears to deal exclusively with matters of procedure.<sup>401</sup> Though critics of the doctrine have found it difficult to deny entirely the existence of at least some pre-Fourteenth Amendment substantive due process decisions,<sup>402</sup> they have

396. See *supra* Section III.A.

397. See *supra* Sections III.B-C.

398. See *supra* notes 352-354 and accompanying text.

399. See *supra* Subsection III.C.2.

400. See *supra* notes 284, 365, and accompanying text.

401. See, e.g., ELY, *supra* note 1, at 18; Harrison, *supra* note 6, at 552 ("The impression conveyed by a close study of the doctrine's possible textual sources is that none of them is a natural understanding of the language."). Of course, the same textual difficulty exists with respect to the Fifth Amendment Due Process Clause. But in view of the relative paucity of contemporaneous evidence supporting a substantive reading of that provision, the textual argument is less significant in the Fifth Amendment context than is the case in the context of the Fourteenth Amendment.

402. Critics of substantive due process generally acknowledge the doctrine's role in Taney's *Dred Scott* opinion, though usually as part of a larger argument against its historical legitimacy.

generally dismissed such decisions as poorly reasoned and insufficient to overcome the apparently procedural intent of the constitutional text.<sup>403</sup>

One possible answer to the textualist objection might be that the sheer number and authority of reported judicial decisions embracing a substantive role for due process and similar provisions was sufficient to convert the phrase “due process of law” into a legal term of art with substantive content, even if those decisions were widely believed to reflect inaccurate readings of the relevant constitutional provisions.<sup>404</sup> Such an argument might be plausible but it is hardly airtight. After all, the twenty states whose courts had expressed support for substantive due process prior to 1868, though a majority of the states then existing, fell well short of the three-fourths required for ratification of a constitutional amendment, and statements in certain of those cases expressing support for substantive due process were at least arguably dicta.<sup>405</sup> What is needed, therefore, is a plausible explanation for how competent mid-nineteenth-century readers could have reconciled the language of the two Due Process Clauses and similar provisions in state constitutions with an understanding of those provisions that protected substantive as well as procedural rights. The fact that numerous lawyers, judges, politicians, and treatise writers unquestionably shared such an understanding suggests the availability of such a reading.

Part of the answer to how mid-nineteenth-century readers came to recognize substantive content in due process and cognate law-of-the-land provisions likely stems from the difficulty of translating a provision originally understood under English law as a restraint on monarchical abuses to the context of an American bill of rights addressed to all branches of government,

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*See, e.g.,* BORK, *supra* note 3, at 31 (inaccurately characterizing Taney’s *Dred Scott* decision as “the first appearance in American constitutional law of the concept of ‘substantive due process’”); Lund & McGinnis, *supra* note 5, at 1558-59 (inaccurately stating that, prior to Taney’s decision, the Due Process Clause “had never been thought to have any bearing on the right of legislatures to regulate or abolish slavery” and accusing Taney of “suddenly imputing . . . such substantive effect to the Clause”).

403. *See, e.g.,* ELY, *supra* note 1, at 18 (discounting the significance of purportedly “aberrational” pre-Fourteenth Amendment substantive due process decisions based on their apparent inconsistency with the constitutional text).

404. *Cf.* Harrison, *supra* note 6, at 553 (acknowledging the possibility “that in . . . 1868 the words of the Due Process Clauses had a generally accepted meaning that differed from what someone ignorant of that meaning would deduce from the words themselves”).

405. *See supra* note 248.

including the legislature.<sup>406</sup> The interpretive difficulty posed by the shifting context was exacerbated by the prevalence of the law-of-the-land formulation in most of the early state constitutions—a formulation that posed the interpretive riddle of how a provision demanding that deprivations only be accomplished “according to the law of the land” could sensibly apply to a legislative body, the very purpose of which was to declare what the law of the land should be. One possible answer would have been to read the law-of-the-land provisions in a strictly positivist manner, equating “law of the land” with duly enacted law and denying that the provisions imposed any restraint on the legislature.<sup>407</sup> This was the approach followed by the New Hampshire Supreme Court in *Mayo v. Wilson*,<sup>408</sup> but it was almost uniformly rejected by courts in other states.<sup>409</sup>

If “law of the land” did not mean any law that the legislature chose to enact, what could it then mean? By the time of the Fourteenth Amendment’s ratification in 1868, two distinct but complementary answers to this question had come to be embraced by courts and legal commentators. First, “law of the land” could be defined by reference to the separation of powers among the legislative, judicial, and executive functions. Under this reading, “law of the land” meant an action appropriate for the legislature, as opposed to the judicial branch of government. Legislative enactments that violated this principle—for example, laws that settled rights between private parties or that transferred property from *A* to *B*—were viewed as quasi-judicial acts that exceeded the legislature’s legitimate authority.<sup>410</sup> It was from reasoning of this sort that the vested rights reading emerged.<sup>411</sup> The second answer to the riddle posed by “law of the land” as a restraint on the legislature focused on a normative conception of law and demanded that legislative enactments satisfy some minimal criteria of generality and impartiality before they would be deemed

406. Cf. *supra* note 221 (discussing the difficulty of translating eighteenth-century English conceptions of “due process” and “law of the land” to the context of an American bill of rights).

