An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment

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AN ORIGINALIST DEFENSE OF SUBSTANTIVE DUE PROCESS: MAGNA CARTA, HIGHER-LAW CONSTITUTIONALISM, AND THE FIFTH AMENDMENT

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This is the first in a planned series of articles in which I propose to explore the extent to which the various dimensions of the contemporary constitutional right to privacy can be grounded in an originalist understanding of the Due Process Clauses of the Fifth and Fourteenth Amendments.
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Abstract

A longstanding scholarly consensus holds that the Due Process Clause of the Fifth Amendment protects only rights to legal process. Both this consensus and the occasional challenges to it have generally overlooked the interpretive significance of the classical natural law tradition that made substantive due process textually coherent, and the emergence of public-meaning originalism as the dominant approach to constitutional interpretation. This Article fills those gaps.

One widely shared understanding of the Due Process Clause in the late eighteenth century encompassed judicial recognition of unenumerated substantive rights as a limit on congressional power. This concept of “substantive” due process originated in Sir Edward Coke’s notion of a “higher-law” constitutionalism that understood natural and customary rights as limits on crown prerogatives and parliamentary lawmaking. The American colonies adopted higher-law constitutionalism in their revolutionary struggle, and carried it with them through independence and constitutional ratification.

Natural and customary rights limited the exercise of legislative power in the late eighteenth century through the normative definition of “law” inherited from the classical natural law tradition, which maintained that an unjust law was not really a “law.” American judges and attorneys did not consider legislative acts that violated natural or customary rights to be real “laws,” regardless of their compliance with a positivist rule of recognition. Accordingly, deprivations of life, liberty, or property effected on the authority of such acts did not comply with the “law” of the land or the due process of “law,” because regardless of the process such acts afforded, the deprivations they imposed were not accomplished by a true “law.” The classical understanding of “law” and the substantive understanding of due process that it underwrote are evident in legal dictionaries and in judicial decisions and arguments of counsel during the years immediately before and after ratification of the Bill of Rights in 1791. On balance, these authorities show that one widely held public understanding of Fifth Amendment Due Process Clause in the late eighteenth century included judicial protection of unenumerated substantive rights against congressional encroachment.

Given the contemporary dominance of originalist theories of interpretation, an originalist defense of substantive due process under the Fifth Amendment is important for at least three reasons. First, such a defense provides a textual footing for important unenumerated substantive rights against the federal government. Second, because the original meanings of the Fifth and Fourteenth Amendment Due Process Clauses are widely thought to be identical, the originalist defense dramatically alters the interpretive landscape surrounding Fourteenth Amendment substantive due process, placing on its opponents the burden of explaining how and why the substantive understanding of due process in 1791 was lost by 1868. Finally, an
originalist defense of substantive due process demonstrates that originalism is consistent with the progressive, common law recognition of individual rights.

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I. INTRODUCTION

It is difficult to imagine a more maligned constitutional doctrine than “substantive due process.” Referring to the proposition that the Due Process Clauses of the Fifth and Fourteenth Amendments empower federal judges to constitutionalize unenumerated substantive rights, substantive due process formally debuted in Chief Justice Taney’s infamous Dred Scott opinion.1 After that inauspicious beginning, things never really got any better. For more than a century, sharp and sustained criticism of substantive due process has been a fact of constitutional life in the United States.2

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1 60 U.S. 393, 450 (1856) (“And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”).

2 See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1873) (“[U]nder no construction of [the ‘due process of law’] that we have ever seen, or any that we deem
This criticism has had particular resonance since the 1980s, when the Reagan
administration endorsed “originalism” as the only legitimate approach to constitutional
interpretation.\(^3\) The most widely defended version of this interpretive theory holds that the
contemporary meaning of a constitutional provision is the meaning that was understood by the
people who lived at the time that the provision was proposed by Congress and ratified by the
states.\(^4\) Sometimes called “public-meaning” originalism, this version is concerned with
uncovering a purportedly objective public meaning, and is distinct from original intention or
“intentional-meaning” originalism, which focuses on the subjective understanding of the framers
or ratifiers of a constitutional text.\(^5\) A public-meaning originalist would interpret the 1787

admissible, can the restraint imposed by the State of Louisiana 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.”); Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (“I think
that the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural
outcome of a dominant opinion . . . .”); ROBERT BORK, THE TEMPTING OF AMERICA 114 (New
York: Basic, 1990) (scornfully referring to Roe v. Wade’s substantive due process protection of
abortions rights as a “judicial fiat”); John Hart Ely, The Wages of Crying Wolf, 82 YALE L.J. 920,
942 (1973) (suggesting that Roe is a more dangerous substantive due process precedent than
Lochner).

\(^3\) See, e.g., Edwin Meese III, July 9, 1985 Speech Before the American Bar Association, in
MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDMUN MESEE III, 1985-88, at 7
(1989).

\(^4\) See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 92 (Princeton, N.J.:
Princeton University Press, 2004); BORK, supra note #, at 144; ANTONIN SCALIA, A MATTER OF
INTERPRETATION 17 (1997); KEITH WHITTINGTON, CONSTITUTIONAL INTERPRETATION 35
(Lawrence: University Press of Kansas, 1999).

\(^5\) BARNETT, supra note #, at 92 (“Whereas ‘original intent’ originalism seeks the
intentions or will of the lawmakers or ratifiers, ‘original meaning’ originalism 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; BORK, supra note #, at 144 (arguing that originalism is not
a search for the subjective intention of the framers or the ratifiers, but rather for “how the words
used in the Constitution would have been understood at the time” of its framing or ratification”);
Steven G. Calabresi, The Originalist and Normative Case Against Judicial Activism: A Reply to
constitutional text and the 1791 Bill of Rights in accordance with the common usage and public understanding of the words of those texts in the 1780s and 1790s, the Reconstruction Amendments of 1865, 1868, and 1870 in accordance with such usage and understanding in the 1860s and 1870s, and so forth. Proponents of originalism argue that adherence to original meaning in constitutional interpretation prevents federal judges (and especially Supreme Court justices) from giving their personal value preferences the force of constitutional law.⁶

⁶ See, e.g., RAOUl BERGER, GOVERNMENT BY JUDICIARY 371 (Indianapolis, Ind.: Liberty Fund, 2nd ed. 1997) (1977) [hereinafter BERGER, GOVERNMENT BY JUDICIARY] (arguing that if judges are not constrained by original meaning, the “chains of the written constitution are converted into ropes of sand”); Bork, supra note #, at 146 (arguing that “the problem of the neutral derivation of principle is solved” so long as the “judge finds his principle in the Constitutional as originally understood” and refrains from making “unguided value judgments of his own”); Kay, supra note #, at 287 (arguing that adherence to original intent constrains judges more than any other theory of judicial review); Ronald Reagan, Address to the Nation on the Supreme Court Nomination of Robert H. Bork (Oct. 14, 1987), available at <http://www.reagan.utexas.edu/archives/speeches/1987/101487b.htm> (“The principal errors in recent years have had nothing to do with the intent of the framers who finished their work 200 years ago last month. They’ve had to do with those who have looked upon the courts as their own
The doctrine of substantive due process has been a particular source of interpretive controversy. By their terms, the Due Process Clauses of both the Fifth and Fourteenth Amendments appear to protect only rights to legal process. With respect to the Fifth Amendment Due Process Clause, moreover, an overwhelming scholarly consensus holds that it protects only procedural rights. Originalism has emerged as yet another weapon against the special province to impose by judicial fiat what they could not accomplish at the polls.

7 See 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.”). But see Walter Dellinger, Remarks on Jeffrey Rosen’s Paper, 66 GEO. WASH. L. REV. 1293, 1293 (1998) (arguing that the text of the Due Process Clauses has an “irreducibly ‘substantive’ content” rooted in the fact that an absence of substantive restrictions on government renders procedural restrictions “worthless”).

doctrine of substantive due process—that is, against judicial recognition and enforcement of individual rights that are not enumerated in the constitutional text, and in support of a more constrained judiciary that subordinates such rights to the actions of the elected branches of the federal and state governments.

But originalism is more than a supplemental argument against unenumerated rights and judicial activism. In addition to possessing a powerful intuitive appeal, originalism rests on a plausible philosophical foundation, highlighted by the fact that writing is an intentional act. As numerous commentators have pointed out, human beings are uninterested in interpreting signs that lack a sentient author—that is, in attributing meaning to randomly occurring marks that are


10 See O’NEILL, supra note #, at 231; Friedman & Smith, supra note #, at 87.

11 See, e.g., Paul W. Kahn, Reason and Will in the Origins of American Constitutionalism, 98 YALE L.J. 449, 514 (1989) (describing the powerful nature of originalist imagery, which portrays judges as “keepers of the covenant” and provides a powerful link with the past); Jonathan R. Macey, Originalism as an “ism”, 19 HARV. J.L. & PUB. POL. 301, 308 (1996) (suggesting that the widespread appeal to originalism in constitutional interpretation, even by non-originalists, constitutes strong evidence that the theory is intellectually legitimate); Earl Maltz, Forward: The Appeal of Originalism, 1987 UTAH L. REV. 773 (arguing that beyond its potential for justifying conservative policy outcomes, originalism has a deep and widespread appeal because of its apparent neutrality, especially in comparison with other theories of constitutional interpretation).
unrelated to any human communicative intention. On this view, signs or marks that lack a sentient author cannot be “writing,” because the meaning of any writing is identical to the message that its author meant to communicate.

If writing generally is an intentional act, then written law is especially so. Laws have “purposes”; once enacted, they are expected to have certain effects, to “do” something that the lawmakers intended be done. Written law is “written” precisely to fix in words a particular (albeit collective) human intention. Written law is thus the paradigmatic example of writing as an intentional act.

12 The classic exposition of this view is Steve Knapp & Walter Benn Michaels, Against Theory, 8 Critical Inquiry 723 (1982), reprinted in Against Theory: Literary Studies and the New Pragmatism 18 (W.J.T. Mitchell ed., 1985), which argues again that the meaning of a text is simply and necessarily the meaning intended by its author, which obviates the need for “theories” of interpretation. See also E.D. Hirsch, Validity in Interpretation (New Haven, Conn.: Yale University Press, 1967); John R. Searle, Mind: A Brief Introduction (2004). Numerous legal academics have adapted this intentionalist account to legal and (especially) constitutional interpretation. See, e.g., Paul Campos, Against Constitutional Theory, 4 Yale J.L. & Hum. 279 (1992); Steven D. Smith, Correspondence, Law without Mind, 88 Mich. L. Rev. 104 (1989).


13 See Knapp & Michaels, supra note #, at 724.

14 See Whittington, supra note #, at 59, 60; Campos, supra note #, at 302; Smith, supra note #, at 112, 115.

15 See Kay, supra note #, at 239; Smith, supra note #, at 111.

Originalism is rhetorically grounded in this relationship between intention and writing. An originalist would argue that the framers had certain purposes which they expected the Constitution to fulfill. Because the framers were rational, intelligent, and well-educated, they can be presumed to have written the Constitution in those words which best communicated these purposes to the people it would bind. What else could the words of the Constitution mean, then, if not what those words were publically understood to mean at the time that the Constitution was drafted and ratified?

As recent Supreme Court nominations have made unmistakably clear, originalism

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17 See, e.g., Barnett, supra note #, at 636 (arguing that the “original meaning of a text” binds us because we “profess our commitment to a written constitution, and original meaning interpretation follows inexorably from that commitment”).

18 WHITTINGTON, supra note #, at 60. Unlike intended-meaning originalism, public-meaning originalism does not give controlling authority to these subjective understandings and expectations. See note 5 [Draft #20 p.5] & and accompanying text supra.

19 See WHITTINGTON, supra note #, at 60; e.g., Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824) (“As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”).

20 Cf. Rosenthal, supra note #, at 9 (“[I]t is difficult to understand why one would adopt a constitutional text if not to memorialize its then-understood meaning as organic law.”)

21 During President Reagan’s administration, the Department of Justice was reported to have used fidelity to originalist interpretive method as an important factor in federal judicial nominations. JONATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 146 (2005). President Reagan’s nomination of then-Circuit Judge Robert Bork to the Supreme Court brought arguments over originalism into the realm of popular public debate, and the question whether a judge will “strictly interpret the Constitution” is now common fare at all Supreme Court confirmation hearings. See, e.g., Roberts Confirmation Hearings, Questioning by Senator Grassley on September 15, 2005 (asking then-Judge Roberts whether he would uphold decisions “which you found not to be based on the original intent of the Constitution”); see also George W. Bush, First Bush-Gore Presidential Debate (Oct. 3, 2000), Comm’n on Pres. Debates, Unofficial Debate Trans., available at <http://www.debates.org/pages/trans2000a.html>.
now defines the terms of public debates about constitutional meaning. Given the political, intuitive, philosophical, and rhetorical appeal of originalism, proponents of substantive due process cannot ignore the question whether the doctrine is defensible on originalist grounds.

An originalist defense of substantive due process under the Fifth Amendment Due Process Clause would be particularly important, for at least three reasons. First, such a defense would provide a textual footing in the Fifth Amendment for important substantive rights that bind the federal government only through that Amendment’s Due Process Clause, such as the right to “fundamental fairness” in criminal and civil proceedings, the right to equal protection of the laws, and the right to an equally weighted vote in elections for federal office. Second, the voters will know I'll put competent judges on the bench, people who will strictly interpret the Constitution and will not use the bench to write social policy. And that's going to be a big difference between my opponent and me. I believe that -- I believe that the judges ought not to take the place of the legislative branch of government, that they're appointed for life and that they ought to look at the Constitution as sacred. They shouldn't misuse their bench. I don't believe in liberal, activist judges. I believe in -- I believe in strict constructionists. And those are the kind of judges I will appoint.

Id.; Alito Confirmation Hearings, Questioning by Senator Graham on January 10, 2006 (asking then-Judge Alito whether he was a “strict constructionist”).

See, e.g., Michael Perry, Morality, Politics, and Law 280 (Oxford: Oxford University Press, 1990) (suggesting that all theories of constitutional interpretation are in some sense originalist); Barnett, supra note #, at 613 (asserting that originalism is now the “prevailing approach to constitutional interpretation”). For a succinct account of the considerable contemporary influence of originalism on contemporary constitutional law, see Rosenthal, supra note #, at 3-9.

Thomas Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 711-12 (1974) [hereinafter Grey, Unwritten Constitution].


See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Bolling v. Sharpe,
most authorities hold that the original meanings of the Fifth and Fourteenth Amendment Due Process Clauses are the same. An originalist defense of Fifth Amendment substantive due process, therefore, would create a presumption that this doctrine is likewise encompassed by the original meaning of the Fourteenth Amendment Due Process Clause, thereby dramatically altering the interpretive landscape surrounding latter: Opponents of substantive due process would no longer be able to passively stand on the entrenched conventional wisdom, but would have to affirmatively explain how and why an understanding of due process that encompassed the protection of substantive unenumerated rights in 1791 came to be abandoned in favor of an understanding that confined such protection to procedural rights in 1868. And finally, an originalist defense of Fifth Amendment substantive due process would demonstrate that originalism is not inconsistent with the progressive, common law recognition and protection of individual rights championed by the Supreme Court since the mid-twentieth century.

Critics of Fifth Amendment substantive due process, as well as its occasional


27 See, e.g., Malinski v. New York, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring in part); Hurtado v. People, 110 U.S. 516, 534-35 (1884); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 80 (1872); BERGER, supra note #, at 204; II(2) CROSSKEY, supra note #, at 1102-03; JOHN ELY, supra note #, at 15; MEYER, supra note #, at 125; Roscoe Pound, The Development of Constitutional Guarantees of Liberty, 20 NOTRE DAME LAWYER 183, 184 (1945) [Part I]; 20 NOTRE DAME LAWYER 347 (1945) [Part II]; Reeder, supra note #, at 194.

28 See note # supra.
supporters, have largely overlooked the interpretive significance of both public-meaning
originalism and the reception of the classical natural law tradition in late eighteenth century
America. For example, some critics have argued that substantive due process is founded on a
mistaken understanding of the original meaning of the thirteenth century Magna Carta in which
the norm of due process is rooted. Even if true, this is irrelevant: Public-meaning originalism
specifies that the meaning of a constitutional text is its public meaning at the time it was drafted
and ratified, but does not demand that this public meaning be historically accurate. Critics and
supporters have also generally ignored the classical natural law tradition’s normative definition
of “law,” despite this tradition’s powerful influence during the founding era and its crucial
relevance to that era’s understanding of state law of the land clauses and the federal Due Process
Clause. The legal literature contains only two comprehensive examinations of late-eighteenth
century judicial decisions and other authorities bearing on the original meaning of the “due
process of law” in the Fifth Amendment, neither of which considers these authorities in light of

29 See, e.g., James Ely, The Oxymoron Reconsidered: Myth and Reality in the Origins of
Substantive Due Process, 16 CONST. COMM. 315 (1999) [hereinafter James Ely]; Grey, Unwritten
Constitution, supra note #; Thomas C. Grey, Origins of the Unwritten Constitution:
Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978) [hereinafter
941; cf. Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. CHI. L. REV. 1127, 1132
(1987) (arguing that the founders understood certain natural and customary rights to be binding
as constitutional law and enforceable by courts despite their lack of enumeration in the
Constitution or Bill of Rights).


31 See Berger, “Law of the Land”, supra note # (concluding that due process limitations
were never understood to limit legislative power, and that no sound late-eighteenth century
authority supports the view that the Fifth Amendment Due Process Clause authorized the federal
judiciary to protect unenumerated substantive rights against congressional encroachment); Riggs,
supra note # (concluding that seventeenth and eighteenth century authorities support the view
that the framers intended that the Fifth Amendment Due Process Clause protect unenumerated

the now dominant originalism of public meaning or the classical definition of law. This Article fills these gaps.

I will argue that one widely shared understanding of the Due Process Clause of the Fifth Amendment in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights as a limit on congressional power. The concept of due process as a substantive limitation on government originates in thirteenth century England with the “law of the land” clause of Magna Carta.32 Although Magna Carta fell into disuse in succeeding centuries, Sir Edward Coke revived it as the center-piece of a “higher-law” constitutionalism, which held that natural and other rights customarily recognized and enforced at common law constituted fundamental limits on assertions of crown prerogatives (and, perhaps, on parliamentary lawmaking as well).33 This higher-law constitutionalism is evident in Coke’s writing, as well as in the seventeenth century identification of natural law with common law.34

Coke’s reading of substance into due process was adopted by the American colonies and adapted to their struggle against Britain in the 1760s and 1770s.35 The English Civil War, the Interregnum, and the Glorious Revolution resulted in England’s eventual abandonment of natural and customary rights as constitutional limitations on king and Parliament, in favor of a

32 See Part II-B.

33 See Part II-B-1.

34 See Part II-B-2.

35 See Part III.
constitutional understanding that limited the king by vesting full sovereignty in Parliament.\footnote{See Part III-A.}

Higher-law constitutionalism, however, lived on in the American colonies. Indeed, the clash of these two conflicting understandings of the English constitution, the constitution of “sovereign command” and parliamentary supremacy, asserted by George III and the Tory majority in Parliament, versus the higher-law constitutionalism of natural and customary rights asserted by the colonies and the Whig opposition, lay at the heart of the American Revolution.\footnote{See Part III-B.} When the colonies declared themselves independent in 1776, they reconstituted the legislative, executive, and judicial departments of their republican governments by means of written constitutional documents,\footnote{See Part III-C-1.} but left natural and customary rights where they had always been, under the protection of higher-law constitutionalism,\footnote{See Part III-C-2.} as is evident from judicial decisions and arguments of counsel in the years following independence.\footnote{See Part III-C-3.} The subsequent drafting and ratification of the federal Constitution in 1787 followed the same pattern.\footnote{See Part III-D.}

The eighteenth century American adoption of seventeenth century English higher-law constitutionalism is the necessary backdrop for the argument that the doctrine of substantive due process was within the original understanding of the Fifth Amendment.\footnote{See Part III-D.} It is evident from the ratification controversy over the Constitution’s initial lack of a bill of rights that late eighteenth
century Americans understood natural and customary rights to be invested with an existence and
normative force as “higher” or “constitutional” law that did not depend upon their enumeration in
a written constitution. Natural and customary rights limited the exercise of legislative power in
the late eighteenth century through a particular understanding of “law” inherited from the
classical natural law tradition. Cicero, Augustine, Aquinas, and others in that tradition
maintained that an unjust law was not really a “law,” and American judges and attorneys in the
late eighteenth centuries understood “law” in this restrictive manner, as having a normative
content beyond mere positivist compliance with the rule of recognition. Legislative acts that
violated natural or customary rights, therefore, were not considered to be actual “laws,”
irrespective of their compliance with written constitutional prescriptions for the creation of
positive law. Accordingly, deprivations of life, liberty, or property effected on the authority of
such acts were not understood to comply with the “law” of the land or the due process of “law,”
because they were not accomplished in accordance with a “law,” regardless of the process the
acts afforded. If a congressional act were not truly a “law,” in other words, deprivations
accomplished pursuant to that act did not satisfy the Fifth Amendment’s requirement that
deprivations be accomplished in accordance with the due process of “law.”

The classical understanding of “law” in the Fifth Amendment Due Process Clause is
evident in legal dictionaries and in judicial decisions and arguments of counsel during the years

42 See Part IV.
43 See Part IV-A.
44 See Part IV-B.
45 See Part IV-B-1.
immediately before and after ratification of the Bill of Rights in 1791,\textsuperscript{46} and criticisms of it are irrelevant or unpersuasive on originalist grounds.\textsuperscript{47} On balance, there is sufficient historical evidence to support the conclusion that at least one common public understanding of the Due Process Clause of the Fifth Amendment at the time that it was ratified in 1791 was that it protected unenumerated natural and customary rights against encroachment by Congress.\textsuperscript{48}

II. MAGNA CARTA, EDWARD COKE, AND SEVENTEENTH CENTURY DUE PROCESS

A. Due Process and Magna Carta

\textsuperscript{46} See Part IV-B-2.

\textsuperscript{47} See Part IV-C.

\textsuperscript{48} See Part V.
It is universally agreed that the concept of “due process of law” is rooted in Magna Carta, or the “Great Charter,” which was forced on John I by a group of feudal barons at Runnymede in 1215. Without doubt the most influential provision of Magna Carta has been the “law of the land” clause of chapter 29: “No free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers and by the law of the land.”

Chapter 29 assumed the form that would influence centuries of Anglo-American jurisprudence following six parliamentary reaffirmation statutes enacted during the reign of Edward III in the fourteenth century. These reaffirmation statutes memorialized three critical understandings of Chapter 29. First, they provided that the “lawful judgment of [one’s] peers” meant trial by jury, which barely existed when Magna Carta was first issued in the early thirteenth century. Second, they defined the “law of the land” as the “due process of law,” or “procedure by original writ or by an indicting jury,” verbal formulations that suggested substantive as well as procedural protection. And finally, the

49 References to this clause here and elsewhere in this Article are to chapter 29 of the 1225 version of the Charter affirmed by Henry II, which is preferred by historians over chapter 39 of the 1216 version subsequently repudiated by John. See GEORGE BURTON ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 138 (New York: Henry Holt, 1934); HELEN C. CAM, MAGNA CARTA–EVENT OR DOCUMENT? 3, 13 (London: Selden Society, 1965); J.C. HOLT, MAGNA CARTA 393-94 (Cambridge: Cambridge University Press, 2nd ed. 1992) [hereinafter HOLT, MAGNA CARTA].

50 An early and persistent question was whether the agreement of any king to the provisions of Magna Carta bound his successors. This uncertainty was dealt with by regular reaffirmation of Magna Carta, by the crown in coronation charters, and later by Parliament in enacted statutes. ADAMS, supra note #, at 130-31.

51 HOLT, MAGNA CARTA, supra note #, at 10.

statutes extended the protections of chapter 29 from “all free men” to “all persons” of whatever estate or condition,” thereby extending the protections of chapter 29 from the nobility to virtually every inhabitant of England.54

The Charter and its many reaffirmations during the thirteenth and fourteenth centuries coincided with the rise of the English common law. One of the royal innovations during this period was the establishment of royal courts with trained judges and a national jurisdiction that displaced the manorial, shire, and other local courts which had traditionally been controlled by medieval barons and other feudal underlords.55 During the thirteenth and fourteenth centuries, these royal courts accumulated a body of judicial decisions that came to be identified as expressions of the “common law of England.”56 Indeed, the classic definition of the “common law”—“the law and customs common to the whole kingdom of England . . . administered by a

53 See, e.g., FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 4-5 (Durham, N.C.: Carolina Academic Press, 1986) (arguing that the existence in Magna Carta of remedies for dispossession of feudal estates “would seem to resolve in the affirmative the question whether chapter [2]9 was intended to protect substantive property rights”); Riggs, supra note #, at 956-57 (“Finding substantive overtones in the Edwardian statutes is consistent with the position of McKechnie, Holdsworth and Thompson, among others, that in the fourteenth century ‘due process of law’ and ‘law of the land’ were essentially equivalent terms having substantive as well as procedural content.”).

54 CAM, supra note #, at 18-19; HOLT, MAGNA CARTA, supra note #, at 10


56 BAILEY & GUNN, supra note #, at 4; SLAPPER & KELLY, supra note #, at 3.
centralized court system with nationwide acceptance"—points to the origins of common law in the displacement of baronial courts by royal courts. By the fifteenth century, both Magna Carta and the common law were widely viewed as remnants of a romanticized ancient Saxon legal tradition ruptured by the Norman invasion. The coincidence of widespread belief in the ancient roots of the Charter’s rights and remedies with purported discovery by royal courts of a similarly ancient common law, indelibly linked the Charter and the common law in the English legal tradition. This proved to be a critical association, since in medieval and early modern England the common law was generally understood to be the “constitution of the kingdom.”

By the end of the fourteenth century, the “myth of Magna Carta” was well entrenched in


58 See Mcllwain, supra note #, at 140.

59 See, e.g., Cam, supra note #, at 7 (“In 1215, the ‘laws of Edward the Confessor’ [referenced by the original Charter] stood for the ancient customary law of the land in the eyes not only of the barons but of the citizens of London, who preserved a notable twelfth century manuscript in which they were coupled with the Coronation charter of Henry I and expounded as safeguards against tyrants.”); Mcllwain, supra note #, at 172 (By the 15th century, “Magna Carta had come to be considered an enactment much in the original sense of a statute: in affirmation of ancient law.”); Edward S. Corwin, The “Higher Law” Background of American Constitutional Law, 42 Harv. L. Rev. 149, 170 (1928) [Part I] (characterizing the idea of a pre-Norman common as “the veriest fiction,” with origins conventionally traced to the second half of the thirteenth century); 42 Harv. L. Rev. 365 (1928) [Part 2] [hereinafter Corwin, “Higher-Law” Background]; Thomas, supra note #, at 122-25 (summarizing Norman coronation charters which purported to restore the pre-Conquest Saxon laws of Edward the Confessor).

60 See Arthur R. Hogue, Origins of the Common Law 79-80 (Indianapolis, Ind.: Liberty Fund, 1986); Mcllwain, supra note #, at 127.

61 Postema, supra note #, at 155.
English legal culture: Magna Carta declared fundamental English law, or (what amounted to the same thing) the rights and remedies against the king set forth in the Magna Carta formed part of the common law.

B. Coke and the Deployment of Due Process against the Crown (and Parliament?)

Magna Carta originated as a limitation on the crown, which exercised the primary law-making authority in the thirteenth century through royal decrees and judgments of the king’s courts. It was precisely the understanding of Magna Carta as a check on royal power that was championed by Sir Edward Coke and others against the absolutism of the Stuart kings. One of the crucial stories behind substantive due process is how Magna Carta, the due process of law, and the common law evolved into “fundamental” or “higher law” limitations on royal and parliamentary power in early seventeenth century England.

1. “Higher-Law” Constitutionalism

During the fifteenth and sixteenth centuries, the energetic rule of the Tudors—Henry VII, Henry VIII, and Elizabeth I— loosened the customary restraints on royal power represented by common law (including Magna Carta) and Parliament. By the late sixteenth century, chapter 29 and the rest of the Charter had fallen into disuse, rendered

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62 HOLT, MAGNA CARTA, supra note #, at 14; HOWARD, supra note #, at 24.; MCILWAIN, supra note #, at 172, 174.

63 CAM, supra note #, at 17, 20; MCILWAIN, supra note #, at 135; Corwin, “Higher Law” Background, supra note #, at 179.

64 James Ely, Oxymoron Reconsidered, supra note #, at 320; Corwin, “Higher Law” Background, supra note #, at 168.

65 See Pound, supra note #, at 208.
apparently obsolete by the Tudors’ many accretions of royal power. When James I, the first Stuart king, took the throne at the death of Elizabeth, he sought to formalize and consolidate this shift of power to the king. In particular, James maintained that the king could not be subject to law, because law was merely a means of executing the royal will.

To combat James’s assertion of royal absolutism, Coke resurrected and extended the “myth of Magna Carta”—the traditional (and historically dubious) belief that Magna Carta declared ancient legal constraints on royal power. The argument that Magna Carta limited the royal prerogative was based on a simple syllogism:

1. Magna Carta declared the existence of fundamental English laws and customs that formed part of the common law.

2. By ruling the kingdom in violation of these laws and customs, King John had been a tyrant.

3. Therefore, any ruler who failed to observe Magna Carta likewise violated the common law and was similarly guilty of tyrannous behavior.

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66 ADAMS, supra note #, at 142; see HOLT, MAGNA CARTA, supra note #, at 11, 396.

67 See ADAMS, supra note #, at 265; Grey, Fundamental Law, supra note #, at 851; see also Pound, supra note #, at 214 (noting that “James I and his successors undertook to set up in England an absolute monarchy after the fashion of the continent.”).


70 HOLT, MAGNA CARTA, supra note #, at 403.
Coke put this syllogism to good use, using it to characterize Magna Carta as a “higher law” which safeguarded important English liberties held by all subjects of the realm.\textsuperscript{71} By treating Magna Carta and the liberties it declared as possessed of a more fundamental status than ordinary law, Coke meant to invest Magna Carta with a place in the English system that was prior to and more foundational than the actions of crown or, perhaps, even Parliament.\textsuperscript{72}

In Coke’s view, the English constitution did not vest sovereignty in the king or any of the estates,\textsuperscript{73} but in the common law or (what amounted to the same thing) in the courts.\textsuperscript{74} Magna Carta and common law liberties constituted law that was “higher” than the actions of king or estates, law that policed their interactions and limited what they could do even by consensus.\textsuperscript{75} As Professor Grey summarized this point, Parliament, the king, and his courts “all were thought

\textsuperscript{71} Holt, Magna Carta, supra note #, at 9.

\textsuperscript{72} See James Stoner, Jr., Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism 27 (Lawrence: University Press of Kansas, 1992) [hereinafter Stoner, Liberal Theory]; Grey, supra note #, at 858; see, e.g., Corwin, “Higher Law” Background, supra note #, at 367 (Coke’s “basic doctrine was ‘that the King hath no prerogative, but that which the law of the land allows.’”) (quoting Proclamations, 12 Co. 74, 76 (1611)).

\textsuperscript{73} England in the early seventeenth century understood itself to have a “mixed monarchy,” which meant that the king governed only with the consensus of the three traditional English social classes or “estates”—royalty, represented by the king in Parliament; nobility and clergy, represented in Parliament by the “lords temporal and spiritual”; and the people, represented in Parliament by the Commons. Thomas G. Barnes, Introduction to Coke’s “Commentary on Littleton” (1985) in Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke 1, 21 (Indianapolis, Ind.: Liberty Fund, Allen Boyer ed. 2004) [hereinafter Essays on Coke].

\textsuperscript{74} John V. Orth, Due Process of Law: A Brief History 24, 25 (Lawrence, Kan.: University Press of Kansas, 2003); Corwin, “Higher Law” Background, supra note #, at 367; Raffield, supra note #, at 73, 78-79.

\textsuperscript{75} See Marcham, supra note #, at 122; Barnes, supra note #, at 21.
of as institutions controlled by an overarching fundamental law to which they were all jointly responsible.”

Coke not only revived the myth of Magna Carta, therefore, he re-interpreted it to provide for broader and more substantive protection of individual liberty. This recasting of the ancient myth is evident in Coke’s confrontation with James over the respective jurisdictions of common law and ecclesiastical courts, in judicial opinions authored or reported by Coke—notably *Bonham’s Case* and several anti-monopoly cases—and, most clearly, in Coke’s monumental *Institutes of the Law of England* published at the end of his life.

a. **Writs of Prohibition.** Although Coke is best known as a common law judge, his earliest statement of higher law constitutionalism did not appear in a judicial opinion, but in accounts of an audience of all of the judges of the Court of Common Pleas demanded by James. The Archbishop of Canterbury had complained to the King about “writs of prohibition” issued by Coke and other common law judges against attempts by ecclesiastical courts to take or to retain equity jurisdiction of cases that could have been filed in common law courts. In an argument that doubtless appealed to the absolutist James, the Archbishop maintained that in questions of ecclesiastical jurisdiction, “the King himself may decide it in his Royall person; and that the Judges are but the delegates of the king, and that the King may take what Causes he shall please to determine, from the determination of the Judges, and may

76 Grey, *Fundamental Law*, supra note #, at 855


determine them himself.” 79

Coke describes himself as having refuted this argument with an erudite explanation replete with citations to prior decisions, maxims, and other common law authorities. 80 James was not persuaded, responding that “he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges.” 81 In reply, Coke acknowledged that “God had endowed his Majesty with excellent Science, and great endowments of nature,” 82 but insisted that James

was not learned in the Lawes of his Realm of England, and causes which concern the life, inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificial reason and judgment of Law, which Law is an act which requires long study and experience, before that a man can attain to the cognizance of it. 83

An enraged James accused Coke of treason for suggesting that the King was subordinate to law, to which Coke coolly (at least in his own account) quoted Bracton, “The king ought not to be

79 Prohibitions, 12 Co. at 63, I COKE, SELECTED WRITINGS, supra note #, at 479; see also BOWEN, supra note #, at 300-301 (describing how this argument was foreshadowed by Lord Ellesmere’s argument in the litigation of Calvin’s Case); Cromartie, supra note #, at 90 (observing that a significant source of tension between the common law and the church courts “stemmed from the theological commitment among a growing faction of the clergy to an autonomous church polity whose fate was ultimately controlled by king-in-Convocation, not king-in-Parliament”).

80 Prohibitions, 12 Co. at 63-64, I COKE, SELECTED WRITINGS, supra note #, at 63-64; see BOWEN, supra note #, at 303-04.

81 Prohibitions, 12 Co. at 64-65, I COKE, SELECTED WRITINGS, supra note #, at 481.

82 Prohibitions, 12 Co. at 65, I COKE, SELECTED WRITINGS, supra note #, at 481.

83 Prohibitions, 12 Co. at 65, I COKE, SELECTED WRITINGS, supra note #, at 481. Coke’s argument here echoes Fortescue and other medieval jurists. See Corwin, “Higher Law” Background, supra note #, at 182.
under any man, but under God and the Law."\(^{84}\)

b. Bonham’s Case. Just two years later Coke seemed to declare that higher-law constitutionalism limited Parliament as well as the crown. \textit{Dr. Bonham’s Case} involved a dispute over the practice of medicine by Thomas Bonham in violation of the royal charter of the College of Physicians in London.\(^{85}\) Bonham had a degree in medicine from Cambridge, but the College nonetheless found him unfit to practice medicine in London.\(^{86}\) When Bonham persisted in practicing, the College fined and imprisoned him.\(^{87}\)

Bonham brought an action for false imprisonment against the members of the College.\(^{88}\) The defendants pleaded in defense “letters patente”—a royal grant pursuant to which the king had given the College exclusive power to license practitioners of medicine within the city of London, with the power to fine and imprison those who practiced without the College’s license.\(^{89}\) The grant, moreover, had been twice confirmed by parliamentary act.\(^{90}\) As Professor Orth has

\(^{84}\) \textit{Prohibitions}, 12 Co. at 65, I COKE, SELECTED WRITINGS, \textit{supra} note #, at 481.

Other accounts relate that Coke feared for his liberty, and perhaps his life. \textit{See, e.g.}, BOWEN, \textit{supra} note #, at 305-06 (recounting that Coke fell to his knees with his face to the floor in an attempt to placate James); PLUCKNETT, \textit{supra} note #, at 49 n.1 (concluding that Coke must have argued “long and sufficiently effectively to put James into a frenzy in consequence of which the King lost his dignity and Coke his nerve”).

\(^{85}\) 8 Co. 113b (Comm. Pl. 1610), \textit{reprinted in I COKE, SELECTED WRITINGS, \textit{supra} note #, at 264.}

\(^{86}\) 8 Co. at 115a, 155b, I COKE, SELECTED WRITINGS, \textit{supra} note #, at 268, 70.

\(^{87}\) 8 Co. at 114b, I COKE, SELECTED WRITINGS, \textit{supra} note #, at 268-69.

\(^{88}\) 8 Co. at 114a, I COKE, SELECTED WRITINGS, \textit{supra} note #, at 265.

\(^{89}\) 8 Co. at 114a-15a, I COKE, SELECTED WRITINGS, \textit{supra} note #, at 265-67.

\(^{90}\) 8 Co. at 114b-15a, I COKE, SELECTED WRITINGS, \textit{supra} note #, at 266-68.
observed, this meant that the “law in this case was not merely the product of custom but had been solemnly adopted by the highest political powers in the state.” 91

The Court found for Bonham by construing the imprisonment clauses to have given the College the power to imprison only for malpractice, and not for mere unlicensed practice. 92 There being no evidence of malpractice by Bonham, the Court held him to have been unlawfully imprisoned by the College, beyond the powers granted it by King and Parliament. 93

Coke, however, went further. Since the royal grant and its parliamentary confirmations specified that the College retained a portion of the fines it levied for unlicensed practice, Coke argued that the College was interested in the outcome of the cases of unlicensed practice that it judged; the College was, in other words, a “judge in its own case,” in violation of longstanding English law and custom:

The Censors cannot be Judges, Ministers, and parties; Judges to give sentence or judgment, Ministers to make summons; and Parties to have the moyety of the forfeiture [i.e., one-half of the fine], because no one ought to be a judge in his own cause, it is wrong to be the judge of his own property; and one cannot be Judge and Attorney for any of the parties. And it appeareth in our books, that in many Cases, the Common Law doth controull Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will control it, and adjudge such act to be void. 94

Coke also argued that the Royal College’s licensing authority was a monopoly that violated the freedom of English subjects to practice lawful trades and professions without interference by the

91 ORTH, supra note #, at 23.
92 8 Co. at 117a-18a, I COKE, SELECTED WRITINGS, supra note #, at 273-75
93 8 Co. at 116b-17a, I COKE, SELECTED WRITINGS, supra note #, at 272-73.
94 8 Co. at 118a, I COKE, SELECTED WRITINGS, supra note #, at 275 (emphasis in original).
Disagreement persists over whether Coke really meant what he appeared to have said. Most commentators have concluded that Coke merely stated a rule of construction. Others, however, insist that Coke’s dictum is broader and more significant, especially since it came hard on the heels of Coke’s dangerous insistence to James that the king was subject to law. Coke’s opinion did not merely argue that the College’s conflict of interest denied Bonham a fair trial before an impartial decision maker, but pressed the further position that actions of Parliament that effect unwarranted deprivations of substantive liberty, such as granting to a private group monopoly powers over a lawful calling, are limited by fundamental law. As

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95 See [??], supra note #, at 146.

[Coke] seems to have seen the [Royal] College [of Physicians] as a strange combination of two kinds of bodies: an economic monopoly and a learned fraternity. As a learned fraternity, he had no dispute with the College’s charter. But as an economic monopoly, he found no justification for a small group of learned physicians trying to restrict the practices of others, particularly university-trained physicians.

Id.


97 See, e.g., SCHWARTZ, THE GREAT RIGHTS, supra note #, at 55 (arguing that Coke “meant only that the basis of statute law, like that of the common law, was reason and justice and that it was the duty of the courts to construe statutes strictly in order to bring them into conformity with accepted legal principles”).

98 See, e.g., STONER, LIBERAL THEORY, supra note #, at 58 (“To read the famous sentence in Bonham’s as an instance of ‘mere’ statutory construction is too narrow an interpretation. [I]t presumes a distinction between construing statutes and voiding them that [Coke] does not acknowledge.”).

99 PLUCKNETT, supra note #, at 51, 282.

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Professor Orth has argued,

Coke had been defending not only Dr Bonham’s right to a fair trial but also the law’s supremacy over the powers that be. [] Coke was trying to give content to the law’s restraint on power; that is, he was trying to give substance to due process. There were, he thought, things that the supreme power in the state, even the king in Parliament, could not lawfully do, no matter how hard he tried.\textsuperscript{100}

c. \textit{Royal Monopolies}. Coke’s \textit{Bonham} dictum that judges could void government acts contrary to fundamental common law is evident in other decisions authored by Coke,\textsuperscript{101} and was affirmed by his immediate successor on Common Pleas,\textsuperscript{102} as well as by the Chief Justice of Kings Bench nearly a century later.\textsuperscript{103} The general understanding of higher-law constitutionalism that lay behind this dictum—that there is a judicially enforceable common law limit on royal (and perhaps parliamentary) power—was a notable basis for invalidation of the grant of royal monopolies over so-called “ordinary trades or callings.”

It had long been common for English kings to exercise political control and to raise funds by granting to royal favorites the exclusive right to provide certain goods or services. These grants often permitted the holder various rights of self-help against violators that did not conform to the procedural requirements of the common law. In both Elizabeth’s and James’s reigns during the late sixteenth and early seventeenth centuries, royal monopolies were completely out

\textsuperscript{100} ORTH, \textit{supra} note #, at 29.

\textsuperscript{101} See, \textit{e.g.}, James Bagg’s Case, 11 Co. 93b (K.B. 1615), \textit{reprinted in I COKE, SELECTED WRITINGS, supra} note #, at 404; Clark’s Case, 5 Co. 64a (Comm.Pl. 1596), \textit{reprinted in I COKE, SELECTED WRITINGS, supra} note #, at 134.


of control, with large numbers of people subject to fines and imprisonment merely for pursuing common trades or businesses.\footnote{104 See ADAMS, supra note #, at 280; BOWEN, supra note #, at 172; STRONG, supra note #, at 8, 11.}

The crown’s practice of granting such monopolies came under attack in \textit{Darcy v. Allen}, also known as the \textit{Case of Monopolies}.\footnote{11 Co. 84b (K.B. 1602), \textit{reprinted in} I COKE, \textit{SELECTED WRITINGS}, \textit{supra} note #, at 394,} In this case, the court considered an enforcement action by the holder of a royal monopoly on the manufacture of playing cards, against a person who had made cards without the monopolist’s license.\footnote{11 Co. at 84b-85a, I COKE, \textit{SELECTED WRITINGS}, \textit{supra} note #, at 395-96.} The court held the monopoly void as against both common law and various anti-monopoly acts of Parliament, observing that monopolies interfere with “the liberty of the subject” to pursue ordinary trades, damage other subjects by raising the price and diminishing the quality of the monopolized product or service, and depriving subjects of an otherwise lawful means of earning a living.\footnote{11 Co. at 86a-87a, I COKE, \textit{SELECTED WRITINGS}, \textit{supra} note #, at 398-400.} The court elaborated this holding and rationale in a subsequent monopoly decision, observing that “at the Common Law no man might be forbidden to work in any lawful Trade, for the Law doth abhor idleness, the mother of all evil,” and thus “the Common Law doth abhor all Monopolies, which forbid any one to work in any lawful Trade.”\footnote{The Case of the Tailors of Habits &c. of Ipswich, 11 Co. 53a, 53a, 53b (K.B. 1614), I COKE, \textit{SELECTED WRITINGS}, \textit{supra} note #, at 390, 391-93; see Raffield, \textit{supra} note #, at 87 (observing that the natural law “abhorred idleness because it was synonymous with disorder”).} The Court went on to hold that any restraint imposed by a trade guild on someone who had in fact served his apprenticeship was “against the Freedom and
Liberty of the Subject, and are a means of Extortion in drawing moneys” to the guild, both of which were “against the Law and against the Commonwealth.”

d. **The Institutes.** Coke emphatically confirmed the preeminent constitutional place of Magna Carta and common law in the *Institutes of the Lawes of England*, his monumental life-long effort to demonstrate the continuity of seventeenth century common law with pre-Norman Anglo-Saxon law at the dawn of English history. In the *First Institute*, published in 1628, six years before his death, Coke characterized the rights and remedies of Magna Carta as both ancient and constitutionally supreme. More radically, Coke declared that judgments and statutes contrary to the Charter “are adjudged void,” thereby making Magna Carta fundamental and preeminent English law. In Coke’s view, Magna Carta did not merely confirm and restore the common law, but declared the bedrock constitutional principle that the common law bound and limited both the crown and Parliament, a view that Coke emphatically and publically reaffirmed in the debates surrounding the drafting and execution of the Petition of Right, Parliament’s declaration of fundamental common law liberties enacted as a statutory bill

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109 11 Co. at 54a, *I Coke, Selected Writings, supra* note #, at 393-94.