407. Cf. *supra* Subsection I.B.1.a (describing the positivist reading of due process and similar provisions).

408. 1 N.H. 53, 57 (1817).

409. See *supra* Section III.A.

410. See, e.g., SEDGWICK, *supra* note 254, at 676 (noting that the idea that “the legislature can do no judicial act” is “almost identical with the constitutional declaration which insures to all persons attached or charged, the protection of the law of the land”).

411. See *supra* Subsection I.B.2.a.

worthy of recognition as law. It was from reasoning of this latter sort that the general law interpretation emerged.<sup>412</sup>

Once the vested rights and general law interpretations of “law of the land” were firmly entrenched at the state level, it was relatively easy to read those interpretations into the Due Process Clauses of the Fifth and Fourteenth Amendments based on the long tradition of treating “due process of law” and “law of the land” as synonymous concepts.<sup>413</sup> The judicial connotations of the former phrase made it a natural fit with the separation-of-powers principle underlying the vested rights interpretation, and the presence of the word “law” provided the necessary textual hook for the general law reading. To be clear, this Article does not suggest that either of these interpretations provides the objectively best reading of the Fifth Amendment Due Process Clause or that either was implicit in the text of that provision at the time of its inclusion in the Constitution in 1791.<sup>414</sup> But once the presupposition of limited legislative authority underlying both the vested rights and general law interpretations became widely associated with “due process of law” and “law of the land,” these interpretations represent a fairly straightforward and natural way of understanding how those interpretations could be reconciled with the language of the Fourteenth Amendment Due Process Clause.

Though one may still entertain doubts about the apparent textual infelicity of substantive due process as a conceptual matter, if the focus of inquiry is on what a reasonable member of the ratifying public in 1868 would have understood the Fourteenth Amendment Due Process Clause to encompass, the answer almost certainly would have included at least the vested rights and general law versions of substantive due process. A similar degree of confidence is not possible, however, with respect to the broader police powers and fundamental rights versions of substantive due process, neither of which had gained widespread support by the time of the Fourteenth Amendment’s enactment in 1868. Though support for the police powers reading might arguably be found in Justice Cooley’s treatise—publication of which was nearly contemporaneous with the adoption of the Fourteenth Amendment<sup>415</sup>—and in certain of the separate opinions delivered by Justices Bradley and Field in the

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412. See *supra* Subsection I.B.2.b.

413. See, e.g., *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); COKE, *supra* note 79, at 50.

414. See *supra* Section II.E (summarizing conclusions concerning the original meaning of the Fifth Amendment Due Process Clause).

415. See *supra* text accompanying notes 387-395.

early years following the Amendment’s enactment,<sup>416</sup> the two characteristic features of *Lochner*-era police powers jurisprudence—close judicial scrutiny of legislative ends and means and the focus on protection of individual “liberty”<sup>417</sup>—had not yet become widely embraced by the time of the Fourteenth Amendment’s enactment.<sup>418</sup> Support for the fundamental rights conception of substantive due process in the pre-Fourteenth Amendment materials is even more limited. Apart from a handful of statements, primarily appearing in the political arguments of abolitionists,<sup>419</sup> there does not appear to have been any support for viewing the Due Process Clauses as general sources of unenumerated natural or fundamental individual rights.<sup>420</sup>

As with the Fifth Amendment Due Process Clause, resolution of the original meaning question with respect to the Fourteenth Amendment is not entirely free from uncertainty, and a substantive role for the Fourteenth Amendment Due Process Clause—even in the more limited vested rights or general law forms of substantive due process—may therefore be unable to withstand a highly demanding standard of proof. But if the standard to be

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416. See *supra* notes 351, 358, 366 and accompanying text. Although Justice Bradley’s dissenting opinion in *Slaughterhouse* used the phrase “fundamental rights” in discussing the rights protected by the Fourteenth Amendment Due Process Clause, see 83 U.S. 36, 114-16 (1873), the overall context of his opinion suggests a conception of “fundamental rights” much closer to the relatively weak *Lochner*-era conception of “rights” than to the understanding reflected in modern substantive due process cases. See, e.g., Nourse, *supra* note 73, at 796-99 (describing differences between the “strong” conception of rights reflected in modern substantive due process decisions and the relatively weak protection of rights by the *Lochner* Court).

417. See *supra* Section I.B.2.c (describing police powers conception of due process rights).

418. See, e.g., Bernstein, *supra* note 67, at 14-51 (describing the Supreme Court’s increased focus on “liberty” commencing in the late 1890s and continuing throughout the *Lochner* era); Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1795-1835 (2009) (describing a gradual shift to more aggressive judicial review of legislative purposes during the *Lochner* era).

419. See *supra* notes 312-313 and accompanying text (summarizing abolitionist statements that might be read to reflect arguable support for a fundamental rights conception of due process rights).

420. It does not necessarily follow, however, that all modern fundamental rights cases are necessarily unsupportable on originalist grounds. It might be possible, for example, to defend certain modern due process decisions as applications of the general law principle. See, e.g., Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1544-58 (2002) (suggesting that certain “fundamental rights” cases might be similarly decided under a rule requiring that laws depriving people of liberty not burden particular groups unreasonably). The degree to which particular modern substantive due process decisions might be supportable under either a vested rights or general law interpretation is a subject that is beyond this Article’s scope.

applied requires only that a substantive understanding of the Fourteenth Amendment's Due Process Clause appear more likely than an exclusively procedural understanding, the evidence surveyed in this Section seems more than sufficient to satisfy that standard.<sup>421</sup>

#### IV. THE FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS CLAUSES AND THE PROBLEM OF CONSTITUTIONAL SYNTHESIS

Unfortunately, the analysis of the original meanings of the Fifth and Fourteenth Amendment Due Process Clauses cannot end with the conclusion that most observers in 1868 likely would have attributed substantive content to the phrase "due process of law" while the majority of observers in 1791 most likely would not. The identical language of the Fifth and Fourteenth Amendment Due Process Clauses implicates potentially difficult issues of constitutional synthesis, which, as explained by one commentator, "describes how later texts come to affect the meaning of earlier texts."<sup>422</sup> When viewed through the lens of constitutional synthesis, there are at least three possible alternative models of how the Fifth and Fourteenth Amendment Due Process Clauses might have been understood in relation to one another to produce an original synthetic meaning.

The first of these three models, which I refer to as the blind incorporation model, operates by treating the Fourteenth Amendment's repetition of previously ratified constitutional language from the Fifth Amendment's Due Process Clause as dispositive of the meaning of the later-enacted provision, regardless of the actual public understanding of that provision at the time of its enactment.<sup>423</sup> Under this model, the specific understanding of "due process of

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421. See *supra* notes 228-230 and accompanying text (discussing potential significance of standard of proof selection in judging claims about original constitutional meaning).

422. Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 407, 408 (1995); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 966 (2002) ("Synthetic interpretation of the Constitution endeavors to interpret one clause or provision in light of another—attending especially to relations among different parts of the Constitution as they are interpreted or amended over time.").

423. The term "blind incorporation" is derived from Justice Scalia's majority opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991), where the phrase was used to describe a similar interpretive model that would derive the meaning of the Eighth Amendment by looking to the original meaning of a predecessor provision. See *id.* at 975 ("Unless one accepts the notion of a blind incorporation . . . the ultimate question is not what 'cruel and unusual punishments' meant in the [English] Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment.").

law” shared by members of the public that framed and ratified the Fourteenth Amendment is assumed to be of secondary importance to the more general understanding that the rights protected by the Fourteenth Amendment’s Due Process Clause would be identical to the rights protected by the equivalent clause of the Fifth Amendment. As Andrew Hyman argues in an unusually forthright defense of this model,

[T]he primary goal of the Framers of the Fourteenth Amendment was to duplicate the inherent meaning of the Fifth Amendment’s [Due Process] [C]ause . . . . Even if the Framers and ratifiers of the Fourteenth Amendment had misinterpreted the Fifth Amendment in a uniform way . . . , still their primary overriding belief about “due process” was that it meant just what the same clause in the Fifth Amendment meant, and there was no inclination in 1866 to alter the meaning of the venerated Bill of Rights.<sup>424</sup>

Though Hyman’s argument is expressed in the form of a claim about the specific intentions of the framers and ratifiers of the Fourteenth Amendment, his argument can be generalized to a claim about how the Fourteenth Amendment’s Due Process Clause would have been understood by a reasonable member of the ratifying public in 1868. Under this theory, an ordinary interpreter in 1868 would have approached the Fourteenth Amendment Due Process Clause by asking what the phrase “due process of law” had meant to the members of the ratifying public when the Fifth Amendment was enacted seventy-seven years earlier, regardless of how that phrase had been understood and interpreted in the intervening decades.

As a descriptive account of how members of the ratifying public in 1868 actually approached the Fourteenth Amendment Due Process Clause, the blind incorporation model seems like a relatively poor fit. Though it appears reasonable to assume that most people would have understood the Fourteenth Amendment’s Due Process Clause to carry the same meaning as the parallel provision in the Fifth Amendment, the most common reference for determining the meaning of both provisions in 1868 was not historical evidence regarding the public understanding of “due process of law” in 1791 but rather more recent interpretations of the Fifth Amendment Due Process Clause and of parallel provisions in state constitutions. For example, when pressed for an explanation of “due process of law” during legislative debate on the proposed Fourteenth Amendment, Representative Bingham referred his questioner not to evidence of the original meaning of that phrase in 1791 but

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424. Hyman, *supra* note 18, at 9-10.

rather to the decisions of the courts, which Bingham claimed had “settled” the issue.<sup>425</sup> Similarly, when called upon to interpret the newly enacted Fourteenth Amendment Due Process Clause for the first time, members of the *Slaughterhouse* majority rightly observed that the language used in that provision was “not without judicial interpretation . . . both State and National” which could be looked to for purposes of understanding its meaning.<sup>426</sup>