110 *The First Part of the Institutes of the Lawes of England: Or A Commentary upon Littleton, Not the Name of the Author Only, but of the Law It Selfe* (1628), *excerpted in II Coke, Selected Writings, supra* note #, at 577.

111 *II Coke, Selected Writings, supra* note #, §108, at 697 (describing Magna Carta as “the fountaine of all the fundamentall Lawes of the Realme,” and the “Confirmation or restituttion of the Common Law” accorded “great reverence” throughout English history for its restoration of the “ancient Lawes” of England).

112 *II Coke, Selected Writings, supra* note #, §108, at 697-98 (observing that the six statutes provided that “judgements given against any points of the Charters of Magna Charta or Charta de Forests are adjudged void,” and that “[i]f any Statute bee made against either of these Charters it shall be voyd,” thereby making Magna Carta “the foundation of other Acts of Parliament”).

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under Coke’s influence in 1628.\textsuperscript{113}

Coke reaffirmed these principles in the \textit{Second Institute}, written in the early 1630s but not published until after his death. He again maintained that chapter 29 and Magna Carta generally were declarations of the ancient rights of Englishmen, and thus limits on the actions of both crown and Parliament.\textsuperscript{114} It was also in the Institutes that Coke clearly equated the “law of the

\textsuperscript{113} \textit{John Fulton, Free Government in England and America: Containing the Great Charter, the Petition of Right, the Bill of Rights, the Federal Constitution} 325, 328 (1864); \textit{see Stoner, Liberal Theory, supra note \#}, at 45-47. A provision in early drafts of the Petition expressly affirmed the “sovereign power” of the king, which Coke famously condemned as inconsistent with the higher-law understanding of Magna Carta as a fundamental limit on both royal and parliamentary power:

I know that prerogative is a part of the law, but “Sovereign Power” is no parliamentary word. Should we add it now, we shall weaken this foundation of law and then the building must needs fall. Take heed what we yield unto: Magna Carta is such a fellow, that he will have no “Sovereign.” I wonder this “sovereign” was not in Magna Charta, or in the confirmation of it? If we grant this, by implication we give a sovereign power above all these laws.

\textit{Bowen, supra note \#}, at 497. In higher-constitutional theory, natural and customary rights bound the king regardless of whether they were enumerated in a writing like the Petition. In practice, however, these rights were obviously more secure when the king formally agreed to observe them, as in the Petition. The Antifederalists made an analogous argument for the Bill of Rights, arguing that a constitutional declaration of natural and customary rights would make them more secure. \textit{See text following note 292 [Draft \#20, p. 78] infra}.

\textsuperscript{114} Coke reiterated that the Charter is prior to both judicial and parliamentary action in the \textit{Prologue} to the \textit{Second Institute}:

And albeit judgments in the Kings Courts are of high regard in Law, and \textit{Judgments} are accounted as \textit{Statements of the law}, yet it is provided by Act of Parliament, that if any judgement be given contrary to any of the points of the great Charter, or \textit{Charta deForesta}, by the Justices, or by any other of the Kings Ministers, &c. it shall be undone, and holden for nought.

\ldots

The highest and most binding Laws are the Statutes which are established by Parliament; and by Authority of that highest Court it is enacted (onely to shew their tender care of \textit{Magna Charta}, and \textit{Charta de Foresta}) That if any Statute be made contrary to the great
Moreover, chapter 29's prohibition of deprivations and forfeitures inconsistent with the "law of the land" or the "due process of law" was characterized by Coke as having clear substantive import, being declaratory of ancient English law that a person’s liberty shall be infringed only when such infringements are justified by the "the Common Law, Statute Law, or Custome of England." The liberty protected by chapter 29, according to Coke, "signifieth the freedomes, that the Subjects of England have," meaning substantive as well as procedural rights.

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*Charter, or the Charter of the Forest, that shall be holden for none:* by which words all former Statutes made against either of those Charters are now repealed; and the Nobles and great Officers were to be sworn to the observation of *Magna Charta*, and *Charta de Foresta*.

Great was once the reverence of the great charter.

The Second Part of the Institutes of the Lawes of England (1642), excerpted in II Coke, Selected Writings, supra note #, at 745, 751-52.

115 II Coke, Selected Writings, supra note #, at 858 (defining the “Law of the Land” by reference to one of the six statutes wherein the phrase is defined as “due process of Law,” and further glossed as “by indictment of presentment of good and lawfull men, where such deeds by done in due manner, or by writ originall of the Common Law. Without being brought in to answere but by due Proces of the Common law. No man be put to answer without presentment before Justices, or thing of record, or by due proces, or by writ originall, according the old law of the land’’); see Strong, supra note #, at 14 (observing that it was Coke “who gave permanence to the concept of ‘due process by law’ by asserting its equivalence to *per legem terrae* of chapter 29 of Magna Carta”).

116 II Coke, Selected Writings, supra note #, ch.29, at 849, 859.

117 II Coke, Selected Writings, supra note #, ch.29, at 851; accord II id at 249 (“And these Laws [*i.e.,* Magna Carta and Carta de Foresta] are in the *Register* in many writs called *Liberties*, for there it is said, according to the tenor of the great charter of the liberties of England, so called of the effect, because they make free.”).

118 See Howard, supra note #, at 23 (“Magna Carta’s power lay . . . in the symbolism and moral force that it carried for later times, an influence so great that by the seventeenth century the best-read of lawyers traced almost anything that was worthy and good back to the Charter,
Coke’s belief that monopolies constituted a violation of higher law is confirmed by his discussion of them in the Second Institute.\(^{119}\) Here, however, Coke strengthened his argument against monopolies by replacing general recourse to the common law with the more specific assertion that monopolies violate chapter 29, a law “of definite content and traceable back to one particular document of ancient and glorious origin.”\(^{120}\) Coke condemns the grant of royal monopolies for the manufacture or provision of useful articles as a violation of the individual liberty protected by Magna Carta:

So likewise, and for the same reason, if a grant be made to any man, to have the sole making of Cards, or the sole dealing with any other trade, that grant is against the liberty, and freedom of the Subject, that before did, or lawfully might have used that trade, and consequently against this great Charter.\(^{121}\)

Coke viewed monopolies as violations of substantive and not merely procedural liberty. He did not attack monopolies because of the manner in which they deprived individuals of their right to practice a trade or calling, but rather for the deprivation itself. In a foreshadowing of the language of the Fifth Amendment Due Process Clause, Coke emphasized that a man’s trade is his life, and “therefore the Monopolist that taketh away a man’s trade, taketh away his life.”\(^{122}\) The violation of chapter 29 lies not in the fact that monopolies deprive individuals of life or property including trial by jury, habeas corpus, and Parliament’s right to control taxation.”)

\(^{119}\) See, e.g. II COKE, SELECTED WRITINGS, supra note #, ch.29, at 851.

\(^{120}\) Corwin, “Higher Law” Background, supra note #, at 378.

\(^{121}\) II COKE, SELECTED WRITINGS, supra note #, ch. 29, at 851.

without trial by jury or other legal process, but in the fact of that monopolies effect such a
deprivation at all. Thus, Coke flatly declares that “[g]enerally all monopolies are against this
great Charter, because they are against the liberty and freedome of the Subject, and against the
Law of the Land.”123

2. Natural Law and Common Law.

Coke’s invocation of “common right and reason” in Bonham’s Case had a
natural law resonance that is not as immediately apparent today. Although during the late
medieval and early modern eras it was widely maintained that the common law somehow
reflected or incorporated natural law principles,124 common law decisions generally did not make
explicit natural law arguments or otherwise expressly refer to the natural law.125 The natural law

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123 Edward Coke, The Third and Fourth Parts of the Institutes of the Lawes of
(1979 reprint).

Coke also condemned the practice by which kings (and occasionally Parliament) sought
to rid themselves of troublesome political opponents by appointing them to posts outside of
England. Acceptance of the appointment took the appointee (conveniently) out of English
politics, while refusal triggered punitive forfeiture of lands and privileges, and sometimes even
imprisonment. Coke argued that this practice and its associated penalties constituted a
“banishment” or “exile” that violated the plain language of chapter 29 when imposed without
prior conviction of a felony. As with monopolies, the crux of the violation of chapter 29 was
not lack of process when a royal appointee incurred penalties upon rejection of the appointment,
but rather the penalties themselves. II Coke, Selected Writings, supra note #, ch.29, at 852,
853; see Bowen, supra note #, at 482.

124 Postema, Classical Common Law, supra note #, at 176; see Norman Doe,
Fundamental Authority in Late Medieval English Law 3-5 (Cambridge: Cambridge
University Press, 1990); Cromartie, supra note #, at 81-82, 84; Richard O’Sullivan, Natural Law
and Common Law, in III Univ. Notre Dame Nat. L. Proc. 9, 19-20, 29, 32 (Edward F. Barrett
ed. 1950).

125 Doe, supra note #, at 176; Postema, Classical Common Law, supra note #, at 177-78;
Pound, supra note #, at 228, 364.
entered into the common law implicitly, through the notion of *resoun*, an evocative Norman French cognate of “reason” which combined notions of “rightness” and “reasonableness” and was employed by judges and lawyers to describe the essence of the common law. 126 Usually rendered “reason” or “right reason,” *resoun* conveyed at once the notion of a living community, and its sense of justice. 127 A decision that had “reason” or “right reason” was “fitting” in a dual sense, both consistent with customary precedent, and expressive of a morally correct outcome. 128 Indeed, in the classical common law tradition, “reason” was sometimes understood as the

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126 *Powell, supra* note #, at 77 (“[L]aw is *resoun*.”) (quoting Flaundres v. Rycheman, 18 & 19 Y.B. Edw. III 374 (Com. Pl. 1344)); see *Stoner, Liberal Theory, supra* note #, at 173 (noting the classical common law maxim, “What is not reason is not law”); Postema, *Classical Common Law, supra* note #, at 21 (arguing that in seventeenth century, the “artificial reason” of the common law “was seen as the most reliable procedure for approximating” natural justice); e.g., *Christopher Saint German, St. German’s Doctor and Student* 33-35 (London: Selden Society, 1974) (arguing that the first ground of the law of England is the law of reason).

127 *Powell, supra* note #, at 78 (“*Resoun* meant that which is reasonable, that which makes sense. It also and simultaneously meant that which is just, fair, moral. And at times it meant that which is a believable story, an acceptable narrative—people sometimes said ‘let me display my *resoun*’ (i.e., let me tell my story).”); see *Doe, supra* note #, at 176 (arguing that an “idea of abstract right” was implied by the “resemblance between the practitioner’s reason, upon which the common law was founded, and the theorist’s justice, which required that each be given his due,” and observing that although common lawyers rarely invoked the natural law, they employed “comparably moral ideas,” appealing to “conscience and ideas of natural law”); *Gerald J. Postema, Bentham and the Common Law Tradition* 7 (Oxford: Clarendon, 1986) [hereinafter *Postema, Common Law Tradition*] (“Common Law is seen to be the *expression* or manifestation of commonly shared values and conceptions of reasonableness and the common good.”).

128 See *Postema, Common Law Tradition, supra* note #, at 7 (“In the common law system no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.”) (quoting A.W.B. Simpson, *The Common Law and Legal Theory, in Oxford Essays in Jurisprudence* 77, 79 (Oxford: Oxford University Press, A.W.B. Simpson ed. 2nd series, 1973)).

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equivalent of “justice.” As Professor Postema has observed, “reason” in the classical common law stood for “the situated, experience-informed judgment of the judge using all the resources the vast body of the law provides, thinking by analogy and extension from all that he knows, to fashion a just and workable solution.”

Although this close relationship between the common law and the natural law was widely assumed in the seventeenth century, the common lawyers never formally explained it. They rhetorically grounded common law in both custom and natural law without ever confronting the improbability of deriving one from the other. This problem became increasingly acute as the

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129 Doe, supra note #, at 120; see also id. at 115 (noting that “reason” was deployed at common law for substantially the same ends as equity was deployed in the chancery courts).

130 Postema, Classical Common Law, supra note #, at 179; accord Doe, supra note #, at 177 (arguing that for common lawyers of the fifteenth and sixteenth centuries, “the authority of morality (manifested in natural law, divine law, justice or conscience) and good sense and proportionality (manifested in reason) were of crucial importance for the existence and development of law”).

131 James Q. Whitman, Why Did the Revolutionary Lawyers Confuse Custom and Reason?, 58 U. CHI. L. REV. 1321, 1352-61 (1991); see Postema, COMMON LAW TRADITION, supra note #, at 35-36 (observing that the common law conception of reason was “practical and historical; the natural law’ involved is not external to the tradition, but implicit in it, not socially transcendent, but immanent”).

Professor Whitman argues that this casual “mingling” of common law and natural law was the result an “evidentiary crisis of custom” in the late medieval and early modern eras. Whitman, supra note #, at 1323. According to Whitman, the basic norm of both the continental and English legal systems was local custom. Id. at 1329-30, 1331-40. “But what was customary could be determined only in local gatherings, in which the local populace, or perhaps the local elders, could arrive at consensus.” Id. at 1330. As centralized courts replaced feudal and other local courts, however, it became impossible for judges to consult local witnesses to prove the customs that governed the outcome of the cases before them. Id. at 1330-31, 1340-47, 1352-56.

Lacking local witnesses, early modern lawyers were forced to seek an alternative means of determining custom. The alternative they chose was to blend customary and natural law into a peculiar concoction, which they called the “common custom of the realm,” and which they embodied in treatises that could be consulted in lieu of consulting local
modern era matured and natural law came to mean deductive reasoning rather than divine law or practical wisdom.\textsuperscript{132} It is unclear, for example, how one could derive the customary common law right to a jury trial from human existence in the state of nature, or by any other form of deductive reasoning.

Coke shared the widespread and confused belief of his era that the common law incorporated the natural law.\textsuperscript{133} The concept of resoun is clearly at work in Coke’s understanding that certain common law rights and principles constitute “higher law.” Both witnesses. The consequence was a thorough confusion of custom and reason . . . .

\textit{Id.}

In England, the common lawyers developed “an association of common law with the law of reason,” which enabled them to retain custom as the fundamental norm of the common law, while facilitating proof of custom by substituting “reason” for the testimony of local witnesses. \textit{Id.} at 1357-60. Once the customs that grounded the common law were claimed to be reasonable, in other words, they could be proved by recourse to reason rather than testimony. \textit{See, e.g., id.} at 1356 (“‘[T]he common law is reasonable usage, throughout the whole realm, approved time out of mind in the king’s courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the common wealth.’”) (quoting Thomas Henley, Speech to Parliament in 1610, \textit{in J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW} 172-73 (Cambridge, Cambridge University Press, 2\textsuperscript{nd} ed. 1990)); \textit{id.} at 1359 (“‘[It is argued that] for want of an express text of law “in terminus terminantibus,” and of examples and precedents in like cases (as was objected by some), we are driven to determine the question by natural reason . . . .’”) (quoting \textit{Calvin’s Case} (James I 1608), \textit{in 2 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783}, at 607, 641 (T.C. Hansard, T.B. Howell ed. 1816)).

\textsuperscript{132} \textit{See} Whitman, \textit{supra} note #, at 1362 (“‘[W]hen eighteenth-century lawyers spoke of ‘reason,’ they most often meant, not craftsmanlike reason, nor revealed truth, but the activity of reasoning from first principles.’”); \textit{see also} Postema, COMMON LAW TRADITION, \textit{supra} note #, at 37 (noting a “deep ambiguity in Common Law theory, for it is not clear whether Common Law is regarded as itself defining standards of reason and justice in this area of social life (Common Law regarded as reason), or whether Common Law is the working out of reason (reason regarded as working in and through Common Law).

\textsuperscript{133} \textit{See, e.g.,} Cromartie, \textit{supra} note #, at 86 (observing that Coke shared the classical common lawyer’s view that “common law was natural law applied to English life”).
*Prohibitions del Roy* and *Dr. Bonham’s Case*, for example, rested on *resoun*. As Coke was at pains to inform James, “reason” in the common law was not the natural reason possessed by all humanity, but rather an “artificial” reason developed by deep study and long experience in the profession.\(^{134}\) In *Bonham*, Coke used the ubiquitous common law phrase, “against Common right and reason,” to describe royal and parliamentary actions that were void and unenforceable as violations of higher law.\(^{135}\) A decision or result “against common right and reason” (or, more simply, “against reason”) would violate both the legal order, in the sense that it would be inconsistent with custom and precedent,\(^{136}\) and the natural order, in the sense that it would violate broader principles of natural justice and right.\(^{137}\)

\(^{134}\) Cromartie, *supra* note #, at 83; Postema, *Classical Common Law, supra* note #, at 178; *see also* STONER, *LIBERAL THEORY, supra* note #, at 177.

The common law proceeds by reason, but by reason that collects and judges particulars—by a set of Aristotelian practical reason—rather than by reason in the modern, Enlightenment, analytical sense—the reason that breaks apart and reassembles. It stresses continuity rather than novelty, though it demands some reason greater than custom alone, for by common law, unreasonable custom has no legal force.

*Id.*


\(^{136}\) *See* STONER, *LIBERAL THEORY, supra* note #, at 25 (summarizing Littleton’s view that a legal interpretation was “against reason” if it was “inconvenient,” meaning that it “would conflict with other rules of law, going against the web of inconsistency which the law weaves”); *id.* at 54 (calling an interpretation or result “against common right and reason” was a common law way of denoting “inconsistency.”); Postema, *supra* note #, at 178 (“In 17th century common law parlance, for a custom, practice, rule or judgment to be ‘against reason’ (or often ‘inconvenient’) was for it to be inconsistent with the law as a whole, to fail to fit coherently into the common law.”).

\(^{137}\) *See* Corwin, *Natural Law, supra* note #, at 79 (observing that “common right and reason” was the sixteenth century English equivalent of “Natural Law”); Pound, *supra* note #, at
III. DUE PROCESS AND UNENUMERATED RIGHTS BEFORE THE FIFTH AMENDMENT

Coke was not alone in the development and use of higher-law constitutionalism during the seventeenth century.\textsuperscript{138} For example, both John Seldon and Sir Matthew Hale, seventeenth century common lawyers of great distinction, acknowledged the influence of natural law on common law,\textsuperscript{139} and defended the position that judicial application of common law defined the limits of the royal prerogative.\textsuperscript{140} Nevertheless, Coke was the figure to whom the American colonists looked in formulating higher-law arguments against their perceived oppression by Britain.

Coke’s understanding that due process and higher-law checked on royal and parliamentary encroachments on substantive liberties was replaced by parliamentary supremacy during the century following the Glorious Revolution in 1688. Higher-law constitutionalism,

\footnotesize{228 (same); see also Doe, supra note #, at 176 (observing that absurd results or arguments were considered “against reason”); Stoner, Liberal Theory, supra note #, at 58 (a violation of “common right and reason” was “an absurdity—that is, an utter violation of reason”); id. at 173 (noting the classical common law doctrine that “precedents against reason, ‘flatly absurd or unjust,’ do not bind”).}

\textsuperscript{138} See Raffield, supra note #, at 78.

\textsuperscript{139} See, e.g., Postema, Classical Common Law, supra note #, at 27.

\textsuperscript{140} See Stoner, Liberal Theory, supra note #, at 131-33; Raffield, supra note #, at 78.
however, was received and adapted by the American colonies in their revolutionary struggle with Britain. Parliamentary supremacy slowly displaced higher-law constitutionalism during the eighteenth century in Britain, but not in America, thereby framing the constitutional conflict that led to the American Revolution and, ultimately, to the American Constitution and Bill of Rights.

A. *The English Constitutional Transition*

Despite the best efforts of Coke and his contemporaries, Magna Carta, due process, and common law courts did not prove adequate to cabin the absolutist claims of the Stuarts. The efforts of Parliament, however, were another story. During the 1640s, Parliament—more accurately, the Commons—fought, deposed, and beheaded James’s son and successor Charles I.\(^{141}\) After a decade of theocratic despotism under “Lord Protector” Oliver Cromwell and his son Richard, Parliament removed Richard in 1660 and restored the monarchy, placing the son of the executed Charles on the throne as Charles II.\(^{142}\) Nearly three decades of fierce disagreement with Charles II and his successor, the openly Catholic James II, ended in Parliament’s orchestration of the “Glorious Revolution” of 1688, in which James II was forced from the throne, and the Dutch-Protestant William of Orange and his wife Mary, James II’s daughter, were installed as king and queen.\(^{143}\)

By the end of the seventeenth century, then, Parliament had impeached, deposed, and executed one king, overthrown the Puritan dictatorship that followed, and driven yet another king

\(^{141}\) *ADAMS*, *supra* note #, at 316-21


\(^{143}\) *ADAMS*, *supra* note #, at 338-57.
into exile. That it was necessary for Parliament to take these actions at all is perhaps the best
evidence that higher-law constitutionalism was not adequate to the task of reining in abuses of
prerogative by the Stuarts. What eventually arose in place of higher-law constitutionalism was a
different constitutional understanding, under which Parliament itself wielded absolute
constitutional authority as the sovereign in the British constitutional system. Having vanquished
the royal foes of English liberty, Parliament formalized the protection of that liberty in itself. 144
As Professor Reid has observed, the Glorious Revolution “was the triumph of liberty, but of a
liberty that had been institutionalized in Parliament’s supremacy over the Crown.” 145 The
supremacy of Magna Carta, due process, and the common law, in which Coke had placed so
much faith, was replaced by the supremacy of Parliamentary. 146

As the British seventeenth century gave way to the eighteenth, the authority of Bonham’s
Case and the constitutional understanding that common law judges might challenge royal and
parliamentary power in defense of individual liberty slowly receded. 147 By the mid-1700s, a
competing understanding of the English constitution had taken its place alongside higher-law

144 See Bernard Bailyn, The Ideological Origins of the American Revolution 200
(Cambridge, Mass.: Harvard University Press, enlarged ed. 1992); 4 John Phillip Reid,
Constitutional History of the American Revolution 55 (Madison: University of
Wisconsin Press, 1987) [hereinafter Reid, Constitutional History].