Of course, it could be argued that even if actual interpreters in 1868 did not themselves follow originalist interpretive practices, the true original meaning of the Fourteenth Amendment Due Process Clause should nonetheless be determined by looking to the original meaning of the Fifth Amendment.<sup>427</sup> But this argument seems dubious. Assuming the perspective of a hypothetical reasonable observer at the time of enactment—the perspective assumed by most modern theories of original public meaning originalism<sup>428</sup>—it is not at all clear why such an observer would look to evidence regarding the meaning of the Due Process Clause at the time of the Fifth Amendment’s enactment seven decades earlier rather than to how its language was generally understood by members of the ratifying public in 1868. Even if this hypothetical interpreter concluded that the predominant public understanding of the Fifth Amendment Due Process Clause in 1868 reflected a misunderstanding of that provision’s true original meaning, this widely shared misunderstanding would nonetheless form part of the relevant background context against which he or she would have understood the likely intended meaning of the Fourteenth Amendment Due Process Clause.<sup>429</sup> Such an interpreter would thus most likely have recognized his or her own historically correct understanding as idiosyncratic

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425. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866); see also *supra* notes 323-325 and accompanying text.

426. 83 U.S. 36, 80 (1873).

427. Professors Gary Lawson and Guy Seidman suggest a somewhat similar argument, hypothesizing that the appropriate perspective for constitutional interpretation, including both the original Constitution as well as later amendments, is that of a reasonable member of the ratifying public at the time of the original Constitution’s enactment in 1788. See Lawson & Seidman, *supra* note 22, at 75-76.

428. See, e.g., BARNETT, *supra* note 23, at 92 (“[O]riginalism seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”); Kesavan & Paulsen, *supra* note 8, at 1144-45 (describing interpretive approach focused upon the understandings of “an ordinary, reasonably well-informed user of the language”).

429. See, e.g., Andrew S. Gold, *Absurd Results, Scrivener’s Errors and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 33 (2006) (“A reasonable reader understands language in light of how authors under the circumstances usually intend their words.”).

and therefore not the most likely intended meaning of the Fourteenth Amendment Due Process Clause.<sup>430</sup>

The second approach to reconciling the meanings of the Fifth and Fourteenth Amendment Due Process Clauses, which I refer to as the reverse incorporation model, is, in many ways, the mirror image of the above-described blind incorporation model.<sup>431</sup> Rather than treating the views of the framers and ratifiers of 1791 as dispositive of the meaning of “due process of law” in 1868, the reverse incorporation model treats the views of the generation that framed and ratified the later-enacted Fourteenth Amendment as having effected a change in the meaning of the earlier-enacted Fifth Amendment Due Process Clause. A leading proponent of this model is Professor Akhil Amar, who, in his influential article, *Intratextualism*,<sup>432</sup> defended the substantive due process rationale of the Supreme Court’s 1954 decision in *Bolling v. Sharpe*<sup>433</sup> in the following terms:

The framers of the Fourteenth Amendment believed that due process of law meant a suitably general evenhanded law. . . . Thus, for the framers and ratifiers of the Fourteenth Amendment, the words of its Equal Protection Clause were not expressing a *different* idea than the words of the Due Process Clause but were elaborating the *same* idea: the Equal Protection Clause was in part a clarifying gloss on the due process idea. . . . [I]f equal protection really was implicit in the Fourteenth Amendment concept of “due process of law,” as its framers believed and said, then after the ratification of this Amendment, equal protection should also be seen as implicit in the Fifth Amendment

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430. Cf. Gedicks, *supra* note 17, at 656 (“[O]riginalism does not require that interpretations of the Constitution be historically correct in some larger sense; it only requires that such interpretations coincide with the general public meaning of the constitutional words being interpreted at the time the [constitutional provision] was drafted and ratified.”).

431. “Reverse incorporation” is the label commonly given to the doctrine enunciated by the Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954), whereby the equality principle expressed through the Fourteenth Amendment’s Equal Protection Clause is applied against the federal government through the Fifth Amendment’s Due Process Clause. See generally Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1970-75 (1984) (describing the doctrine’s development).

432. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

433. 347 U.S. 497 (1954).

phrase “due process of law.” What’s sauce for the Fourteenth Amendment should intratextually be sauce for the Fifth.<sup>434</sup>

Amar’s meaning here is somewhat opaque. Professors Adrian Vermeule and Ernest Young interpret Amar as suggesting that the framers of the Equal Protection Clause “may have reflected upon the meaning of Fifth Amendment Due Process in a helpful way, and included the Equal Protection Clause as a ‘clarifying gloss’ that should be read back into the earlier provision” and criticize this view as implausible because “there is little reason to think that the Fourteenth Amendment’s framers and ratifiers had any special insight into the Fifth Amendment’s original meaning.”<sup>435</sup> But Amar himself makes no explicit claim that the framers and ratifiers of the Fourteenth Amendment had any special knowledge regarding the original meaning of the Fifth Amendment in 1791. Rather, he suggests that only “*after* the ratification of” the Fourteenth Amendment should “equal protection . . . be seen as implicit in the Fifth Amendment” and then only if equal protection was, in fact, “implicit in the *Fourteenth Amendment* concept of ‘due process of law.’”<sup>436</sup> In other words, Amar appears to be arguing that regardless of whether or not the framers and ratifiers of the Fourteenth Amendment were correct in their interpretation of the Fifth Amendment, once the Fourteenth Amendment was ratified, the meanings implicit in the phrase “due process of law,” as used in the later-enacted provision, “should be seen as” part of the meaning of the earlier-ratified Fifth Amendment Due Process Clause.<sup>437</sup>