145 Reid, Constitutionall History, supra note #, at 67; accord Arthur R.
(“When James II fled across the Channel, the question whether the law of the land bound the
King was finally settled. It was clear that there was no prerogative power vested in him which
was not subject to ultimate control by Parliament.”).

146 See Orth, supra note #, at 25.

147 Powell, supra note #, at 81.
This new understanding held the English constitution to be what Parliament chose to enact or repeal as law, even when such actions violated natural or common law. Though this new constitution of “sovereign command” would not clearly displace that of higher-law constitutionalism until the nineteenth century, already in 1765 Blackstone could declare that there was no constitutional remedy for parliamentary violation of the fundamental common law rights protected by the English constitution, even of a right so long recognized and enforced as that to an impartial judicial decision maker.

B. Constitutional Ambiguity in the American Revolution

Because most of the American colonies were initially chartered and settled during the early seventeenth century when Coke’s career as a judge and member of Parliament was at its

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148 See 1 Reid, CONSTITUTIONAL HISTORY, supra note #, at 76; 3 id. at 63-70; 4 id. at 55.

149 See Powell, supra note #, at 107; cf. Gordon Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1687, at 26-27 (Chapel Hill: University of North Carolina Press, 2nd ed. 1998) (describing the eighteenth century development of the Commons into “a kind of independent body distinct from the people,” and the “correlative conception of the sovereignty of Parliament, that is, that Parliament was the final and supreme authority for all law even against the wishes of the people whom it supposedly represented”).


151 See I William Blackstone, Commentaries on the Laws of England §3, ¶10, at 91 (Phila.: William Birch Young & Abraham Small, St. George Tucker ed. 1803). Blackstone argued that acts of Parliament leading to absurd results were void, but that this rule did not extend to mere unreasonable acts, and was in any event not judicially enforceable. I id. Blackstone made clear that an unambiguous parliamentary intrusion upon a fundamental common law liberty was not an “absurd” result that invoked the rule of voidness; rather, while courts were to construe acts of Parliament so as to avoid their intrusion upon customary fundamental rights when possible, the British constitution provided no remedy for parliamentary intrusion upon common law liberties. I id.; accord II id., bk. I. ch. II, pt. III, at 161, 162 (“True it is, that what the Parliament doth no authority on earth can undo. [] So long, therefore, as the English constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control.”).
height, Coke exerted a comparable influence on colonial law.\textsuperscript{152} A large number of seventeenth century American lawyers received their legal education in England, where Coke’s \textit{Reports} and \textit{Institutes} were a staple of legal education.\textsuperscript{153} Moreover, English books on law and political theory were readily available in America throughout the seventeenth and eighteenth centuries\textsuperscript{154}—and again, especially Coke’s \textit{Reports} and \textit{Institutes}, which were widely read in the colonies and were by far their most authoritative law texts until the publication of Blackstone’s \textit{Commentaries} in 1765.\textsuperscript{155} Even after Blackstone, Coke and his school of thought remained the more influential before and during the Revolution, as the arguments of Locke and the Whigs of the Glorious Revolution dominated legal and political thought in the colonies.\textsuperscript{156}

Consequently, American lawyers were well informed about major legal and constitutional developments in Britain, including the “myth of Magna Carta” and higher-law constitutionalism, and used these English sources and materials in their legal practices in the colonies.\textsuperscript{157}

\textsuperscript{152} Barnes, \textit{supra} note #, at 24; Corwin, “\textit{Higher Law}” \textit{Background}, \textit{supra} note #, at 394; Grey, \textit{Fundamental Law}, \textit{supra} note #, at 850; Pound, \textit{supra} note #, at 229, 349; Riggs, \textit{supra} note #, at 945, 958-59.

\textsuperscript{153} See \textit{BOWEN}, \textit{supra} note #, at 539; RODNEY L. MOTT, \textit{DUE PROCESS OF LAW} \S 31, at 87-88 (New York: Da Capo, 1973) (1926).

\textsuperscript{154} Meyler, \textit{supra} note #, at 34; see \textit{BOWEN}, \textit{supra} note #, at ix; \textit{POWELL}, \textit{supra} note #, at 81.

\textsuperscript{155} See \textit{BAILYN}, \textit{supra} note #, at 30-31; \textit{BOWEN}, \textit{supra} note #, at ix, 506-07; \textit{MOTT}, \textit{supra} note #, \S 31, at 88-89; STONER, \textit{LIBERAL THEORY}, \textit{supra} note #, at 4, 13; Barnes, \textit{supra} note #, at 24-25; Meyler, \textit{supra} note #, at 36.

\textsuperscript{156} See \textit{BAILYN}, \textit{supra} note #, at 30; \textit{MOTT}, \textit{supra} note #, at 90; Corwin, “\textit{Higher Law}” \textit{Background}, \textit{supra} note #, at 376; Pound, \textit{supra} note #, at 229, 349.

\textsuperscript{157} See \textit{ADAMS}, \textit{supra} note #, at 333, 360-61; \textit{BAILYN}, \textit{supra} note #, at 45; \textit{STRONG}, \textit{supra} note #, at 14; \textit{WOOD}, \textit{supra} note #, at 297.
Bonham’s Case, chapter 29, and all of the other resources of higher-law constitutionalism were thus available to the colonists as resources for development of colonial legal systems, and their influence was evident in the colonies as early as the mid-1650s.\footnote{E.g., Giddings v. Brown (Salem Cty, Mass. June 22 & Aug 20, 1657) (voiding a financial assessment voted by the majority of the town of Ipswich for the purpose of providing a house for their pastor, on the ground that it violated fundamental law, “binding king and Parliament and thus the town as well, to take a man’s property and give it to another without his consent”), rev’d (Mass. Gen’l Ct. Oct 14, 1657) (holding that the decision of the majority in such matters properly binds the whole), reported in Thomas J. Hutchinson, A Collection of Original Papers Relative to the History of the Colony of Massachusetts-Bay 287-91, 308-09 (Boston: Thomas & John Fleet, 1769); see, e.g., Mott, supra note #, §33, at 935-95 (noting that nine provisions of Magna Carta were included in the Massachusetts “Body of Liberties” drawn up in the 1630s in response to intrusive and trivial laws promulgated by Governor Winthrop); Powell, supra note #, at 108 (observing that “late colonial American lawyers” understood Coke in Bonham’s Case “to have asserted a judicial power to disregard or invalidate unreasonable and unconstitutional statutes”); Corwin, “Higher Law” Background, supra note #, at 394, 395 (noting that during the seventeenth century Magna Carta became closely identified in the colonies with “all documents of constitutional significance, and thereby a symbol and reminder of principles binding on government,” and that Coke’s dictum in Bonham’s Case was occasionally cited outside New England, “even before its notable revival by Otis”).} When the revolutionary conflict arose in the mid-eighteenth century, the colonists bolstered their arguments against Britain with the higher-law constitutionalism of the seventeenth century, not the sovereign command constitutionalism of the eighteenth century.\footnote{See, e.g., Plucknett, supra note #, 41 (observing that “[i]t was mediaevalists in England, armed with Bracton and the Year Books, who ended Stuart statecraft, and the Constitution of the United States was written by men who had Magna Carta and Coke upon Littleton before their eyes.”); Powell, supra note #, at 82 (arguing that the “subversion of the classical common law in England was substantially ignored in America”); Corwin, “Higher Law” Background, supra note #, at 367 (suggesting that few judicial pronouncements are more important to the origins of American constitutional theory than Coke’s dictum in Bonham’s Case).} Much of the revolutionary conflict between Britain and the colonies stemmed from their respective adherence to these incommensurable understandings of the British constitution.\footnote{Bailyn, supra note #, at 67.}
For more than a century after the onset of the English Civil War in the 1640s, neither the crown nor Parliament injected itself very deeply into colonial affairs.\textsuperscript{161} The king ruled the colonies directly through his prerogative powers,\textsuperscript{162} the most important of which was the power to appoint colonial governors, judges, and other executive officials.\textsuperscript{163} Even so, the colonists retained considerable independence, being primarily governed by colonial courts and popularly elected colonial legislatures,\textsuperscript{164} which did not adopt the entirety of the common law until considerable economic and social development occurred in the colonies.\textsuperscript{165} Parliament itself “touched only the outer fringes of colonial life.”\textsuperscript{166}

By the mid-18th century, however, competition with other European powers had forced

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\item[\textsuperscript{161}] See BAILYN, supra note #, at 203; BECKER, supra note #, at 81; JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 29 (Boston: Little, Brown, 1943).
\item[\textsuperscript{162}] See BAILYN, supra note #, at 203; MILLER, supra note #, at 46; MOTT, supra note #, §35, at 96-99. The king’s use and purported abuse of the prerogative power created a popular colonial perception of widespread corruption in the colonial administrations. See, e.g., WOOD, supra note #, at 75-76, 159-60.
\item[\textsuperscript{163}] BAILYN, supra note #, at 203; BECKER, supra note #, at 80; Grey, supra note #, at 867.
\item[\textsuperscript{164}] BAILYN, supra note #, at 203-04; BECKER, supra note #, at 80; MILLER, supra note #, at 30-31.
\item[\textsuperscript{165}] Pound, supra note #, at 349-50. Indeed, the complex task of adapting English common law to the different economic, social and political situations of the colonies led to contradictory decisions by colonial common law courts, and early confusion about the authority of common law in the colonies. WOOD, supra note #, at 296-97; see also O’Sullivan, supra note #, at 42 (noting “a period of untechnical, popular law” in the colonies was “followed by the slow and gradual reception of most of the rules of the Common Law”).
\item[\textsuperscript{166}] BAILYN, supra note #, at 203; accord MILLER, supra note #, at 37-38 (observing that Britain seemed “to have remained long in that state of absent-mindedness with which it had acquired its colonies,” and characterizing early seventeenth century British policy towards the colonies as one of “salutary neglect”).
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Britain to expend ever-increasing amounts to protect its American markets and trading routes.\textsuperscript{167} By the conclusion of the Seven Years War, whose entire financial cost was borne by Britain, George III and the Tory majority in Parliament were agreed that the colonies must be taxed so that the they would bear a greater portion of the expense required to maintain and protect them.\textsuperscript{168} They were also resolved that the colonies should generally be brought under closer English supervision and control.\textsuperscript{169} These decisions triggered the constitutional conflict between the colonies and the British government that ended in the American Revolution.

The Revolution itself took place against a backdrop of constitutional polarity in Britain and the American colonies.\textsuperscript{170} The higher-law constitutionalism of Coke and the seventeenth century common lawyers was receding, while the constitutionalism of parliamentary supremacy and sovereign command was ascendant.\textsuperscript{171} George III and the Tory majority in Parliament acted in accordance with the new constitutional understanding, under which enactment of a statute by Parliament was, by definition, consistent with the English constitution.\textsuperscript{172} They saw nothing constitutionally problematic in Parliament’s imposition of revenue-raising and internal regulatory measures on the colonies. The colonists and the Whig minority, on the other hand, continued to

\textsuperscript{167} \textsc{Miller}, supra note #, at 4, 83-84.

\textsuperscript{168} \textsc{Miller}, supra note #, at 203.

\textsuperscript{169} \textsc{Miller}, supra note #, at 22.

\textsuperscript{170} \textsc{4 Reid, Constitutional History}, supra note #, at 4, 56.

\textsuperscript{171} See \textsc{Mott}, supra note #, §24, at 66; \textsc{4 Reid, Constitutional History}, supra note #, at 4-5; Grey, \textit{Fundamental Law}, supra note #, at 866-67; \textsc{Meyler}, supra note #, at 12.

\textsuperscript{172} See \textsc{Bailyn}, supra note #, at 30-31, 47; \textsc{Jack N. Rakove, Original Meanings} 211 (New York: Vintage, 1997); \textsc{Wood}, supra note #, at 13-15; text accompanying notes 144-51 [Draft # 20, pp. 42-43] \textit{supra}. 
understand the colonies’ relationship to king and Parliament in terms of seventeenth century higher-law constitutionalism.\textsuperscript{173} They accordingly reacted to parliamentary taxation and internal regulation of the colonies by invoking Magna Carta, due process, and fundamental common law rights.\textsuperscript{174} Ultimately, of course, this conflict was resolved by revolution and independence.

In resisting parliamentary control during the pre-revolutionary period, the colonists relied heavily on the arguments of higher-law constitutionalism from seventeenth century England, including Magna Carta and Coke’s dictum in \textit{Bonham’s Case}.\textsuperscript{175} \textit{Paxton’s Case}, for example, involved a royal customs officer who sought a “writ of assistance,” or general search warrant, giving him unbounded authority to search the home of any colonist for smuggled goods.\textsuperscript{176} Opposing the writ, colonial lawyer James Otis appealed directly to higher law constitutionalism, citing \textit{Bonham’s Case}: “As to Acts of Parliament, an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament shold be made, in the very Words of this Petition, it would be void.”\textsuperscript{177} Citing Magna Carta and Coke’s \textit{Second Institute}, Otis

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\textsuperscript{173} See Part III-A supra.

\textsuperscript{174} 2 REID, CONSTITUTIONAL HISTORY, \textit{supra} note #, at 14, 138; Grey, \textit{Fundamental Law}, \textit{supra} note #, at 879, 880, 887.

\textsuperscript{175} See MOTT, \textit{supra} note #, §49, at 12; RAKOVE, \textit{supra} note #, at 212, 245; JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 65 (DeKalb, Ill.: Northern Illinois University Press, 2005) [hereinafter REID, ANCIENT CONSTITUTION]; see also MILLER, \textit{supra} note #, at 169 (observing that “natural law and the rights of Englishmen” constituted sources of constitutional argument deployed by the colonists against Britain).


\textsuperscript{177} Quincy 51, App. I-D, at 471, 474 & n.20 (citing Viner (“Reason of y’ Com. Law to control an Act of Parliament”); \textit{Bonham’s Case}, 8 Co. Rep. 118); see also Quincy 51, App. I-I, at 521-24 (noting that Otis’s “main reliance was the well known statement of Lord Coke in \textit{Dr.}}
concluded that Parliament was not “the final arbiter of the justice and constitutionality of its own acts”; rather, “the validity of statutes must be judged by the Courts of Justice,”\(^{178}\) thereby foreshadowing, in the words of reporter John Adams, the basic principle of American constitutionalism, “that it is the duty of the judiciary to declare unconstitutional statutes void.”\(^{179}\)

Although the court in *Paxton’s Case* ultimately granted the writ, Otis’s higher-law argument that courts may invalidate parliamentary acts against Magna Carta and common law rights quickly became a staple of colonial constitutional argument.\(^{180}\) Otis’s contemporaries immediately grasped the rhetorical power of subjecting governmental institutions and positive law to “fundamentals” and “principles,” as Otis seemed to have done in arguing against British governance of the colonies.\(^{181}\) Indeed, the colonists understood Otis to have gone far beyond Coke by arguing that an ordinary court could overturn the specifically enacted will of Parliament,\(^{182}\) and they accordingly treated *Bonham’s Case* as a virtual rule permitting courts to

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*Bonham’s Case;* 8 Co. 118a, and that he “appeared also to have in mind the equally familiar *dictum* of Lord Hobart—’Even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself’”).


\(^{179}\) Quincy 51, App. I-I at 521.

\(^{180}\) SCHWARTZ, THE GREAT RIGHTS, *supra* note #, at 57-58; Corwin, *“Higher Law” Background*, *supra* note #, at 398-99; Riggs, *supra* note #, at 971.

\(^{181}\) Pound, *supra* note #, at 368; Riggs, *supra* note # at 970.

\(^{182}\) Corwin, *“Higher Law” Background*, *supra* note #, at 398; *see also* SCHWARTZ, THE GREAT RIGHTS, *supra* note #, at 56.

During the conflict that lead to the Revolution, Americans increasingly took the dictum of
void any act of Parliament against natural justice or the common law.\textsuperscript{183} After Otis published his argument in pamphlet form,\textsuperscript{184} a number of prominent colonial revolutionaries relied on it as the basis for their own constitutional arguments against parliamentary actions.\textsuperscript{185} Although some of these emphasized the writtenness of a constitution, they also emphasized that even a written constitution did not create or eclipse fundamental rights, but merely guaranteed them.\textsuperscript{186} Although they did not always cite chapter 29, in most cases they were relying on the concept of higher-law constitutionalism embedded in the seventeenth century concept of due process of law.\textsuperscript{187} With Coke,\textsuperscript{188} the colonists understood chapter 29 and due process as general protections

\begin{quote}
Dr. Bonham's Case literally, as a statement that there was a fundamental law limiting Parliamentary powers. Had no my Lord Coke concluded, they argued among themselves, that when an Act of Parliament is contrary to such fundamental law, it must be adjudged void? Did this not mean that when the British government acts toward the colonies in a manner contrary to common right and reason, its decrees too must be given no legal force?
\end{quote}

\textit{Id.}


\textsuperscript{184} JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764).

\textsuperscript{185} See, e.g., BAILYN, supra note #, at 181-82 (Samuel Adams); id. at 182-83 (Samuel Cook); Corwin, “Higher Law” Background, supra note #, at 169 (John Adams); Corwin, “Higher Law” Background, supra note #, at 400 (Massachusetts Circular Letter (1768)); Riggs, supra note #, at 970 (John Adams’s Stamp Act Petition); id. at 970-71 (Benjamin Franklin); id at 971 (Daniel Dulany); see also id. at Corwin, “Higher-Law” Background, supra note #, at 184 (defining a constitution as a “set of fundamental rules by which even the supreme power of the state shall be governed’ and which the legislature is absolutely forbidden to alter”) (quoting and paraphrasing revolutionary pamphlet).

\textsuperscript{186} See, e.g., BAILYN, supra note #, at 183 (“[A]ll the great rights which man never mean, nor ever ought, to lose should be guaranteed, not granted, by the constitution, for at the forming a constitution, we ought to have in mind that whatever is left to be secured by law only may be altered by another law.”) (quoting Samuel Cook).
against arbitrary and oppressive government,\(^{189}\) which left only a short step to understanding the common law “as a limitation upon the impairment of vested rights or the tyrannical exercise of the police power” by Parliament.\(^{190}\)

The extent to which the colonists incorporated higher-law constitutionalism into their constitutional thinking in the years following *Paxton’s Case* is evident in *Robin v. Hardaway*, a case reported by Thomas Jefferson about a decade later.\(^{191}\) George Mason, who would later participate in the Philadelphia convention (but refuse to endorse its constitutional product), represented native American plaintiffs challenging a Virginia colonial statute which provided that descendants of native American women were slaves.\(^{192}\) Citing *Bonham’s Case*, Mason

\(^{187}\) *See*, e.g., MOTT, *supra* note #, §50, at 132 (arguing that general citations to Magna Carta during the revolutionary era probably referred to the concept of due process, because of the ubiquitous of and quotation from chapter 29 in the revolutionary protest literature); Corwin, *Natural Law*, *supra* note #, at 55-56 (summarizing arguments against writs of assistance, the Stamp Act, and other Parliamentary acts).

\(^{188}\) *See* Part II-B-1.

\(^{189}\) MOTT, *supra* note #, §54, at 142 (observing that for the American colonists, “due process of law” resembled “a catch-all phrase for human rights rather than a phrase with a well defined content”); REID, *Ancient Constitution*, *supra* note #, at 84 (“The rights of Magna Charta depend not on the Will of the Prince, or the Will of the Legislature, but they are the inherent natural Rights of Englandmen.”) (quoting ELISHA WILLIAMS, *The Essential Rights and Liberties of Protestants* 65 (Boston: ***, 1744) (emphasis in original).

Professor Reid argues late eighteenth century English Whigs had a comparable understanding of Magna Carta as “a virtual constitution of individual rights,” an organic law whose general function was “to enhance individual liberty and restrain governmental discretion.” REID, *Ancient Constitution*, *supra* note #, at 82, 83.

\(^{190}\) *See* MOTT, *supra* note #, §47, at 123.


\(^{192}\) 1772 WL 11, at *1.
argued as a general constitutional rule that “all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.” Mason also drew an analogy which showed how central higher-law constitutionalism had become to colonial thought in the decade since Paxton, arguing that natural law had the same normative force with respect to the statute in question in Robin as the colonies claimed for it in arguing against oppressive acts of Parliament. The court did not reach this issue, however, finding that the challenged act had already been repealed.

By the early 1770s, therefore, the meaning attributed to chapter 29 had merged with the broader concept of higher-law constitutionalism, which held Crown and Parliament alike to limitations prescribed by the natural and customary rights recognized at common law. By then, the colonists had also adopted the seventeenth century tenet that common law liberties reflected and reinforced natural law and natural rights, thereby importing this confused relationship into American law. The colonists multiplied the confusion by largely abandoning the purportedly

193 Robin, 1772 WL at *5 (citing Bonham’s Case and Calvin’s Case).

194 1772 WL at *5 (“If natural right, independence, defect of representation, and disavowal of protection, are not sufficient to keep them from the coercion of [colonial] laws, on what other principles can we justify our opposition to some late acts of power exercised by the British legislature?”).

195 Robin, 1772 WL at *11.

196 See, e.g., Meyler, supra note #, at 18 (arguing that “the common law occupied a disunified field” in late eighteenth century America, and that its “very definition and scope,” including “its relation to the ‘ancient constitution’ securing the rights of the people,” was the subject of serious dispute among the founding generation); Whitman, supra note #, at 1324, 1325 (observing that “[l]egal thought among the American revolutionary lawyers presented a picture of apparent intellectual chaos, draw from a variegated mass of traditions. [] The apparent disorder was worst in the many writings that commingled talk of ‘natural law’ or the ‘law of reason’ with talk of the English constitution and customary law.”); Whitman, supra note #, at 1365 (observing that the colonists were well read in Pufendorf, Coke, Hale, Blackstone, and other “seventeenth
ancient Saxon origin of the common law as the source of its authority, in favor of the common law’s purported implementation of natural law and natural rights.\footnote{197} even though that identification had been only implicitly and sporadically present in the seventeenth century.\footnote{198} As in the seventeenth century, this identification of natural law and common law was never worked out. The colonists adopted the common law, in other words, not because it was customary, but

\footnote{197} See BAILYN, \textit{supra} note \# , at 77, 184-85; MORTON HORWITZ, \textit{THE TRANSFORMATION OF AMERICAN LAW}, 1780-1860, at 8 (New York: Oxford University Press, 1992); WOOD, \textit{supra} note \#, at 299; \textit{e.g.}, BAILYN, \textit{supra} note \#, at 78 (“The great corpus of common law documents and the pronouncements of King and Commons were but expression of God and nature . . . . The natural absolute personal rights of individuals are . . . the very basis of all municipal laws of any great value.'') (quoting John Dickinson); BAILYN, \textit{supra} note \#, at 186 (“Britons are entitled to their ‘natural absolute personal rights’ by virtue of the ‘laws of God and nature, as well as by the common law and the constitution of their country so admirably built on the principles of the former. [T]he origin of the ‘inherent, indefeasible rights of the subject’ lay in ‘the law of nature and its author. This law is the grand basis of the common law and of all other municipal laws that are worth a rush.’") (quoting Otis); BECKER, \textit{supra} note \#, at 98-99 (summarizing Samuel Adams’s belief that all legislation is subordinate to the British constitution, “an authority higher than any positive law,” because it is “‘fixed,’ having its foundation in ‘the law of God and nature’") (quoting Adams); HORWITZ, \textit{supra}, at 7-9 (discussing statements by eighteenth century American judges and lawyers, including John Adams and James Kent, that the common law constituted a fixed body of discoverable rules precisely because it was ground in natural reason); STONER, \textit{LIBERAL THEORY}, \textit{supra} note \#, at 194-95 (arguing that Jefferson believed that common law and natural law “actually do tell similar stories: Both look back to a past where the power of hereditary authority is limited, in the one case by settled custom and the other by popular consent and both insist of law and constitution that they meet the test of reason”); Whitman, \textit{supra} note \#, at 1326 & n.18 (observing that the Massachusetts Circular Letter of 1768 identified “‘the fundamental rules of the British constitution’ with ‘an essential, unalterable right, in nature,’” and that Richard Bland and Alexander Hamilton held comparable beliefs).

\footnote{198} See Part II-B-2 \textit{supra}.
because they believed that it reflected “‘the highest Reason.’”199 This led them to an improbable attempt to synthesize liberal political principles with common law adjudication.200

The colonists were somewhat clearer on the consequences of higher-law constitutionalism than were the seventeenth century common law lawyers and judges. “Law” for the colonists, Professor Wood concluded, “was basically what the principles of right reason declared to be the law, the codification of which was hardly conclusive,” even when such codifications were rooted in the common law.201 Though they believed that common law incorporated natural rights, they also believed that in case of tensions and conflicts, it was law that must give way to right.202

199 See, e.g., WOOD, supra note #, at 9 (quoting Roger Sherman); accord CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 40 (Westport, Conn.: Greenwood, 1993) (noting St. George Tucker’s project of demonstrating that “reason should be the ultimate test in determining the soundness of law and its application); Whitman, supra note #, at 1365 (arguing that the colonial impulse to ground the common law in the natural law “informed Otis’s frantic efforts to reconcile common law and natural law”).

200 See POWELL, supra note #, at 79.

The equation of the common law tradition with ‘the rights of Englishman,’ and of the latter with Enlightenment concepts of individual autonomy and the rule of law, enabled many Americans of the Founding era to make the theoretically implausible assumption that liberal political principles could be explicated in the forms of the common law.

Id.; accord Whitman, supra note #, at (observing that Bolingbroke’s well-known equation of common law with natural reason “reflected the apparent lack of order in Anglo-American legal writing of the eighteenth century,” and noting the “faintly comical identification of the constitution of England with the laws of Eternity”).

201 WOOD, supra note #, at 295; see also id. (“[W]hen pressed, few Americans would admit that the codification of the fundamental principles of law and justice was the actual source of those principles and the only means of their fair implementation.”).

202 WOOD, supra note #, at 9; e.g., id. at 299 (noting that colonial courts tended to reject unjust results even when such results were indicated by the relevant common law precedents); id. at 303 (“When there is a contrariety between law and reason, the judges must be embarrassed.”)
Eventually, the invocation of “Magna Carta” came to function as a short-hand referent for the natural and customary rights which the colonists understood to be guaranteed by the English constitutional tradition. The citation of “Magna Carta” was understood, not (or not merely) as an invocation of chapter 29 or any other particular chapter, but as an appeal to all of the seventeenth century terms and arguments used to identify unconstitutional acts.

In sum, by the time the colonies declared their independence in 1776, due process and Magna Carta had become an integral part of the colonial argument against parliamentary taxes (quoting Anonymous, Rudiments of Law and Government Deduced from the Law of Nature 35 (1783), reprinted in I Charles S. Hyneman & Donald S. Lutz, American Political Writing during the Founding Era 1760-1805, at 588 (1983)) (emphasis in original).

203 See, e.g., Reid, Ancient Constitution, supra note #, at 84.

The jurisprudence of Magna Carta in the eighteenth century . . . was a rejection of the constitutionalism of arbitrary power. The rights that it enunciated “were not the grants and concessions of our Princes,” a pamphlet that the American colonists attributed to Lord Chancellor Somers insisted, “but recognitions of what we have reserv’d unto ourselves in the original institution of our government, and of what had always appertain’d unto us by common law, and immemorial custom.”

Id.; see also Mott, supra note #, §27, at 74-75.

Some scholars see in chapter [twenty]-nine of the great Charter from the very first the protection of general justice and right. According to such an interpretation, this article was the general norm of all governmental actions and should prove valuable at least as a moral precept controlling the government in all its dealings with individuals. [] There was a very common tendency to regard the “law of the land” as something equivalent to the common law and in almost every case it is looked upon as being the type of law which had formerly existed. [] Thus arose the idea that that phrase had a large residual content. Because so few occasions had arisen in which it was necessary to apply it in a specific manner, it remained a vast undelimited concept invoked chiefly to support those with grievances in particular cases in which redress could not otherwise be obtained.

and regulation of the colonial police power. As Dean Mannion observed, pre-revolutionary colonial courts “were constantly hearing arguments and deciding cases on the natural rights theory projected by Coke as a basic principle of the common law.” The colonists’ central constitutional claim was that they, no less than other English subjects, were entitled to all of the unwritten natural and customary rights that had been recognized at English common law and granted to English subjects. Adopting Coke’s higher-law constitutionalism, the colonists argued that chapter 29 and the due process of law protected them from arbitrary and unjust actions by Parliament as well as the crown. The colonists also adopted (and exaggerated) Coke’s view that chapter 29 was not confined to a guarantee of procedural fairness, but also limited the substantive goals that Crown and Parliament could pursue.

C. Due Process and Unenumerated Rights in the Post-Revolutionary States

Colonial independence in 1776 necessitated two adjustments in American constitutional thought: a more explicitly natural-rights formulation of the constitutional basis for unenumerated rights, and a reconstitution of the state governments into republics from colonial administrations subject to British monarchial rule. Both of these developments support the thesis that higher-law constitutionalism continued past independence, as reflected in the states’ continued amalgamation of natural and customary rights, their constitutional distinction of “forms,” “frames,” and “plans” of governments from “declarations” and “guarantees” of rights, and the

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204 Clarence E. Mannion, The Natural Law Philosophy of the Founding Fathers, in I NATURAL L. INST. PROC. 25 (Alfred L. Scanlan ed. 1949); accord McCormack, Locher, supra note #, at 446 (“In the early days of the Republic, [the colonists] frequently made recourse to the ‘unwritten law’ ordained by ‘nature and nature’s God.’”). As Mannion’s observation illustrates, the natural law approach to constitutional interpretation was considered quite consistent with conservative principles in the decades prior to the Reagan administration’s adoption of originalism.
manner in which state courts dealt with such “declarations” and “guarantees” in decisions that implicated natural or customary rights.


The English constitution provided an incomplete justification of the American revolution, since revolt necessarily entailed withdrawal from that constitutional system.\footnote{STONER, LIBERAL THEORY, supra note #, at 186; Grey, Fundamental Law, supra note #, at 890.} Thus, the Declaration of Independence begins with natural rights theory drawn from Locke’s Second Treatise, rather than arguments of higher-law constitutionalism drawn from the English common law.\footnote{See BECKER, supra note #, at 20-21; Corwin, supra note #, at 383.} Nevertheless, the colonists belief that the common law captured and reflected natural rights and the natural law, imported from the English seventeenth century,\footnote{See Part II-B-2 supra.} enabled them to combine the Declaration’s appeal to natural rights with arguments about customary rights drawn from the common law.\footnote{See RAKOVE, supra note #, at 293; 1 REID, CONSTITUTIONAL HISTORY, supra note #, at 5; STONER, LIBERAL THEORY, supra note #, at 186.} The confused amalgamation of natural right and common law that characterized both seventeenth century and preRevolutionary constitutional jurisprudence was thereby carried into independence.\footnote{See, e.g., RAKOVE, supra note #, at 293 (noting the “tension in the Declaration of Independence between the preambular invocation of natural rights and the legalist appeal to specific English rights in the body of the text”).}

The Declaration follows its natural law introduction with a long list of common law rights and liberties which George III was alleged either to have violated, neglected, or failed to
secure against parliamentary encroachment. The Declaration even accused the king of combining with Parliament to subject the colonies “to a jurisdiction foreign to our constitution and unacknowledged by our laws,” employing the term “constitution” in the same manner as the English Whigs to refer to fundamental laws that limited government, and echoing Otis’s and Mason’s respective higher-law constitutional arguments in Paxton’s Case and Robin v. Hardaway.

The Declaration’s basic argument—that Britain’s violation of natural and customary rights justified revolution—fit neatly with the seventeenth century notion that the “law of the land” and the “due process of law” limited the actions of crown and Parliament. In the eyes of

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210 DECLARATION OF INDEPENDENCE (July 4, 1776) (“The history of the present king of Great Britain, is a history of repeated injuries and usurpations,” including indefinite dissolution of colonial legislatures, veto of laws providing for an independent colonial judiciary, maintenance of standing armies in the colonies during times of peace, quartering of troops in the colonists homes, embargoing colonial trade, imposition of taxes without colonial consent or representation in Parliament, and depriving colonists of trial by jury and at the venue); see REID, ANCIENT CONSTITUTION, supra note #, at 110; 1 REID, CONSTITUTIONAL HISTORY, supra note #, at 92; STONER, LIBERAL THEORY, supra note #, at 187; Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127, 1133 (1987).

211 DECLARATION OF INDEPENDENCE (July 4, 1776) (emphasis added).

212 See STONER, LIBERAL THEORY, supra note #, at 188 (arguing that the term “constitution” in the Declaration “could not have meant . . . anything so narrow as the particular colonial charters,” but rather “must be taken to mean, as the term then meant when used in reference to the British, the whole amalgam of offices, principles, and fundamental laws that give the polity its form. [] What the whole sentence suggests is that independence, thought necessarily a step beyond the existing constitution and thus necessarily based on the most fundamental political principles, still proceeds down a well-trodden path”).


214 See, e.g., MOTT, supra note #, §30, at 85 (“Locke’s suggestion that the power of the Legislature should not extend to the issuance of extemporary decrees, special or partial laws, or laws which are against the ‘law of Nature,’ is very closely akin to the modern concept, if not to
the colonists, it was precisely the failure of Britain to respect these limits that justified their withdrawal from the empire.\textsuperscript{215}

2. Constituting Post-Revolutionary State Governments

Upon their formal separation from Britain, the newly independent states needed to constitute their governments as sovereign entities without the royal appointments that had formed a crucial part of the colonial governments, or the reliance on royalty and nobility that characterized the British constitutional monarchy.\textsuperscript{216} The states generally adapted the British constitutional monarchy to republican government by providing for a popularly elected bicameral legislature and an emasculated executive, stripped of most prerogative powers and largely subordinated to the legislature.\textsuperscript{217} Each of the states also provided for a separate judiciary,\textsuperscript{218}

\begin{itemize}
  \item the original meaning, of due process of law.”); \textit{see also} STONER, LIBERAL THEORY, \textit{supra} note #, at 189 (arguing that the “specifics of the common law and the ancient constitution” gave Locke’s natural rights theory “its distinctive form,” while that theory ordered the particulars of the common law).

\textsuperscript{215} \textit{See} MILLER, at 8; McCormack, \textit{Lochner, supra} note #, at 446-47.

\textsuperscript{216} \textit{See, e.g.,} BAILYN, \textit{supra} note #, at 71; LAWRENCE M. FRIEDMAN, \textit{A HISTORY OF AMERICAN LAW} 100 (New York: Simon & Schuster, 1973); RAKOVE, \textit{supra} note #, at 21, 306; WOOD, \textit{supra} note #, at 157.

\textsuperscript{217} \textit{See} RAKOVE, \textit{supra} note #, at 214; WOOD, \textit{supra} note #, at 135-51 \textit{passim}, 163; Appendix infra.

Connecticut and New Hampshire elected merely to eliminate references to royal authority from their colonial charters and otherwise formally to affirm them as their constitutions, although less than a decade after independence New Hampshire replaced its reaffirmed charter with a wholly new frame of government and a declaration of rights. Rhode Island, on the other hand, did nothing. BAILYN, \textit{supra} note #, at 191; WOOD, \textit{supra} note #, at 133, 134.

\textsuperscript{218} \textit{See} BAILYN, \textit{supra} note #, at 71; WOOD, \textit{supra} note #, at 153-54.
although it is doubtful that this signified genuine independence for the courts.\textsuperscript{219} In any event, there was little doubt that the state legislatures were the most important and powerful part of the new governments.\textsuperscript{220}

That revolutionary Americans carried higher-law constitutionalism into independence, as I have argued,\textsuperscript{221} is reflected in their post-independence constitutions. A state “constitution” generally consisted of a written plan or frame of government that was positively enacted or affirmed by the state legislature, together with natural and customary rights whose existence predated any constitutional text, and which may not have been reduced to any writing at all.\textsuperscript{222} Like the British version, American higher-law constitutionalism presupposed that natural and customary rights are prior to any frame of government or, indeed, to any writing at all.\textsuperscript{223} As Professor Sherry has argued, following independence, “the written [state] constitution or charter served as the sole source of fundamental law for determining the [state] government's internal

\textsuperscript{219} See Wood, supra note #, at 153-54, 157-61 (noting that the courts were alternately conceptualized as a division of the executive department or an extension of the legislature rather than a truly separate branch of the state governments).

\textsuperscript{220} See Wood, supra note #, at 162-63.

\textsuperscript{221} See Part II-B.

\textsuperscript{222} See Sherry, supra note #, at 1146; see also Friedman, supra note #, at 103 (observing that the two purposes of the new state constitutions were to set forth the “permanent shape of government, what its parts are, their boundaries and limits,” and to list “essential rights, essential limitations on government, essential rules—all those propositions of high or highest law”); McIlwain, supra note #, at 244 (implying that some revolutionary state constitutions formally distinguished “bills of rights” from “frames of government”).

\textsuperscript{223} Sherry, supra note #, at 1133; see text accompanying notes 175-204 [Draft #20 pp. 47-55] supra.
structure, but not for describing its relationship to the citizenry."

Because natural and customary rights were believed to exist independent of any writing, it was not necessary to enumerate them textually or otherwise to enact them into positive law for them to function as limits on the actions of the newly framed state governments. Textual enumeration did make clear that these rights and liberties were understood to be a natural birthright rather than a royal or parliamentary concession, and that they were enforceable against legislative as well as executive action.

That the newly independent states observed the distinction between frames of government enacted as positive law, and natural and customary rights which existed independent of positive law, is evident in the language used in the written constitutions enacted by the states following independence. Whereas these constitutions created the frames of state government, they merely

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224 Sherry, supra note #, at 1135; accord McCormack, Lochner, supra note #, at 446-47 (“[T]he idea of ‘inalienable rights’ places limits on the claims that government can make on an individual, and posits that those claims are not dependent on human laws and constitutions but naturally belong to all persons.”); see also WOOD, supra note #, at 286-87 (observing that the understanding that identified the state “constitutions” more closely with positively enacted forms of government was abandoned during the 1780s, in favor of an understanding of such constitutions as limitations on the powers of the government it created, which correspondingly protected individual rights).

225 See Sherry, supra note #, at 1146; e.g., BAILYN, supra note #, at 188 (“Legal rights are ‘those rights which we are entitled to by the eternal laws of right reason’; they exist independent of positive law, and stand as the measure of its legitimacy.”) (quoting Philip Livingston). But see RAKOVE, supra note #, at 309 (suggesting that the state bills of rights functioned less as enforceable constitutional law than as statements of first principals which provided standards according to which the people could judge the performance of their elected officials.

226 See BAILYN, supra note #, at 184-88.

227 WOOD, supra note #, at 272.
 declared or guaranteed natural and customary rights.\textsuperscript{228} For example, five of the original thirteen states, plus Vermont,\textsuperscript{229} enacted extensive textual enumerations of natural and customary rights which they called “declarations” or “bills” of such rights, and which they formally separated from the texts that framed the new state governments.\textsuperscript{230} Virginia and North Carolina even placed their frame of government and declaration of rights in wholly different texts that their legislatures enacted at different times.\textsuperscript{231} The distinction between frames of government and declarations of rights was even evident in the ratification debates.\textsuperscript{232} The remaining original

\textsuperscript{228} \textit{E.g.}, MASS. CONST., Preamble to Part the First (1780) (“A Declaration of the Rights of the Inhabitants of the Commonwealth”), \textit{in} 1 POORE, \textit{supra} note #, at 956; VA. BILL OF RIGHTS, Preamble (1776) (“A declaration of rights”), \textit{in} 2 POORE, \textit{supra} note #, at 1908; \textit{see} WOOD, \textit{supra} note #, at 269, 271; \textit{see also} BAILYN, \textit{supra} note #, at 189 (“No voice was raised in objection when in 1776 the idea was proclaimed, and acted upon, that ‘all the great rights . . . should be guaranteed’ by the terms of a written constitution.”) (quoting Jefferson) (emphasis in original).

\textsuperscript{229} Vermont was not formally admitted as a state until 1790, after Massachusetts, New Hampshire, and New York formally renounced their respective claims to its territory. It had, however, organized its own government and had functioned as a separate colony independent of the others since the early 1770s, and consequently adopted its own constitution in the wake of the others’ declarations of independence in 1776. \textit{See} WOOD, \textit{supra} note #, at 133.

\textsuperscript{230} \textit{See} Appendix \textit{infra} (Maryland, Massachusetts, North Carolina, Pennsylvania, Vermont, and Virginia). New Hampshire enacted a constitution on this pattern in 1784, Delaware in 1792, and Kentucky upon its admission as a state in 1792. \textit{Id.}

\textsuperscript{231} For Virginia, compare VA. BILL OF RIGHTS (June 12, 1776), \textit{in} 2 POORE, \textit{supra} note #, at 1908 with VA. CONST (June 29, 1776), \textit{in} 2 POORE, \textit{supra} note #, at 1910. Both documents were enacted by the same constitutional convention. \textit{See} 2 id., at 1910 n.*. For North Carolina, see N.C. CONST. (1776), \textit{in} POORE, \textit{supra} note #, at 1409, 1411 (separating “A Declaration of Rights, &c.” from “The Constitution, or Form of Government, &c.”); JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 2-3 (noting that the “declaration of rights” was enacted December 17, 1776, while the “constitution” was enacted December 18, 1776).

\textsuperscript{232} \textit{See}, \textit{e.g.}, THE FEDERALIST no.78, at 527 (arguing that judicial independence is necessary “to guard the constitution and the rights of individuals”); \textit{id.} at 528 (arguing that judicial independence is essential not only “with a view to infractions of the constitution,” but also to protect against “injury of the private rights of particular classes of citizens, by unjust and
states, with one exception, interwove enumerations of a few natural and customary rights into the texts that framed their forms of government. Finally, eight of the original thirteen states, plus Vermont, enacted “law of the land” clauses—paraphrases of chapter 29 which generally declared or guaranteed that citizens could not be deprived of their lives, liberty, property, or privileges, except by the “lawful judgment of their peers or the law of the land.

3. Higher-Law Constitutionalism in Post-Revolutionary Judicial Decisions

The historical record of judicial decisions and arguments of counsel following the Revolution is mixed, although the weight of this authority supports the proposition that the colonists carried higher-law constitutionalism with them into independence. Several cases involved clear arguments or holdings based on higher-law constitutionalism following independence. Rutgers v. Waddington, for example, involved a claim under New York’s general trespass statute by a homeowner whose property was used by a British merchant during the occupation of New York City in the Revolutionary War. The court held that the law of

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233 Rhode Island, which following independence neither enacted a new state constitution nor affirmed its colonial charter as such. Appendix infra; see WOOD, supra note #, at 133-34.

234 See Appendix infra (Connecticut, Delaware, Georgia, New Hampshire, New Jersey, New York, South Carolina). New Hampshire enacted a frame of government and a declaration of rights in 1784, and Delaware followed suit in 1792. Id.