Though the reverse incorporation model more accurately reflects the actual practices of interpreters in 1868 than does the blind incorporation model, it is not clear why the understandings of the ratifying public in 1868 as to the meaning of “due process of law” in the Fifth Amendment should be allowed to trump the understandings of that phrase shared by members of the ratifying public at the time of the Fifth Amendment’s enactment in 1791. If the language of the two Due Process Clauses reflected some sort of actual conflict such that

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434. Amar, *supra* note 432, at 772-73. Note that Amar’s reading here focuses on the general law interpretation of substantive due process, which he claims was implicit in the meaning of the Fourteenth Amendment Due Process Clause, a view that is consistent with the historical evidence. See *supra* Subsection I.B.2.b; Section III.D.

435. See Adrian Vermeule & Ernest A. Young, *Hercules, Herbert, and Amar: The Trouble with Intratextualism*, 113 HARV. L. REV. 730, 765 (2000).

436. Amar, *supra* note 432, at 772-73 (emphasis added).

437. See Vicki C. Jackson, *Holistic Interpretation: Fitzpatrick v. Bitzer and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1279 n.89 (2001) (“Implicitly, [Amar’s] argument is driven by a commitment to the primacy of the later amendment in informing understanding of prior parts of the Constitution.”).

the competing understandings of the two generations of ratifiers could not be honored simultaneously, there would be a fairly strong argument that the meaning of the later-enacted provision should control.<sup>438</sup> But this is not the case. The Fourteenth Amendment Due Process Clause, by its express terms, is limited to the actions of state governments; while the Fifth Amendment Due Process Clause, though phrased in general terms, has long been construed to apply only to the federal government.<sup>439</sup> There is no direct conflict presented by two separate provisions restraining different levels of government in different ways and thus no occasion to resort to the unexpressed intentions of the framers and ratifiers in 1868 to resolve such a perceived conflict.<sup>440</sup> As a textual matter, the reverse incorporation model thus seems like a nonstarter.<sup>441</sup>

The third and final approach to reconciling the meanings of the two Due Process Clauses construes each Clause in light of the public meaning of its language at the time of its respective enactment, which, based on the evidence examined above, would suggest that the two provisions carry nonidentical original meanings. This divergent meanings model rests on a very basic intuition—that “because every document is created at a particular moment in space and time, documents ordinarily, though not invariably, speak to an audience at the time of their creation and draw their meaning from that point.”<sup>442</sup> Indeed, the intuition that communications usually carry the meaning

438. See, e.g., 1 BLACKSTONE, *supra* note 92, at \*59 (“[W]here words are clearly *repugnant* in two laws, the later law takes place of the elder . . .”).

439. Compare U.S. CONST. amend. XIV, § 2 (“No state shall . . . deprive any person of life, liberty, or property without due process of law . . .”), with U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”); accord *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (interpreting the Fifth Amendment to apply only to the federal government and not to state governments).

440. See Michael W. McConnell, *McConnell, J., Concurring in the Judgment*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 158, 166 (Jack M. Balkin ed., 2001) (“The Constitution contains many limitations that apply only to the states, or only to the federal government, and this Court is not free to ignore those aspects of the constitutional design.”) (footnotes omitted).

441. Cf. Stephen A. Siegel, *The Federal Government’s Power To Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477, 577 (1998) (“The Fourteenth Amendment’s text guides judicial scrutiny toward state, not federal, activity. . . . There is no ambiguity to clarify through resort to legislative history.”).

442. Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1826 (1997); see also, e.g., Lawrence B. Solum, *Semantic Originalism* 60 (Ill. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 07-24, 2008), available at <http://ssrn.com/abstract=1120244> (“Words and phrases mean in context, and the context includes time and place.”).

that they would ordinarily have been expected to possess at the time they were made is so basic that one commentator has described it as an “implicit background rule of construction” that “underlies all laws and almost all forms of communication.”<sup>443</sup>

In the case of the two Due Process Clauses, there are at least two plausible arguments for why this “default rule” might not apply. First, it might be argued that interpreting the two Due Process Clauses to carry different meanings would conflict with the apparent intention of the framers and ratifiers of the Fourteenth Amendment that the two provisions share a common meaning.<sup>444</sup> On this view, the choice of identical language in the two provisions can be understood as expressing an overriding intention that the meanings of the two provisions be identical as well, such that interpreters should be forced to choose between either the blind incorporation model or the reverse incorporation model. But even if one were inclined to accord such a privileged role to the intentions of the framers and ratifiers, it is simply not possible to honor simultaneously all of the competing intentions expressed through the identical language of the Fifth and Fourteenth Amendment Due Process Clauses. Honoring the apparent intention of the Fourteenth Amendment’s framers and ratifiers that the two provisions share a common meaning would require either (1) interpreting the Fifth Amendment Due Process Clause in a manner that would not reflect its actual public meaning in 1791 (contrary to the presumptive intentions of the Fifth Amendment’s framers), or (2) interpreting the Fourteenth Amendment Due Process Clause in a manner that would not reflect its actual public meaning in 1868 (contrary to the presumptive intentions of the Fourteenth Amendment’s framers and

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443. Prakash, *supra* note 316, at 541; *see also* Kesavan & Paulsen, *supra* note 8, at 1128 & n.51 (endorsing Prakash’s characterization of this principle as a “default rule” for human communication).