235 See Appendix infra (Connecticut, Maryland, Massachusetts, New York, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia)

nations—long considered a branch of natural law reasoning—properly determined the outcome, reasoning that the law of nations was part of the common law and, therefore, necessarily limited the reach of the statute. The court accordingly decided that the merchant was not liable under the statute for any use of the property justified under the law of nations.\footnote{I HAMILTON LAW PRACTICE, supra note #, at 399-415.}

In \textit{Trevett v. Weeden}, the court held that a Rhode Island criminal statute prescribing banknotes as legal tender and mandating bench trials for violations was “void” for violation of the “constitutional” right to trial by jury. Although Rhode Island had no written post-independence constitution or declaration of rights, the court accepted counsel’s argument that the state’s “constitution” included Magna Carta and other natural and customary English rights.\footnote{See, e.g., \textit{Trevett v. Weeden} (R.I. 1786), \textit{private report reprinted in I BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY} 417, 420-21, 423 (New York: Chelsea House with McGraw Hill, 1971) [hereinafter SCHWARTZ, THE BILL OF RIGHTS] (argument of James Varnum) (letters modernized).}

Counsel also attacked the statute on substantive grounds, arguing that its requirement that banknotes be accepted at par with gold and silver specie was an “abominable act” against “common right or reason,” though the court did not reach this issue.\footnote{I SCHWARTZ, THE BILL OF RIGHTS, supra note #, at 425-26 (argument of James Varnum) (letters modernized).}

In \textit{Butler v. Craig},\footnote{2 H. & McH. 214, 1787 WL 95 (Md. Gen’l Ct. 1787)} a Maryland court refused to enforce a statute which provided that the offspring of illegal marriages between free whites and enslaved blacks were themselves slaves, apparently accepting counsel’s argument that depriving the defendant of her freedom without a jury trial convicting her parents of an unlawful marriage violated the law of the land or
due process guarantees set forth in chapter 29 of Magna Carta.\textsuperscript{241} Although the Maryland Declaration of Rights contained both law of the land and jury trial guarantees,\textsuperscript{242} counsel did not discuss or cite them, relying solely on Coke’s Second Institute, Edwardian confirmations of chapter 29, and other English common law authorities.\textsuperscript{243}

The strongest judicial statement of higher-law constitutionalism prior to 1791 appears in \textit{Ham v. McLaws}. There, a South Carolina court considered the state’s attempt to impose a statutory fine and forfeiture for illegal importation of slaves assessed against a family newly arrived in the state.\textsuperscript{244} The statute had been enacted while defendants were in transit on the high seas.\textsuperscript{245} South Carolina’s Declaration of Rights contained a law of the land clause but defendants’ counsel and the court relied solely on the arguments and sources of higher-law constitutionalism.

Conceding that defendants fell within the strict the letter of the statute, counsel argued that its application to defendants would nevertheless be “an act of injustice” unintended by the legislature, and “contrary to common right and reason,” “natural equity,” and “Magna Carta”—common law code for violations of natural and customary rights:

For there were certain fixed and established rules, founded on the reason and fitness of

\textsuperscript{241} 1787 WL 95, at *12. (citing 2 Inst. 45).

\textsuperscript{242} See Appendix infra.

\textsuperscript{243} 1787 WL 95, at *12 (citing 2 Inst. 50, 51; Sullivan’s Lect. 352-72; 28 Edward III ch. 3; 42 Edward III ch.3).

\textsuperscript{244} 1 Bay 93,1789 WL 140, at *1 (S.C. Comm. Pl. 1789).

\textsuperscript{245} 1789 WL 140, at *2. There was testimony that prior to immigrating, the defendants had actually inquired whether they could bring their slaves with them, and had correctly ascertained that the then-current law of South Caroline permitted it. 1789 WL 140, at *1.
things, which were paramount to all statutes; and if laws are made against those principles, they are null and void. For instance, statutes made against common right and reason, are void. So statutes made against natural equity, are void; and so also are statutes made against Magna Carta.  

The court agreed, declaring that it “is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles,” and holding that it was obligated to construe the statute in a manner “consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law.” As Dean Treanor has observed, the eighteenth century practice of avoiding an unjust result by construing a statute not to apply to a situation that is clearly within its language, was akin to the contemporary practice of declaring a statute unconstitutional “as applied” to a particular individual or situation. Thus, noting that application of the statute against defendants “would be evidently against common reason,” the court held that the legislature must not have intended the statute to apply to persons in the defendants’ situation, and the jury accordingly returned a verdict for defendants.

246 1789 WL 140, at *2 (original emphasis deleted).
247 1789 WL 140, at *3 (original emphasis deleted).
248 1789 WL 140, at *3.
249 Treanor, supra note #, at 500; see also Treanor, supra note #, at 501 (noting that Ham’s construction of legislative intent was consistent with the eighteenth century common law practice of “construing a statute so as not to cover an unusual fact pattern when the court believed that application would produce inequitable results”).
250 1789 WL 140, at *3 (original emphasis deleted).
251 1789 WL 140, at *3-4.

Symsbury Case might be added to Trevett, Rutgers, Butler, and Ham as yet another example of post-revolutionary reliance on higher-law constitutionalism, but the reporter’s to state
On the other hand, several courts declined to decide cases on the basis of higher-law constitutionalism and instead relied directly on the texts of enumerated rights. In *Holmes v. Walton*, for example, a defendant found guilty of illicit war trade with the British protested the confiscation of his smuggled goods because he had been tried to a six-person jury, “contrary to the constitution, practices, and laws of the land,” although the New Jersey constitution did not contain either a twelve-person jury guarantee or a law of the land clause. The court declined the invitation to decide the case according to chapter 29, and instead decided the case by interpreting the general jury trial guarantee in the New Jersey constitution to require twelve-person juries, based on the “common law of England,” “immemorial custom,” and prior colonial charters.

Likewise, *Bayard v. Singleton* reviewed a North Carolina statute providing that property held by a British subject after independence would escheat to the state, based on the longstanding common law rule that enemy aliens cannot own property. The court struck down the portion of the statute that required automatic dismissal of a suit for title once the defendant produced an

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255 1 N.C. 5, 1787 WL 6, at *3 (N.C. Sup. Ct. L. & Eq. 1787).
affidavit of title from the state, reasoning that this deprived plaintiffs who took title from British subjects of their right to trial by jury as provided by the “constitution”—by which it apparently meant North Carolina’s law of the land and jury trial clauses— which was the “fundamental law of the land.”

Finally, one other authority from this period bears extended discussion. In early 1787 Alexander Hamilton delivered a speech to the New York legislature in which he explicated the meaning of New York’s law of the land clause. Perhaps because Hamilton and New York had multiple connections with higher-law constitutionalism and the concept of due process during the founding era, this speech is widely cited by both sides in the debate about the original meaning of the Due Process Clause.

In debate on a proposed statute that would have prohibited privateers who sailed for the British during the Revolution from holding public office in New York, Hamilton argued that the statute violated New York’s constitutional law of the land clause, as well as a due process clause enacted only weeks earlier as part of a statutory bill of rights:

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

256 See 1787 WL 6, at *2-3.

257 Hamilton was counsel to the plaintiff in Rutgers v. Waddington, a principal author of The Federalist (and sole author of its essays on judicial review), and a resident of New York, which was the only state to suggest an amendment to the Constitution guaranteeing the “due process of law” rather than the “law of the land.” Some commentators believe that Madison lifted language of the Due Process Clause directly from New York’s suggested amendment. See, e.g., MEYER, supra note #, at 148; SCHWARTZ, THE GREAT RIGHTS, supra note #, at 151-54.

258 See James Ely, supra note #, at 325.
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.”

Some commentators have seized upon the last sentence of this quotation as conclusive proof that Hamilton did not believe that the legislature was limited by the concept of due process. In fact, however, Hamilton was arguing precisely the opposite, by expressly adopting Coke’s equation of the “law of the land” with the “due process of law.” Coke may have been mistaken in equating these two phrases, but his position was nonetheless widely held in late-eighteenth century America, as Hamilton’s argument illustrates.

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261 See text accompanying notes 50 & 113 supra (noting the equation of “law of the land” and “due process of law” by Coke and others in English history); see also ORTH, supra note #, at 7-8 (“[T]he ‘law of the land,’ Coke said, meant the common law, and the common law required ‘due process.’”).

262 E.g., Butler v. Craig, 2 H. & McH. 214, 1787 WL 95, at *12 (Md. Gen'l 1787) (adopting Coke’s equation of “legem terrae” with “due process of law”); see, e.g., ORTH, supra note #, at 31, 100 (observing that for late eighteenth century Americans, due process of law and law of the land “came to the same thing”); James Ely, supra note #, at 325 (noting that “the view that ‘due process of law’ and ‘law of the land’ had the same meaning was broadly shared” in the late eighteenth century); Thomas Grey, The Uses of an Unwritten Constitution, 64 CHI.-KENT L. REV. 211, 218 (1988) (observing that the “law of the land” and the “due process of law” were “always treated as equivalents”); Riggs, supra note #, at 992-993 (observing that late eighteenth century Americans regarded the “law of the land” and the “due process of law” as “embracing the same subject matter”); Wolfe, supra note #, at 221 (observing that eighteenth century American authorities gave a broad reading to due process, “following Coke in identifying it with the Magna Charta provision that the king will not take or imprison or dispossess or outlaw or exile any freeman ‘except by the lawful judgment of his peers or the law of the land’”); cf. Harrison, supra note #, at 542-43 (observing that the “equivalence of due process clauses and clauses forbidding deprivations of life, liberty, or property except by ‘the law of the land’ was “a common place of nineteenth century constitutional law”).

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Hamilton believed that the proposed statute violated the statutory due process clause;\(^{263}\) if this was not clear from his initial statement, any ambiguity was removed by the two rhetorical questions he asked immediately after: “Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?”\(^{264}\)

Coke may not have actually held the position that the law of the land or the due process of law limited Parliament, but late eighteenth century Americans believed that he did, and this was a cornerstone of their constitutional argument against British control of the colonies. At a minimum, then, Hamilton’s speech is strong evidence of his twin beliefs that the law of the land and the due process clause were synonymous, and that they bound the legislature as well as the executive.

Finally, it is likely that Hamilton understood both clauses as imposing substantive as well as procedural limitations on legislative action. Hamilton is arguing that the process by which a legislature enacts a law does not satisfy the guarantee of process owed under New York’s statutory due process clause, which he considered a guarantee of judicial rather than legislative

\(^{263}\) See James Ely, supra note #, at 326.

\(^{264}\) 4 PAPERS OF ALEXANDER HAMILTON 35-36, quoted in James Ely, supra note #, at 326.
A legislature’s mere compliance with the formal requirements for enacting a law, in other words, did not mean that its acts necessarily accorded with the “law of the land,” or constituted the “process of law” owed to a person suffering a deprivation of life, liberty, or property. Moreover, by citing Coke, Magna Carta, and due process, Hamilton invoked three weighty symbols of higher-law constitutionalism in opposition to the contemplated legislative deprivations of the customary right to vote. Once again, it seems unlikely that Hamilton would have cited such trenchant symbols of substantive limits on legislative action if he did not believe that they imposed any such limits.

Hamilton seems to have adapted an argument about vested real property rights to the more esoteric property suggested by rights to an office. A legislature violates the “law of the land” or the “due process of law” when it deprives a person of title to property without a trial by jury, since this was a procedural right long recognized at common law. The government also violates the “law of the land” or the “due process of law,” however, by depriving a person of title to property for a private purpose without compensation, since the common law had long recognized public purpose and due compensation as substantive restrictions on the government’s exercise of its sovereign power of eminent domain.

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265 See Wood, supra note #, at 454.

266 Orth, supra note #, at 7-8 & n.9 (author’s translation) (quoting 2 Institutes 50); James Ely, supra note #, at 326 (“Hamilton is asserting that due process limits the power of the legislature to deprive former privateers of their rights. His speech thus lends support for the view that due process placed substantive restraints on legislative power.”); see also Orth, supra note #, at 7-8.

267 For example, Symbury Case is a vested property rights decision that sounds in substantive due process, though the court did not cite either a state law of the land clause or chapter 29. See note 251 [Draft # 20, p. 66] supra. Symbury reviewed an act of the Connecticut colonial legislature purporting to resolve a boundary dispute by confirming title in one of the
Hamilton’s position constitutes support for substantive due process if one assumes that rights to political participation were considered a kind of property in the late eighteenth century, as indeed Locke argued; they then could not be taken by legislative act. Even without this assumption, it is difficult to see how Hamilton’s speech constitutes support for the narrow procedural reading of the Due Process Clause, since he follows Coke in equating the law of the land with due process of law, and the American reading of Coke that these two concepts bound the legislature. It is improbable that Hamilton would accept these two aspects of higher-law constitutionalism, while rejecting the third aspect of substantive limitation.

D. Unenumerated Rights in the Drafting and Ratification of the Constitution

By the time the Constitutional Convention convened in Philadelphia during the summer of 1787, most of the states in existence since 1776 had been governing for some years under positively enacted or affirmed frames of government that had replaced their colonial administrations, together with textual declarations or enumerations at least some natural and

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The court held the statute void as beyond the legislative power, and further held that the town of Symsbury had title to the disputed property because its grant was prior in time to that of the defendant, reasoning that the statute could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent; and the grant to Symsbury being prior to the grant made to the towns of Hargord and Windsor, under which the defendant claims, we are of the opinion the title of the lands demanded is in the plaintiffs.

1 Kirby 444, 1785 WL 63, at *2 (Conn. 1785); accord Ware v. Hylton, 3 U.S. 199, 245 (1796) (holding that the alteration of the terms of Revolutionary War debts mandated by the Treaty of 1783 violated “immutable principles of justice” whose existence predated their textual declaration in the Takings Clause of the Fifth Amendment). Dean Treanor reads the Symsbury holding as authority for the proposition that “dispute resolution concerning competing claims to property was a matter for the courts, not the legislature.” See Treanor, supra note #, at 34.
customary rights, including a chapter 29 analogue.\footnote{See Part III-C supra.} There were two basic models. One, adopted by six states and Vermont, enacted a frame of government and recognized an extensive list of natural and customary rights from the English constitution as adapted by the colonists in their conflicts with Britain prior to independence.\footnote{See Appendix infra (Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia).} The other, followed by six other states, enacted a frame of government and interwove within that enactment the declaration of a few neutral and customary rights and liberties from the English constitution.\footnote{See Appendix infra (Connecticut, Delaware, Georgia, New Jersey, New York, and South Carolina).} Both models were premised on the notion that natural and customary rights pre-existed state governments and bound state executives and legislatures regardless of whether or not they were textually enumerated in a constitutional writing.\footnote{See Corwin, Natural Law, supra note #, at 58 (emphasis in original); cf. McCormack, Lochner, supra note #, at 446 (observing that the “unwritten law” of natural rights “places limits on the claims that government can make on an individual, and posits that those claims are not dependent on human laws and constitutions but belong naturally to all persons.”).} As Professor Corwin once emphatically pronounced, “judicial review initially had nothing to do with a written constitution.”\footnote{Corwin, Natural Law, supra note #, at 58 (emphasis in original).}

Although there is little evidence of a conscious decision to choose one model over the other, the document produced by the Philadelphia convention in fact reflected the sensibilities of the second model.\footnote{Schwartz, The Great Rights, supra note #, at 78; see also Wood, supra note #, at 536 (quoting James Wilson’s observation that “it had ‘never struck the mind of any member’” to include a bill of rights in the Constitution until George Mason brought up the issue virtually at -73-
three branches of the national government or defined their relationship with each other or the states. The Constitution enumerated very few individual rights and liberties, and even these were criticized by some delegates as “irrelevant and useless.” A suggestion near the end of the convention to include of a bill of rights in the Constitution did not draw the support of a single state delegation.

When the Convention reported the Constitution to the states for ratification, however, the lack of a national bill of rights in the Constitution emerged as an issue almost immediately. The Anti-Federalists focused on the Necessary and Proper and Supremacy Clauses, arguing that the former would permit the national government to exercise implied powers, and the latter would render state constitutions ineffective in protecting fundamental rights against the use of such powers. They also emphasized that virtually every state had a constitutional declaration

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274 Excluding the provisions that once protected property in slaves, the 1787 constitutional text enumerates only individual rights against bills of attainder, ex post facto laws, suspension of the writ of habeas corpus, and state interference with contractual obligations. See U.S. CONST. art. I, §9, cls. 1-3; id., §10, cl.1.

275 WOOD, supra note #, at 536.

276 RAKOVE, supra note #, at 288.

277 See SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS 66 (New York: New York University Press, 1995); RAKOVE, supra note #, at 147; STONER, LIBERAL THEORY, supra note #, at 220; WOOD, supra note #, at 536-37; e.g., Letter of Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), reprinted in COGAN, supra note #, at 701, 702-03.

or reservation of fundamental rights and liberties.279 Even Thomas Jefferson, a supporter of the original Constitution then serving as ambassador to France, saw the lack of a federal bill or declaration of rights as a serious flaw.280

The Federalists made two arguments in reply. First, they maintained that an enumeration of natural and customary fundamental rights and liberties was unnecessary, because the Constitution nowhere delegated to the national government any power to infringe upon such rights.281 Second, they argued that an enumeration of rights and liberties against the national government would be dangerous, by supplying a basis for recognizing unenumerated government powers.282 It would be impossible to enumerate all of the rights and liberties individuals held,

279 See Wood, supra note #, at 537; e.g., Letter of Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), reprinted in Cogan, supra note #, at 701, 705.

280 See Wood, supra note #, at 537.

281 E.g., The Federalist, supra note #, no. 84, at 578-79 (arguing that Magna Carta, the Petition of Right, and the English Bill of Rights “are, in their origin, mere stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations or rights not surrendered to the prince,” whereas under the American Constitution “in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations”); see, e.g., Cogan, supra note #, at 742 (remarks of Thomas McKean at the Pennsylvania ratifying convention); Cogan, supra note #, at 746 (remarks at the Pennsylvania ratifying convention); IV Debates in the Several State Conventions on the Adoption of the Federal Constitution 166067 ((Phila.: J.B. Lippencot, Jonanthan Elliot 2nd ed. 1836); Rakove, supra note #, at 144 (remarks of James Wilson at the Pennsylvania ratifying convention).

282 E.g., The Federalist, supra note #, No.84, at 579 (Bills of rights “are not only
and those that were not enumerated would be presumed to have been ceded to the national
government or not to exist at all.283

Both Federalist arguments were undermined by the Constitution’s enumeration of a few
natural and customary rights,284 as Antifederalists were quick to argue.285 Nevertheless, both
arguments rested on the twin assumptions that natural and customary rights exist independent of
the federal Constitution and any other text, and that the federal judiciary would be empowered to
invalidate acts of Congress or the state legislatures intruding upon such rights.286 For example,
Edmund Randolf argued during the Philadelphia convention that “any individual conceiving
himself injured or oppressed by the partiality or injustice of a law of any particular State may
resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the
unnecessary in the proposed constitution, but would even be dangerous. They would contain
various exceptions to powers which are not granted; and on this very account, would afford a
colourable pretext to claim more than were granted.”); see, e.g., RAKOVE, supra note #, at 144
(summarizing Wilson’s argument).

283 See Graber, supra note #, at 18; Sherry, supra note #, at 1162; e.g., COGAN, supra note #, at 738-746 (remarks of James Wilson at the Pennsylvania ratifying convention); IV DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 166-67 (Phila.: J.B. Lippincott, Jonathan Elliot 2nd ed. 1836) [hereinafter ELLIOT, DEBATES] (remarks of James Iredell at the North Carolina ratifying convention).

284 See text accompanying notes 273-76 [Draft #20, pp. 72-73] supra.

285 E.g., COGAN, supra note #, at 712, 716 (essay of Brutus, No. 2); COGAN, supra note #, at 744 (remarks of John Smilie at the Pennsylvania ratifying convention); COGAN, supra note #, at 712, 716 (essay of Brutus, No. 2).

286 STONER, LIBERAL THEORY, supra note #, at 199, 208 (arguing that the framers intended the courts as “immediate guarantor” of justice and the guardians against “unjust and partial” laws); see Randy E. Barnett, The Ninth Amendment: It Means What It Says, 85 TEX. L. REV. 1 (2006) (arguing that the Ninth Amendment was designed to address Federalist arguments about the dangers of enumerating natural and customary rights, by ensuring that such rights retained the same fundamental stature after ratification of the Bill of Rights as they had enjoyed before).
principles of equity and justice.” Similarly, Theophilus Parsons argued during the Massachusetts ratifying convention that a bill of rights limiting the national government was unnecessary, because “no power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.” Hamilton’s essay on the judiciary is likewise permeated by the presupposition that the federal courts would defend unenumerated natural and customary rights beyond those few enumerated in the constitutional text; indeed, some commentators have flatly concluded that Federalist 78 is basically an

287 Edmund Randolph, Suggestions for the Conciliation of the Small States ¶5 (July 10, 1787), reprinted in 4 FOUNDERS’ CONSTITUTION, supra note #, at 597.

288 II ELLIOT, DEBATES, supra note #, at 161-62.

289 Throughout No. 78, Hamilton generally distinguishes the “rights of individuals” as separate from and in addition to the “constitution.” THE FEDERALIST, supra note #, no. 78, at 527 (“This independence of the judges is equally requisite to the constitution and the rights of individuals” from unusual federal actions that might seriously burden political minorities) (emphasis added); id., at 529 (referring to the indispensability of “inflexibility and uniform adherence to the rights of the constitution and of individuals”) (emphasis added); accord id., at 528.

But it is not with a view to infractions of the constitutions only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation, of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them . . . .

Id. (emphasis added). At one point Hamilton seems to contradict himself by limiting the reach of the courts to enumerated rights, see id., at 524 (“By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance as that it shall pass no bills of attainder, no ex post facto laws, and the like.”), but the immediately following sentence returns to the assumption that the judicial power extends to the protection of rights beyond the four corners of the constitutional text, see id. (“Limitations of this kind can be
argument for judicial enforcement of unenumerated natural and customary rights.\textsuperscript{290} Finally, while some framers preferred to speak in terms of judicial enforcement of limits on the enumerated powers rather than judicial protection of individual rights,\textsuperscript{291} the two were generally understood as functional equivalents.\textsuperscript{292}

Anti-Federalist arguments are more equivocal. Anti-Federalist criticism that the Constitution failed to include a declaration of rights shares the Federalist assumption that such rights already existed even though they were not textually enumerated, though the anti-Federalists believed that failure to declare that their existence in a textual enumeration made preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.”) (emphasis added).

\textsuperscript{290} See, e.g., GERBER, supra note #, at 112, 113 (arguing that an “often overlooked” aspect of Federalist No. 78, “is Hamilton’s explanation about the primary reason judicial review is necessary: to help protect the natural rights of the American people”); STONER, LIBERAL THEORY, supra note #, at 204 (arguing that in Federalist No. 78, “Hamilton grants the courts the power to declare void statutes they find in violation of the Constitution and even to limit statutes which, though not infringing the document itself, nonetheless threaten justice or constrict rights.”).

\textsuperscript{291} See, e.g., III ELLIOT, DEBATES, supra note #, at 443 (“But . . . who is to determine the extent of [the enumerated] powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void.”) (remarks of George Nicholas at the Virginia ratifying convention); II ELLIOT, DEBATES, supra note #, at 196 (“This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overlap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.”) (remarks of Oliver Ellsworth at the Connecticut ratifying convention).

\textsuperscript{292} See, e.g., Letter from James Madison to George Washington (Dec. 5, 1789) (“If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”), reprinted in COGAN, supra note #, at 662.
them less secure. For example, one form of anti-Federalist criticism was that lack of a Bill of Rights meant that the Constitution would not protect the natural and customary rights of citizens, and would thus fail in the very purpose of republican government. As one anti-Federalist put it, the Constitution not only rendered state declarations of rights ineffectual by virtue of the Supremacy Clause, but the Constitution was “proposed without any kind of stipulation for any of those natural rights, the security whereof ought to be the end of all governments.”

Less specifically, George Mason opposed the Constitution because it failed to secure the people’s right to “the enjoyment of the common law,” and its Supremacy Clause rendered nugatory even those state constitutional provisions that expressly affirmed the common law.

Some anti-Federalist criticism in this vein, however, seemed to presuppose that the natural and customary rights left without explicit textual protection were purely procedural. For example, in one of his “Federal Farmer” essays, Richard Henry Lee made clear his belief that chapter 29 of Magna Carta protected unwritten natural and customary procedural rights and liberties. He also expresses skepticism that these rights will be protected in the absence of enumeration; since the United States was so new, Lee did not believe that Americans would be recognized as holding any fundamental rights by “immemorial usage.”

The Anti-Federalists ultimately won the bill of rights battle, although the Federalists won

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294 ESSENTIAL BILL OF RIGHTS, supra note #, at 291.


296 Lee, supra note #, at 357.
the ratification war. In Massachusetts, New York, and Virginia, three states whose approval was essential for organization of a viable national government, a majority opposed ratification without a bill of rights. The necessary majority in these states was obtained only after pro-ratification forces promised amendment of the Constitution to include a bill of rights once the post-ratification national government was organized. Even so, the ratification margins were dangerously narrow. In all, seven states, including Massachusetts, New York, and Virginia, proposed amendments as part of their ratification; New York, North Carolina, and Virginia included a paraphrase of chapter 29 in their proposed amendments. \[\text{Id.} \]

\[\text{297 Rakove, supra note #, at 188-20.} \]
\[\text{298 Rakove, supra note #, at 125-28.} \]
\[\text{299 Rakove, supra note #, at 122-25.} \]
\[\text{300 Rakove, supra note #, at 113, 114.} \]
\[\text{301 Rakove, supra note #, at 96, 116, 120.} \]
\[\text{302 See Complete Bill of Rights, supra note #, ¶¶ 10.1.2.1 to -.4, at 348-49.} \]

\text{Virginia} (June 27, 1788): “That no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.”

\text{New York} (July 26, 1788): “That no Person ought to be taken [sic] imprisoned, or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law.”

\text{North Carolina} (Aug. 1, 1788): “That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed or exiled, or in any manner destroyed or deprived or his life, liberty, or property but by the law of the land.”
IV. AN ORIGINALIST READING OF THE “DUE PROCESS OF LAW” IN THE FIFTH AMENDMENT

While the early eighteenth century saw Britain slowly moving away from the seventeenth century higher-law constitutionalism of Coke towards the new constitutionalism of parliamentary supremacy, Coke’s higher-law constitutionalism remained highly influential in the colonies. When Britain began to intervene more closely in colonial affairs, the colonists adapted higher-law constitutionalism as a defense to internal British taxation and regulation, as illustrated by arguments of counsel in Paxton’s Case and Robin v. Hardaway which were popularized as the foundation of colonial arguments under the English constitution.

The colonists also adopted the confused seventeenth century notion that the common law reflected the natural law and natural rights, captured in the phrase, “against common right and reason,” which they carried into independence, as is evident in language and structure of the Declaration of Independence. Following independence, they adopted written constitutions that created republican frames of government but which merely declared or guaranteed already existing natural and customary rights. The Federalist defense of the Philadelphia Convention’s near-complete failure to protect such rights in the 1787 Constitution underlined the higher-law belief that such rights were enforceable against federal and state government action independent of any constitutional enumeration or writing. All this is confirmed in post-revolutionary decisions reported after independence.

By 1790, therefore, when Madison set out to draft the Fifth Amendment and the rest of the Bill of Rights, the higher-law constitutionalism of Coke and the English seventeenth century had been adopted, adapted, and embedded in American constitutional thinking. In particular, the notion of the “due process of law” associated with the “law of the land” guaranteed by chapter 29
of Magna Carta was understood to include a residual guarantee of substantive liberty against arbitrary actions of government, including (especially) those of the state legislatures.

A. The Drafting and Ratification of the Due Process Clause

Following ratification and election of the First Congress, James Madison introduced a package of twelve proposed amendments which he had drafted to address state concerns over the Constitution’s lack of a bill of rights. The Due Process Clause was contained one of these proposed amendments:

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.  

Although this proposed amendment underwent significant changes before it was reported out to the states and ratified, there is no record of any discussion of the Due Process Clause itself in any of the ensuing House or Senate committee reports or debates over the proposed amendments. In the House, the Due Process Clause was not implicated in any of the reported discussions or debates. The Senate met in closed session until 1794, so there is no record of Senate floor debate or committee deliberations that might have related to the Due Process Clause.

The proposed amendment containing the Due Process Clause was reported out of the

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303 See 1 CONG. REG. 427-28 (June 8, 1789), reprinted in COMPLETE BILL OF RIGHTS, supra note #, ¶10.1.1.1.a, at 337 (emphasis added).

House on August 24, 1789, and a somewhat different version reported out of the Senate on September 9, 1789. Following House-Senate conference negotiations, the final version of the proposed amendment containing the Due Process Clause was reported to the states as “Article the seventh” in a joint resolution of the House and Senate on September 28, 1789:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; 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, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

The seventh proposed amendment, containing the Due Process Clause, was ratified as the Fifth Amendment to the Constitution on December 15, 1791.

B. “Law” in Late Eighteenth-Century America

1. The Classical Understanding of “Law”

The argument for an exclusively procedural understanding of the Fifth Amendment Due Process Clause implicitly retrojects an anachronistic positivist meaning onto the term “law” in the crucial phrase, “due process of law.” In this positivist understanding, a “law” is any legislative or other governmental act that has satisfied the rule of recognition; in other words, any such act that effects a deprivation of life, liberty, or property necessarily comports with the due process of law because the act that effects the deprivation has satisfied the

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305 COMPLETE BILL OF RIGHTS, supra note #, ¶10.1.1.8, at 340 (emphasis added).
306 COMPLETE BILL OF RIGHTS, supra note #, ¶10.1.1.12, at 342 (emphasis added).
307 COMPLETE BILL OF RIGHTS, supra note #, ¶10.1.1.22, at 348 (emphasis added).
formal requirements for law-making.\textsuperscript{308} Under this reading, Congress complies with the Due Process Clause—that is, it satisfies the “due process of law” in depriving a person of life, liberty, or property—so long as it accomplishes the deprivation by means of a congressional act passed in accordance with the lawmaking provisions of Article I of the Constitution.\textsuperscript{309}

By contrast, classical natural law theory has long assigned normative as well as positivist content to the definition of “law.”\textsuperscript{310} To fall within the meaning of “law” in the classical view, a legislative or other governmental act required more than mere positivist compliance with the rule of recognition; it also needed to be just.\textsuperscript{311} Cicero, for example, maintained that an unjust statute

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\begin{quote}
[I]f one reads the word “law” as late twentieth century speakers use that word . . . [,] then one cannot easily explain how something that has the form of law, and that was enacted in accord with all relevant structural requirements for lawmaking by the relevant juridical entities, is to be treated as something less than “law” simply because its substantive content flunks various tests, either static or evolving, for how lawmakers may regulate various spheres of economic or social life.
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\textsuperscript{309} U.S. Const., art. I, §7, cls. 2 & 3 (providing that a congressional act becomes law when passed by a majority of the Senate and the House, and is signed by the President, allowed to become law without his signature, or reenacted by a two-thirds majority of each of the Senate and the House over a presidential veto.
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\textsuperscript{310} See, e.g., PLUCKNETT, supra note #, at 40 (arguing that the idea of “law which was directly based upon the divine attribute of justice” proved to be both a practical and an intellectual answer to social problems in the middle ages).
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\textsuperscript{311} E.g., CICERO, DE RE PUBLIC & DE LEGIBUS 385 (Cambridge, Mass. & London: Harvard University Press & William Heinemann, Clinton Walker Keyes trans., 1928) (“[I]n the very definition of ‘law’ there inheres the idea and principle of choosing what is just and true.”);
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is not a “law,” even though clearly adopted and accepted by the nation it governs.\textsuperscript{312} Augustine likewise suggested that “a law that is not just is not a law.”\textsuperscript{313} Aquinas formalized this view into the argument that, since law derived its essential character from its conformity to “right reason,” whose “first rule is the law of nature,” a law that violates the natural law “is no longer a law but a \textit{id.} at 317-19 (“[T]he origin of Justice is to be found in Law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.”); \textit{see SOPHIE VAN BIJSTERVELD, THE EMPTY THRONE 239} (Utrecht: Lemma, 2002) (observing that natural law theorists “adopt the view that there is more to law than the authoritative and correct establishment of a rule and the content of such rule. There are ‘higher’ truths or values which a concrete rule, as it has been adopted, must reflect and adhere to’’); \textit{id.}, at 15-16 (referring to the ancient and medieval idea that natural law is “a standard of good law, ultimately superseding actual law”); Philip Soper, \textit{In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All}, 20 \textit{CAN. J.L. JURIS.} 201, 205 (2007) (attributing to classical natural law theory the view that positive laws “cannot count as law if they are too unjust”). \textit{Compare JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE 185} (London: Weidenfeld & Nicholson, 1955) (originally published 1832 & 1863, respectively) (criticizing as “stark nonsense” the classical view that “human laws which conflict with the Divine law are not binding, that is to say, are not laws”).

\textsuperscript{312} CICERO, \textit{supra} note #, at 385.

What of the many deadly, the many pestilential statutes which nations put in force? These no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskillful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physician’s prescriptions; neither in a nation can a statute of any sort be called a law, even though the nation, in spite of its being a ruinous regulation, has accepted it. Therefore Law is the distinction between things just and unjust . . . .

\textit{Id.}; \textit{accord id.} at 385-87 (concluding that only “those human laws which inflict punishment upon the wicked but defend and protect the good” are properly called laws, and that “we must not consider or even call anything else a law”).

\textsuperscript{313} ST. AUGUSTINE, \textit{ON FREE CHOICE OF THE WILL}, bk. i, ques. V, at 11 (Indianapolis, Ind.: Bobbs-Merrill, Anna S. Benjamin & L.H. Hackstaff trans. 1964) (Defending laws that justify killing in self-defense or as part of a military force, Augustine declares, “We shall not, shall we, dare say that these laws are unjust—or rather, are not laws at all, for I think that a law that is not just is not a law.”).
corruption of law.”

The classical natural law tradition was still vibrant in late eighteenth century America, when the Fifth Amendment was drafted and ratified, and term “law” had not yet acquired the almost entirely positivist connotation that it carries today. To call a legislative act a “law” during that era did not mean that the act merely satisfied constitutional requirements for law-making, but rather signified that it conformed to substantive limitations on legislative power represented by natural and customary rights. Legislative acts that violated these limitations would not have


[L]aws may be unjust in two ways. First, by being contrary to human good . . . , either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive not to the common good but rather to his own cupiditiy or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws, because, as Augustine says, “that which is not just seems to be no law at all.”

Id. (emphasis in original); accord CICERO, supra note #, at 317-19.

Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law. [] Now if this is correct . . . , then the origin of Justice is to be found in Law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.

Id.; see also RÉMY BRAGUE, THE LAW OF GOD 221 (Chicago: University of Chicago Press, 2007) (attributing to Aquinas the view that “the law cannot be reduced to a commandment that would merely be the imposition of a will. The law is rational and, at least within itself, intelligible”).

been considered “laws,” even when they satisfied the constitutional requirements for law-making. 316 Such acts might have given “due process,” in other words, but the process owed and given would not have been a process of law. 317 Under this reading, the Due Process Clause required that a congressional deprivation of life, liberty, or property be accomplished by a “law,” and to be a “law,” a congressional act must not have exceeded the limits of legislative power.

[T]he historical evidence strongly points toward the conclusion that, at least by 1868 even if not in 1791, any state legislature voting to ratify a constitutional rule banning government deprivations of “life, liberty or property without due process of law” would have understood that ban as having substantive as well as procedural content, given that era’s premise that, to qualify as “law,” an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and evenhandedness.

*Id.*

316 *Cf.* Harrison, *supra* note #, at 525-26 (describing but not endorsing this definition of “law”).

317 *See, e.g.*, II(2) William Winslow Crosskey, Politics and the Constitution in the History of the United States 1151 (Chicago: University of Chicago Press, Midway Reprint 1978) (1953) (describing without endorsing argument that the “due process” prescribed by an invalid legislative act, “though it might be ‘due process of’ something or other, could not be ‘due process of law,’” because what was being enforced by the ‘process’ was not ‘law’”) (emphasis in original); Harrison, *supra* note #, at 525 (similarly describing without endorsing argument that if “all deprivations of life, liberty, and property must be with due process of law and if some purported source of authority for a deprivation is not law, then it is possible to say that the deprivation was without due process of law.”); Christopher Wolfe, The Original Meaning of the Due Process Clause, in The Bill of Rights 213, 224 (Charlottesville: University Press of Virginia, Eugene W. Hickock, Jr. ed., 1991) (describing argument that emphasis on the “law” of “due process of law” suggested that “[i]f the law under which one is being deprived of life liberty or property turns out not to be a law really–if it lacked some essential element of law–then it might be argued that such a law violated the due process of clause and that punishment under it (deprivation of life, liberty, and property, was invalid, prohibited”).

Professor Crosskey rejected this reading outright, although his analysis was focused on the meaning of the Due Process of Clause of the Fourteenth rather than the Fifth Amendment. *See* II(2) Crosskey, *supra* note #, at 1151. Professor Harrison similarly concludes that this is an implausible reading of the Due Process Clause of either Amendment. *See* Harrison, *supra* note #, at 530-34. Professor Wolfe, by contrast, finds this reading a plausible one, though not the most plausible one. *See* Wolfe, *supra* note #, at 224-26.

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marked by natural and customary rights.

2. Post Independence Authorities and the Classical Understanding of “Law”

Legal dictionaries from the late eighteenth century repeated Aquinas’s argument nearly verbatim, reasoning that because “laws” derive their obligatory force from their conformity to the natural law, those which do not so conform fall outside the definition of “law.”

Echoing Aquinas, and notwithstanding his ideas about Parliamentary supremacy, Blackstone concluded that there is no obligation to obey human laws that violate the natural law, since such laws have no validity or force. Indeed, even in eighteenth century England,

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318 E.g., “Law,” in T.E. Tomlin, The Law-Dictionary 89 (New York & Phila.: Riley & Byrne, 1st Am. ed. 1811) (“All Laws derive their force a lege naturæ; and those which do not, are accounted as no Laws. No Law will make a construction to do wrong.”) (emphasis in original) (citation to Fortescue omitted); “Law,” def. 2, in Giles Jacob, New Law Dictionary (London: Woodfall & Strahan, 8th ed. 1762) (same); accord John Milton, Defence of the People of England (16**), 6 Milton’s Prose Works 204 (1851) (appealing to “that fundamental maxim in our law, by which nothing is to be counted a law, that is contrary to the law of God, or of reason”), quoted in I James Bradley Thayer, Cases on Constitutional Law with Notes 51 n. (Cambridge, Mass.: Charles W. Sevier, 1895).

319 See Soper, supra note #, at 201.


321 I Blackstone, supra note #, §2, at 42, 43.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. If any human law should allow or enjoin us to commit [a violation of divine or natural law], we are bound to transgress that human law, or else we must offend both the natural and the divine.

Id.

322 I Blackstone, supra note #, §2, at 41 (“This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this.”).
there were members of Parliament who argued that the more extreme acts passed by Parliament to regulate and punish colonial intransigence were not “law” even though properly enacted.²²³

The classical understanding of law is implicit in the ubiquitous language of nullity and voidness that runs throughout late-eighteenth century judicial decisions and arguments of counsel involving legislative acts held to have violated natural or customary rights.²²⁴ Then as now, a void law had no existence; it made sense to think of it as never having been a “law” at all. This understanding was sometimes even made explicit.

For example, the classical theory’s normative definition of “law” is expressly invoked in *Van Horn’s Lessee v. Dorrance*, a case involving a boundary dispute between Pennsylvania and

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²²³ See 4 Reid, *Constitutional History*, *supra* note #, at 29-33.

²²⁴ For judicial opinions, see Ham v. McLaws, 1 S.C. (1 Bay) 93, 1789 WL 140, at *3 (S.C. Comm. Pl. 1789) (observing that “statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, *as far as they are calculated to operate against those principles,*” and declining to apply statute prohibiting importation of slaves which was enacted while defendants were en route to state on the high seas, because such application “would be **evidently** against **common reason**” (emphasis in original); Bowman v. Middleton, 1 S.C. (1 Bay) 252, 1792 WL 207, at *2 (S.C. Comm. Pl. 1792) (holding that legislative act resolving boundary dispute by vesting title in one of the parties was “*ipso facto* void” because it violated Magna Carta and “common right”) (emphasis in original); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, [18ff.] (1800) (presupposing without exercising judicial power to declare a state law “void” as contrary to state and/or federal constitution) (separate opinions of Washington, Chase, Paterson & Cushing, JJ.).

For arguments of counsel, see *Paxton’s Case*, Quincy, App. I-D, at 474 (“As to Acts of Parliament, an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void.”) (argument of James Otis); Robin v. Hardaway, Jeff. 109, 1772 WL 11, at *5 (Va. Gen’l Ct. 1772) (“[A]ll acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.”) (argument of George Mason); Cooper v. Telfair, 4 U.S. (4 Dall.) 14, [18ff.] (1800) (“If a law is contrary to the constitution, the law is void.”) (argument for Plaintiff); Trustees of the Univ. of N.C. v. Foy, 3 N.C. (2 Hayw.) 310, 1804 WL 897, at *8 (N.C. L. & Eq. 1804) (arguing that a legislative act divesting state university of title to property lawfully conveyed by prior legislative act “is against the constitution and void”) (argument of John Haywood).
Connecticut which the states settled by legislatively vesting title to disputed property in certain claimants at the expense of others. The disappointed claimants challenged the settlement act in the federal circuit trial court in diversity. Justice Paterson charged the jury that the legislature’s act of “divesting one citizen of his freehold, and vesting it in another, without a just compensation” was “void” because it violated natural and customary rights. This meant, he explained, that the settlement act “never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made.”

The classical view is also explicit in *Marbury v. Madison*. Chief Justice Marshall famously held in *Marbury* that “an act of the legislature, repugnant to the constitution, is void.” Immediately thereafter, as he introduced the question whether courts are bound to enforce an unconstitutional law, Marshall expressly assumes that a legislative act found to be void because of its inconsistency with the constitution, is not really a “law”: “If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, *though it be not law, does it constitute a rule as operative as if it was a law*?”

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325 Van Horne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 204, 28 F. Cas. 1012, 1015, 1018 (C.C.D. Pa. 1795) (holding that legislative act “void” because it was “inconsistent with the principles of reason, justice and moral rectitude,” “incompatible with the comfort, peace, and happiness of mankind,” “contrary to the principles of the social alliance in every free government,” and “contrary to the letter and spirit of the [state] constitution”; in short, “what every one would think unreasonable and unjust in his own case”).

326 5 U.S. (1 Cranch) 137 (1803).

327 5 U.S. (1 Cranch) at 177.

328 5 U.S. (1 Cranch) at 177 (emphasis added).

Later in *Marbury*, however, Marshall uses the term “law” more loosely, as if it included
Finally, the classical understanding of “law” is clearly evident in state judicial condemnations of the positivist construction of “law” in late eighteenth century decisions construing the meaning of the “law of the land.” These decisions are illustrative of the original meaning of the Due Process Clause because late eighteenth Americans understood the meanings of the “due process of law” and the “law of the land” to be virtually identical.329 “If the lex terrae meant any law which the legislature might pass,” declared one judge in Lindsay v. Commissioners, “then the legislature would be authorized by the constitution, to destroy that right, which the constitution had expressly declared, should be inviolably preserved. This is too absurd a construction to be a true one.”330 Likewise, two judges in Zylstra v. Corporation of Charleston emphatically held that a city charter which permitted the levying of fines without trial by jury could not be considered part of the “law of the land” even if authorized by the legislature:

How then can a law be valid, which constrains a citizen to submit his person and his property, to a tribunal that proceeds to give judgment on both, without the intervention of a jury? Does [sic] these words of the constitution ‘or by the law of the land,’ authorize it? Do they mean any law which may be passed, directing a different mode of trial? Such a construction would be incompatible with the declaration of this privilege; it would be taking away all the security which that intended to give it; it would do more, it would be making the constitution itself authorize the means of destroying a right which it afterwards declares shall be inviolably preserved. For if a law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature.331

unconstitutional as well as constitutional legislative acts. See, e.g., id. at 178 (posing the question, “if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case,” whether “the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law”).