444. Professor Amar suggests a somewhat similar “intentionalist” approach to resolving the potential conflict between the original meanings of the Fifth and Fourteenth Amendment Due Process Clauses:

Suppose those who draft clause 1 at time T<sub>1</sub> think it means X, and those who draft parallel clause 2 at time T<sub>2</sub> think it means Y. If we read clause 1 to mean X, and clause 2 to mean Y, we fail to do justice to the implicit idea that the two clauses are *in pari materia*. If we read both to mean Y, we fail to do justice to the intent of drafters at T<sub>1</sub>. Likewise, if we read both to mean X, we fail to do justice to the drafters at T<sub>2</sub>. One intentionalist approach to the paradox would be to pose a counterfactual: if the drafters of clause 2 had been made aware of the cycle, would they have rewritten clause 1 to mean Y, or would they upon reflection have decided that clause 2 should really mean X, or would they have said that the two clauses should not be interpreted *in pari materia*?

Amar, *supra* note 432, at 789 n.173.

ratifiers). The text of the two Clauses provides no basis for subordinating the intentions of the Fifth Amendment's framers and ratifiers to those of the framers and ratifiers of the Fourteenth Amendment, and it is highly doubtful that the framers and ratifiers of the Fourteenth Amendment, had they been made aware of the conflict, would have chosen to have the provision that they framed and adopted interpreted according to the understandings that predominated in 1791 rather than according to what they themselves understood that provision to mean. From an intentionalist perspective, the divergent meanings model thus seems like the least objectionable of three relatively poor alternatives.

A second potential argument against the divergent meanings model is grounded in a strongly holistic theory of constitutional interpretation, which seeks to interpret all of the Constitution's various provisions as part of a coherent, unitary whole.<sup>445</sup> Professor Lawrence Lessig describes one version of such a strongly holistic approach in the following terms:

[I]magine receiving three letters in the mail, each referring to the very same subject. In order to apply interpretive synthesis to all three, we must treat the three as if they were written by the same person. Likewise, in order to maintain the consistency of our political system, we apply the same assumption to our Constitution. To put it another way, the chain-novel product of eight generations—the Constitution—as the writings of a single political author—the American people.<sup>446</sup>

Professor Jed Rubenfeld has offered a similar defense of an interpretive approach that, like Professor Lessig's, focuses on the imagined intended meaning of a single, hypothetical, intergenerational constitutional author: "If self-government is a generation-spanning project, there must be a generation-spanning subject of this project. This subject I call a people . . . . [T]he idea of an intergenerational 'people' is well known to American constitutional thought. The Constitution seems to claim such a people as its author."<sup>447</sup>

If we accept the fictitious, intergenerational constitutional author posited by Professors Lessig and Rubenfeld as the proper focus of inquiry in constitutional interpretation, the divergent meanings model of the two Due Process Clauses seems highly implausible. No rational author would have

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445. Cf. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 940 (2003) (describing "constitutional holism" as "a commitment to attempting, if fairly possible, to read the Constitution . . . as a coherent, integrated whole").

446. Lessig, *supra* note 422, at 409 n.52.

447. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1146 (1995).

chosen to incorporate the nearly identical language of the two provisions into separate parts of the Constitution in the hope that later interpreters would understand the provisions to have carried different intended meanings.

But if the goal of the interpretive inquiry is to determine the most likely *actual* original meanings of the Fifth and Fourteenth Amendment Due Process Clauses, positing a fictitious intergenerational author seems impossible to justify. As a matter of historical fact, the Fifth and Fourteenth Amendment Due Process Clauses were not drafted by a single author or even a single group of authors acting together and sharing a common purpose. Rather, these two provisions were drafted and ratified by actual historically situated individuals acting many decades apart from one another and in radically different historical and legal contexts. Like all real-world authors, the historical authors of the Fifth and Fourteenth Amendments (and the members of the state legislatures to which their respective creations were submitted for ratification) were forced to act under constraints of limited information—including limited, imperfect, and possibly inaccurate information regarding what earlier generations of drafters and ratifiers had understood themselves to be adopting through the use of similar language.<sup>448</sup> It is thus plausible, and even foreseeable, that the meaning of a provision that borrows language from an existing provision enacted decades earlier may fail to capture fully the actual meaning that the same language would have conveyed to the earlier generation of framers and ratifiers.<sup>449</sup>

It is, of course, possible to act *as if* the entire Constitution, including later amendments, had been set forth by a single author or single group of authors sharing a common, mutually understood purpose and vocabulary. And as a matter of contemporary constitutional practice, there may well be sound normative arguments for preferring the type of strongly holistic constitutional coherence that such an approach promises.<sup>450</sup> But it is important to distinguish

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448. Cf. Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983) (“Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process.”).

449. Cf. Suzanne L. Abram, Note, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 BRANDEIS L.J. 613, 618 (2000) (arguing that where a provision in a state constitution has been borrowed from an earlier source, the borrowed provision “is itself the result of [the] Framers’ reading [of the earlier provision] and represents their construction of another text” based upon that reading).

450. See, e.g., Lessig, *supra* note 422, at 409 n.52 (arguing that a holistic approach better accords with American constitutional practice than narrow “clause-bound” interpretivism); Rubinfeld, *supra* note 447, at 1154-63 (arguing that conceptualizing the Constitution as the collective commitment of a generation-spanning constitutional “people” provides “the normative force through which the Constitution exercises binding authority”).

such normative arguments regarding the legal effect to be accorded such provisions as a matter of modern constitutional law from historical arguments regarding the actual semantic meaning of the two Due Process Clauses at the time of their respective enactments.<sup>451</sup> If a holistic approach to constitutional interpretation is to be preferred on normative grounds, then such a decision should be made with eyes wide open as to how the meaning derived from that approach differs from the actual original meaning of the constitutional text. Foreclosing inquiry into the actual facts regarding the Constitution's historical semantic content would deprive contemporary interpreters of useful and relevant context that is necessary for an informed decision.

## CONCLUSION

One important question remains to be answered – if the historical evidence for the divergent meanings model of the Fifth and Fourteenth Amendment Due Process Clauses' original meanings is really as strong as I believe it to be, why has that model attracted so little judicial and scholarly attention? Answering this question fully would require a detailed historiography of the twentieth-century substantive due process debate that is well beyond the scope of this Article. However, given the potential burden that the absence of such contemporary support may create for acceptance of the Article's conclusions, I will attempt here a few tentative, and admittedly speculative, thoughts as to why the divergent meanings model has not figured more prominently in debates surrounding the historical development and contemporary legitimacy of substantive due process.

Part of the answer likely stems from the fact that the modern substantive due process debate has been shaped and influenced to a large degree by ideological factors that tend to inhibit a fair and impartial inquiry into the original meanings of the two Due Process Clauses. It is likely no coincidence that Professor Corwin and other early twentieth-century critics of the Supreme Court's *Lochner*-era substantive due process jurisprudence, who conducted the first detailed examinations of the pre-Fourteenth Amendment meaning of "due process of law," failed to identify much support for substantive due process. Nor is it a coincidence that more recent critics of post-*Lochner* substantive due process decisions have tended to endorse the conclusions of the *Lochner*-era

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451. Cf. Solum, *supra* note 442, at 30 (distinguishing the "semantic . . . meaning of legal texts" from "normative theor[ies] of legal practice" and observing that "[w]hat words mean is one thing; what we should do about their meaning is another").

critics.<sup>452</sup> Advocates of substantive due process, on the other hand, generally tended (until relatively recently) to accept the historical critique, preferring to defend the doctrine on nonoriginalist grounds.<sup>453</sup>

The ideological stakes at issue in contemporary debates over substantive due process may also conduce to winner-take-all style arguments that are inconsistent with the split-the-difference result to which the divergent meanings model points. For example, the divergent meanings model's conclusion that substantive due process is consistent with the original meaning of the Fourteenth Amendment but inconsistent with the original meaning of the Fifth Amendment would likely offer little comfort to critics of such modern substantive due process decisions as *Lawrence v. Texas*,<sup>454</sup> *Planned Parenthood v. Casey*,<sup>455</sup> and *Roe v. Wade*,<sup>456</sup> each of which was grounded in interpretations of the Fourteenth Amendment Due Process Clause rather than the Fifth Amendment.<sup>457</sup> At the same time, supporters of substantive due process may be uncomfortable with a model that might lend additional credence to the outcomes reached in those particular cases but that would leave the liberty interests recognized in those decisions vulnerable to restriction by the federal government. Many interpreters may also be uncomfortable with the divergent meanings model's tendency to undermine the substantive due process rationale

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452. See *supra* notes 12, 18; see also Ely, *supra* note 17, at 344 (“Critics, from Corwin to Bork, appear to have been animated by their disagreement with particular applications of [substantive due process]. They naturally downplayed evidence showing the long lineage of the substantive reading of due process, and wrongly accused judges of simply inventing the doctrine as a vehicle to impose their own views of public policy.”).

453. See Riggs, *supra* note 17, at 943 (“Since most commentators agree that due process originally embraced only procedural, not substantive, rights, proponents of substantive due process are likely to be ‘non-originalists’ who regard original understanding as generally indeterminate and, at best, but one of many factors bearing on constitutional interpretation.” (footnotes omitted)).

454. 539 U.S. 558 (2003) (finding that state laws banning consensual sodomy violated petitioners’ “liberty” interests under the Fourteenth Amendment’s Due Process Clause).

455. 505 U.S. 833 (1992) (revising *Roe*’s trimester framework but reaffirming its core holding regarding the constitutional status of abortion rights).

456. 410 U.S. 113 (1973) (recognizing a fundamental right to abortion during the first two trimesters of pregnancy as an aspect of “liberty” interests protected by Fourteenth Amendment substantive due process).

457. Of course, it might still be open to critics of such cases to argue that the fundamental rights conception of substantive due process reflected in those decisions was inconsistent with the true original meaning of the Fourteenth Amendment, but such an argument would require considerably more nuance than a blanket condemnation of substantive due process itself as textually and historically illegitimate. Cf. *supra* notes 415-420 and accompanying text (describing relative paucity of pre-Fourteenth Amendment evidence supporting the “police powers” and “fundamental rights” conceptions of due process).

of *Bolling v. Sharpe*, which remains the only recognized constitutional basis for enforcing equal protection norms against the federal government.<sup>458</sup>

More fundamentally, the conclusion that two identically phrased constitutional provisions were originally understood to protect significantly different sets of rights has likely struck most observers as so “incongruous”<sup>459</sup> that arguments concerning the actual original meanings of the two Due Process Clauses have seemed unnecessary. Justice Frankfurter, for example, believed that, in view of the identical language of the two Due Process Clauses, it “ought not to require argument to reject” the proposition that the two provisions did not share a common original meaning.<sup>460</sup>

In these circumstances, where both text and policy arguments point to the same conclusion (that the two Due Process Clauses shared a common original meaning), it would be natural for most observers to conclude that the historical evidence must support that conclusion as well. But if we take a step back from contemporary policy debates and aesthetic concerns regarding the symmetry and congruity of the constitutional text and focus instead upon the actual understandings shared by the ratifying publics in 1791 and 1868, a different picture begins to emerge.

Those who framed and ratified the Fifth Amendment in 1791 did so against a particular historical and legal background that informed their understanding of that Amendment’s Due Process Clause. This background framed understandings of “due process of law” against the role of Magna Carta under English law, which imposed neither procedural nor substantive restrictions on Parliament, and against Coke’s equation of the concept with “presentment and indictment.”<sup>461</sup> Although a few in 1791 (such as Judge Waties of South Carolina and possibly Alexander Hamilton) may already have identified broader substantive potentialities implicit in due process and similar provisions,<sup>462</sup> the weight of historical evidence, including the interpretations given to the phrase “due process of law” by Coke and Blackstone and by each

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458. See Siegel, *supra* note 441, at 480 (observing that “*Bolling* undergirds all equal protection analysis of federal law”).

459. Cf. Farber, *supra* note 22, at 1097 (observing that even if “those who ratified the fourteenth amendment’s due process clause may have had a broader concept of the meaning of due process than their predecessors who adopted the fifth amendment’s due process clause,” it “would be incongruous to give the two due process clauses different interpretations today”).

460. *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

461. See *supra* Section II.A.

462. See *supra* text accompanying notes 137-143 (discussing Hamilton’s public statements relating to “due process” and “law of the land”); *supra* text accompanying notes 163-66 (discussing early opinions written by Judge Waties).

of the major treatise writers during the early decades of the nineteenth century, suggests that the more natural and common understanding of that phrase would most likely have been purely procedural in nature.<sup>463</sup>

By 1868, the background context against which the Due Process Clauses would have been understood had changed dramatically. Interpretations of “due process” by this date were informed by the extensive body of substantive due process decisions issued by state and federal courts during the early decades of the nineteenth century as well as by the rhetorical invocations of the Fifth Amendment Due Process Clause by both proslavery and abolitionist forces. While a proponent of a strictly procedural interpretation of the Fourteenth Amendment Due Process Clause in 1868 might still have been able to put forth a plausible argument in support of that position,<sup>464</sup> the overwhelming weight of authority would have supported a broader interpretation of the provision as a protection of at least some substantive individual rights.<sup>465</sup> A contemporary observer seeking in good faith to understand what his or her fellow citizens had meant by including that provision in the Constitution would almost certainly have recognized such substantive aspects of the provision as part of its intended meaning.

The evolution of due process concepts during the first half of the nineteenth century occurred so gradually and incrementally that the framers and ratifiers of 1868 almost certainly failed to recognize the inconsistency between their own understanding of “due process of law” and the understanding that predominated at the time of the Fifth Amendment’s enactment in 1791. This failure of intergenerational constitutional communication, though regrettable, does not justify a departure from the traditional default rule that identifies the original semantic meaning of a provision with its meaning at the time of enactment.

Applying this default rule to the Fifth and Fourteenth Amendment Due Process Clauses yields a simple and straightforward conclusion: the original meaning of one, and only one, of the Constitution’s two Due Process Clauses—the Fourteenth Amendment Due Process Clause—encompassed a recognizable form of substantive due process. This divergent meanings model of the two Due Process Clauses has been dismissed and ignored for far too long. It is well past time for the model to assume its rightful position in the longstanding public debate regarding the historical legitimacy of substantive due process.

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463. See *supra* Section II.E.

464. Cf. *supra* note 284 and accompanying text (discussing mid-nineteenth-century opinions from Rhode Island that rejected substantive due process).

465. See *supra* Section III.D.