329 See note 262 [Draft #20, p. 68] & accompanying text supra.


The author of this opinion cited its reasoning in a later case as the basis for invalidating a municipal taking. 332 North Carolina v. Foy similarly rejected the positivist construction when it invalidated a state legislature’s unilateral revocation of title to property which the legislature had previously conveyed, reasoning that if the protections of the “law of the land” guaranteed by the North Carolina constitution did not bind the legislature because the legislature was empowered to alter the “law of the land” at will, the clause would be rendered a nullity. 333


If the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared, should for ever be inviolably preserved. This is too absurd a construction to be the true one. He said he understood, therefore, the constitution to mean, that no freeman shall be deprived of his property, but by such means as are authorized by the ancient common law of the land.

*Id.*; cf. Currie’s Administrator v. Mutual Assurance Society, 14 Va. (4 Hen. & M.) 315, 346-47 (1809) (per Roane, J.) (rejecting argument of counsel that “the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable,” and warning that such a conception of untrammeled legislative power would “lay prostrate, at the footstool of the legislature, all our rights of person and property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted); Trustees of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 579-81 (1819) (argument of Daniel Webster) (arguing that the meaning of New Hampshire’s “law of the land” clause included the recognition that “[e]verything which may pass under the form of an enactment, is not . . . to be considered the law of the land”).


I have heard it argued, that as the Legislature can make the law of the land by passing an act for that purpose, that therefore this clause of the bill of rights, if taken as restrictive of their power, is of little or no effect. And can there be a stronger argument to prove that the term *law of the land*, has some other meaning?

... The meaning then of the term we are considering, was, that a man should not be deprived
Perhaps the clearest statement of the classical understanding of “law” is the oft-quoted dictum of Justice Chase in *Calder v. Bull*, a United States Supreme Court decision handed down in 1798, only seven years after ratification of the Fifth Amendment.  

In *Calder*, the Court reviewed a state statute which vacated a probate court’s invalidation of a will and ordered a new trial of the will despite the statute of limitations for appeals having run; the new trial resulted in validation and recording of the will, which was upheld on appeal in the state courts.

The issue before the Court was whether the statute violated the Constitution’s prohibition of *ex post facto* legislation by the states. The Court unanimously upheld the statute, though on varying grounds. Beyond this holding, most of the justices also commented on the limits of

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of his freehold, &c. but by the judgment of a court of justice, regularly constituted and authorised to decide what the law is, and to pronounce it in cases coming before them: which court shall ascertain facts by the verdict of a jury, where proper; or where that would be improper, but such other means as the law has appointed. How different is this from the idea which makes every act of the Legislature a law of the land, and vests in them the arbitrary and despotic power of prostrating all those rights so dear to mankind whenever they please! The term, law of the land, had a precise legal meaning when used by the [North Carolina Constitutional] Convention, and signified the lawful proceedings of the proper tribunals of the country.

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If then the Trustees of the University be considered in the light of individuals, or of a common corporation, the property which they had acquired could not be affected by any act of the Legislature; nor could it be taken from them, but by the judgment of some proper court, having sufficient jurisdiction, and proceeding, according to the known and established law of the land.

*Id.* (emphasis in original).

334 3 U.S. (3 Dall.) 386 (1798).

335 U.S. CONST., art. I, §9. cl.3.

336 3 U.S.(3 Dall.) at 386-87.
legislative power generally. Justice Chase opined that the protection of natural and customary rights was the very purpose of state constitutions, and would be subverted if state legislative power was not subject to natural and customary law limits, regardless of whether such limits were written into the positive law of the state constitutions:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence.

After making the Lockean argument that legislative power is limited by the social contract, Chase emphasizes that such limits are not exhausted by written constitutional restraints or other positive law enactments, and reiterates that the principal purpose of both federal and state government is the protection of natural and customary rights:

There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.

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337 See POWELL, supra note #, at 102 (arguing that one issue in Calder was whether constitutional interpretation was restricted to “exegesis” of the constitutional text or might include “other sorts of political arguments”)

338 The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit.

339 3 U.S.(3 Dall.) at 386-87. Here and elsewhere, Chase makes clear that his argument applies equally to the congressional and state legislative action. See id.
As examples of acts beyond proper legislative authority, Chase suggests a law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.

Chase then directly invokes the classical view, arguing that because such actions violate natural and customary rights, they are not “law” even when enacted pursuant the constitutionally prescribed procedures for law-making: “An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” Chase ends with an explicit appeal to higher-law constitutionalism, echoing the Federalist arguments that a federal bill of rights was unnecessary because natural and customary rights were not displaced by the Constitution: “The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.”

Justice Chase’s famous invocation of the classical understanding was directly challenged by the equally famous dictum of Justice Iredell in the same case. Consistent with the

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340 3 U.S.(3 Dall.) at 386-87 (emphasis added).

341 3 U.S. (3 Dall.) at 387. Compare The Federalist No. 44, supra note #, at 301 (Madison).

Bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters.

Id. (emphasis added).
undeveloped understanding of the separation of powers in the seventeenth century, Iredell first argued that legislative superintendence of the courts by the kind of private statute at issue in Calder was unremarkable. Early in the eighteenth century, it was common to think of legislatures as a kind of “court”—to this day the Massachusetts legislature is called the “General Court”—and thus to think of courts as a subdivision of the legislature. Iredell noted that this conceptualization of the legislative and judicial powers was already outdated by the 1790s, but he was willing to recognize it in Calder as the established usage and custom of Connecticut.

Second, Iredell argued that the only judicially enforceable limits on legislative power were those positively enacted into a constitutional text:

If . . . a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.

Iredell’s support for this conclusion that natural, customary, or other unwritten limits on legislative power are not cognizable by the courts is none other than Blackstone’s doctrine of parliamentary supremacy:

It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament, which should authorise a man to try his own

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342 See notes 218-19 [Draft #20, p. 59] and accompanying text supra.

343 See 3 U.S. (3 Dall.) at 398. A similar conflation of legislative and judicial power was also assumed by Justices Paterson and Cushing. See id. at 395-97 (opinion of Paterson, J.); id. at 400-01 (opinion of Cushing, J.).

344 3 U.S. (3 Dall.) at 398.

345 3 U.S. (3 Dall.) at 398.
cause, explicitly adds, that even in that case, ‘there is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no.’

The historical context of the 1790s when Justice Iredell wrote this dictum suggests that Chase’s position was far more widely held. Blackstone’s doctrine was a consequence of constitution of sovereign command, asserted by George III and the parliamentary majority in support of their governance of the colonies, and resisted by the colonists by their reliance on the higher-law constitutionalism of Coke and seventeenth century England. As I have shown, post-independence state constitutions, arguments of counsel, and judicial decisions make clear that higher-law constitutionalism remained the conceptual foundation of American constitutional thinking through the founding era. Indeed, it was precisely the anarchic consequences stemming from state legislatures that believed their power to be absolute that lead to the Philadelphia convention.

Iredell’s position, moreover, was largely rejected by state constitutional decisions of the period, which generally held that the “law of the land” signified natural and customary rights that constrained legislative action and could not be altered by the ordinary exercise of legislative

346 3 U.S. (3 Dall.) at 398-99.

347 See FRIEDMAN, supra note #, at 106-07; WOOD, supra note #, at 319.

348 See Barnette, supra note #, at 30 n.122 (noting that James Wilson’s lectures at the University of Pennsylvania “undermine the claim that, by the time of the Constitution, Americans had lost their Lockean and revolutionary ardor for natural rights in favor of a more Blackstonian positivism that favored legislative supremacy”).
power. Only two reported decisions even mention the positivist understanding of legislative supremacy argued by Iredell in his dictum, except to ridicule and reject it. Towards the end of its opinion in *Rutgers v. Waddington*, the court remarked that it was not necessary to question the “supremacy of the Legislature,” observing that “if they think fit positively to enact a law, there is no power which can controul them.” This statement seems to be an acknowledgment of the positivist understanding of law argued by Blackstone; indeed, the court was probably quoting Blackstone to the effect that a “law” is whatever the legislature positively enacts, subject to no other definitional constraints.

The court’s holding in *Rutgers*, however, suggests the opposite. The court decided the case under the law of nations—a branch of the natural law—because the statute was subject to the common law, and the common law included the law of nations. Notwithstanding appearances to the contrary, *Rutgers* held that positive law must be construed so that it does not violate the common law, thereby implicitly rejecting the positivist understanding.

The second case, *State v. _____*, involved a challenge to a North Carolina statute that permitted the Attorney General to obtain judgments against debtors owing money to the state without notice or trial on the validity of the debt. An initial motion by the state’s attorney for judgment under the statute was denied on the ground that the statute violated North Carolina’s

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352 I HAMILTON LAW PRACTICE, supra note #, at 399-415.

law of the land clause by depriving the debtor of his customary rights to notice and jury trial before judgment.\textsuperscript{354} The state’s attorney moved for judgment again the next day, this time supporting his motion with a detailed argument that the “law of the land” clause in both \textit{Magna Carta} and the state bill of rights prohibited only deprivations imposed by “foreign” law or royal prerogative.\textsuperscript{355} The attorney emphasized that the law of the clause did not bind the legislature, that the “law of the land” of North Carolina included legislative acts, and finally, echoing Blackstone, that the legislature had full power to amend or alter the common law as it saw fit (including, presumably, the power to eliminate the customary rights of notice and trial prior to judgment).\textsuperscript{356} The court denied the motion again, on the same grounds.\textsuperscript{357}

Undaunted, the state’s attorney moved for judgment yet again a few days later, though before two different judges, on the same grounds. Judge Ashe indicated that he had “very considerable doubts” about the state’s position, but was deferring to the confident opinion of his colleague that the statute was sound. Accordingly, Judge Ashe announced judgment for the Attorney General under the statute, though he confessed—in words that no doubt still resonate with judges everywhere—that “yet he did not very well like it.”\textsuperscript{358}

\textsuperscript{354} State v. _____, 1794 WL 87, at *1 (quoting N.C. Bill of Rights, Art. 12) (“‘No freeman ought to be taken, imprisoned or disseised of his freehold, liberties, or property, &c. but by the law of the land’; and these words mean, 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 [before a jury].”).

\textsuperscript{355} State v. _____, 1794 WL 87, at *2.

\textsuperscript{356} State v. _____, 1794 WL 87, at *2.

\textsuperscript{357} State v. _____, 1794 WL 87, at *3.

\textsuperscript{358} State v. _____, 1794 WL 87, at *3. The following is the reporter’s full account of Ashe’s announcement of the court’s judgment:
Whatever precedential value was represented by *State v. ____* evaporated when another North Carolina court adopted the classical view of “law” in holding the exact opposite little more than a decade later. *Foy v. Trustees of the University of North Carolina* involved a challenge to a state statute enacted in 1789, which provided that the operation of the University of North Carolina would be funded by statutorily granting the University title to “all the property that has heretofore or shall hereafter escheat to the state.”\(^{359}\) In 1800, however, the legislature had second thoughts. It repealed the prior funding act, held void the title to all property that the prior act had vested in the University, and statutorily re vested title in the state; unsurprisingly, the University challenged the constitutionality of the repeal statute under, *inter alia*, the law of the land clause in North Carolina’s bill of rights.\(^{360}\) The state’s attorney argued the position taken by the state in *State v. ____*, that the law of the land clause “does not impose any restrictions on the Legislature, who are capable of making the Law of the Land . . . .”\(^{361}\) The court flatly rejected this position, noting that it would bind the courts to the will of the legislature, “whether agreeable

Judge Ashe gave the opinion of the court, saying he and Judge Macay had conferred together— that for himself 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.*


\(^{361}\) *Foy*, 1805 WL 172, at *12.
to their ideas of justice or not,” and would render the law of the land clause “a dead letter.”

Concluding that the clause “is applicable to the legislature” and must have been “intended as a restraint on their acts,” the court went on to hold that it precluded the University from being deprived of its “liberties and property, unless by a trial by Jury in a court of Justice, according to the known rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution.”

By the time Foy is decided in 1805, therefore, the classical understanding of “law” argued by Justice Chase in Calder v. Bull was well established in the United States as one of the commonly used definitions of “law,” and was reflected in the frequent references to voidness in constitutional decisions of that era. The classical understanding had also been expressly invoked in the majority opinions of one state and two federal courts, including the U.S. Supreme Court. Finally, two state court seriatim opinions had used the classical understanding as a premise in rejecting the positivist argument that state legislatures had unrestricted power to alter the “law of the land” by ordinary enactment. By contrast, the only judicial authority clearly

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362 Foy, 1805 WL 172, at *12.

363 Foy, 1805 WL 172, at *12; see also id. (stating that the University’s property was not subject to “the arbitrary will of the Legislature” even though held in trust for the general good).

364 See text accompanying notes 318-23 [Draft #20, pp. 87-88] supra.


adopting the positivist construction of “law” argued by Justice Iredell in Calder is the opinion reluctantly announced by the court in State v. ____ , and fatally undermined a decade later by Foy. On balance, then, the late eighteenth century legal authorities strongly support the position that the classical natural law of “law” was widely held in the 1790s.

Against the backdrop of colonial adoption and adaptation of Coke’s higher-constitutionalism in the pre-Revolutionary era, the drafting and ratification of the 1787 Constitution and the 1791 Due Process Clause of the Fifth Amendment, together with decisions reported during the period immediately before and after ratification, provide strong evidence that the “due process of law” was originally understood to include expression of judicially enforceable substantive limitations on congressional power, and not just a requirement of minimum procedures.

C. Arguments against an Original Meaning That Includes Substantive Due Process

Of the contemporary commentators who reject substantive due process as part of the original meaning of the Due Process Clause of the Fifth Amendment, only a few have seriously examined the question, and of these only one has engaged the argument that the original meaning of due process included the classical understanding of “law” from the natural law tradition.

The counter-arguments are based on history and linguistic context. Professor Wolfe

1794) (per Waities, J., joined by Bay, J.).

368 See BERGER, GOVERNMENT BY JUDICIARY, supra note #; MEYER, supra note #; Berger, “Law of the Land”, supra note #; Harrison, supra note #; Wolfe, supra note #.

369 Although several commentators mention the classical view, see, e.g., II(2) CROSSKEY, supra note #; Wolfe, supra note #; only Professor Harrison gives it more than cursory examination before rejecting it, see Harrison, supra note #.
concludes that a broad, substantive understanding of the Due Process Clause was plausible in the late eighteenth century based upon the classical understanding, but ultimately rejects this understanding in favor of a narrower, procedural one, because (in his view) the historical evidence supporting the substantive understanding comes “well after the founding,” and the Due Process Clause is placed in the midst of procedural guarantees within the text of the Bill of Rights.370

Ms. Meyer contends that the original understanding of the Due Process Clause in the late eighteenth century is identical to the original understanding of chapter 29 of Magna Carta in the early thirteenth century—that is, both merely guaranteed that a trial be held according to generally applicable procedures prior to judgment and imposition of a criminal penalty.371 She further contends that those who held a broader substantive understanding of the guarantee of due process were mislead by Coke’s mistaken reading of chapter 29.372 Professor Jurow makes a

370 Wolfe, supra note #, at 227.

Professor Wolfe also appeals to the lack of a ratification controversy over the Due Process Clause which, he contends, would have been “inconceivable” if the Clause had been understood as a “broad guarantee against arbitrary government,” since that understanding would have been much broader than the original understanding of chapter 29 of Magna Carta on which the Due Process Clause was modeled. Wolfe, supra note #, at 227. This argument largely begs the question of the original meaning of the Clause. The promise of a Bill of Rights was a Federalist tactic to secure ratification of the original Constitution by placating Antifederalist fears of national power. If the Due Process Clause was originally understood to include a general guarantee against substantive deprivations of natural and fundamental customary rights by the national government, then its addition to the Constitution would probably not have provoked controversy among Antifederalists, whose fear of national power the Bill of Rights was designed to placate, or the Federalists, who thought the Bill of Rights unnecessary and redundant. See text accompanying notes 277-83 infra.

371 MEYER, supra note #, at 128, 149.

372 MEYER, supra note #, at 137-38.
similar argument about thirteenth century meaning, but is more tentative about its relevance to
contemporary understanding of due process.\footnote{Jurow, \textit{supra} note #, at 266 (noting that it may not matter to Supreme Court doctrine if Coke’s equation law of the land and due process of law was historically incorrect).}

Professor Berger gives the most detailed consideration of the relevant judicial
precedents, distinguishing or otherwise rejecting the authority of every late eighteenth century
decision that might support a substantive reading of the Clause.\footnote{See Berger, \textit{“Law of the Land”}, \textit{supra} note #, at 14-20.}

Finally, Professor Harrison expressly rejects the classical understanding of “law” as
wholly implausible, focusing entirely on other usages of “law” in the 1787 constitutional text that
are inconsistent with the classical understanding, particularly those in the Contracts, Ex Post
Facto, Presentment, and Supremacy Clauses.

1. Counterarguments from History

a. \textit{Thirteenth Century Meaning}. Ms. Meyer and Professor Jurow
make persuasive cases that the original thirteenth century understanding of the “due process of
law,” if not the “law of the land,” was entirely and narrowly procedural, requiring merely that the
king follow well-established common law procedures before enforcing feudal or criminal
penalties.\footnote{See MEYER, \textit{supra} note #, at 135; Jurow, \textit{supra} note #, at 265-79; accord Whitten, 
\textit{supra} note #, at 742, 43 (concluding that “due process of law” merely referred to the regular,
common law procedure by which persons were summoned to answer and defend prosecutions
and lawsuits that threatened life, liberty, or property).} Professor Berger additionally argues that the “law of the land” was originally
understood to apply only to the king and his agents—an indisputable proposition, since no
Parliament or other such legislative entity was even contemplated in 1216. Coke is usually
blamed for this confusion.\footnote{\textit{See, e.g.}, \textsc{Berger, Government by Judiciary, supra note #, at 226 Meyer, supra note #, at 130, 137, 140; Berger, \textit{Law of the Land}, supra note #, at 5; Jurow, supra note #, at 271-72, 277-79; Whitten, \textit{supra} note #, at 741.}

Meyer uses her conclusion that the English understanding of the law of the land was entirely procedural as the premise to an argument that substantive due process is historically unjustified.\footnote{\textsc{Meyer, supra note #}, at 127.} Berger uses his conclusion that the “law of the land” bound only the executive to dismiss two important late eighteenth century judicial authorities which relied on the classical understanding of “law” to impose limits on state legislative authority.\footnote{\textsc{Berger, Law of the Land, supra note #, at 18 (rejecting the authority of Bowman v. Middleton (1792) because it applied Magna Carta to legislative acts); \textit{id.} at 19-20 (same with respect to University of North Carolina v. Foy (1805)); \textit{see also id.} at 24 (criticizing \textit{Foy} for erroneously applying the \textit{lex terrae} to the legislature, “a reading unmistakably contradicted by history”); \textit{id.} at 30 (characterizing as “poorly reasoned” state court decisions that refused to recognize that “Magna Carta had never been applied to override statutes”).}

Both Meyer and Berger rely on the mistaken premise that the original understanding must also be an accurate historical understanding. But originalism 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 that the Constitution was drafted and ratified. Even if Berger’s and Meyer’s historical analyses are correct—that is, even if the law of the land clause of chapter 29 was indeed understood in 1216 to protect only certain common law rights to judicial process, and then only against royal encroachment—this says almost nothing about how the American public understood “law,” the “law of the land,” and the “due process of law” nearly 600 years later.

It is clear that Coke equated the law of the land with the due process of law, and that he
understood both to have imposed substantive limitations on actions of the crown. Revolutionary Americans adopted these propositions wholesale, and carried into them into independence and beyond. It is less clear whether Coke really thought that the law of the land bound Parliament, as Bonham’s Case seems to have suggested, but revolutionary Americans insisted that it did, and that is all that matters. 379 Whether the law of the land was originally understood to have a procedural dimension that bound the legislature, whether Coke correctly stated the original thirteenth century meaning of the law of the land and the due process of law, whether late eighteenth century Americans correctly understood and applied Coke, whether the wholesale adoption of Coke by Americans ultimately led them down a path of historically unwarranted understandings of both phrases—these questions are all irrelevant to how Americans in fact understood the phrase “due process of law” in the late eighteenth century.

b. Belated Judicial Authority. Although Professor Wolfe ultimately rejects any substantive understanding of the Due Process Clause as part of its original meaning, 380 he does acknowledge a line of cases that “gave a broader reading to ‘due process of law’” by defining “law” in accordance with the classical view. 381 Wolfe mentions “widespread agreement” that a legislative act had to be generally applicable to be properly within the definition of “law” in early American jurisprudence, and suggests “taking from A and giving to B” as the paradigmatic example of an act lacking generality and thus the character of “law.”

379 See Whitten, supra note #, at 742; see also Levy, supra note #, at 4 (noting that American views on law, religion, and political theory were informed by “a highly selective and romanticized image of seventeenth-century England, and they perpetuated it in America even as England changed”).

380 Wolfe, supra note #, at 217, 222.

381 Wolfe, supra note #, at 224.
then traces the various incarnations of the classical view in the early nineteenth century, conceding that “there is some historical evidence which could be used to support a broader reading of the due process clause.” However, he rejects a broader substantive reading of the Due Process Clause based upon the classical view because, he maintains, judicial precedent supporting these broader readings comes “well after the founding.” Professor Harrison makes a similar argument.

Wolfe and Harrison are simply wrong. While the cases Wolfe discusses are indeed all from the nineteenth century, he ignores the wealth of eighteenth century precedent in the years preceding and following the 1791 ratification of the Fifth Amendment. *Robin v. Hardaway* (1772), *Butler v. Craig* (1787), *Ham v. McLaws* (1789), *Bowman v. Middleton* (1792), *Van Horne’s Lessee v. Dorrance* (1792), *Zylstra v. City of Charleston* (1796), *Lindsay v. Commissioners* (1796); *Calder v. Bull* (1798), and *Marbury v. Madison* (1803), all support that judges and attorneys during that period understood the meaning of “law” to include a fundamental normative dimension as prescribed by classical natural law theory and higher-law constitutionalism. Presumably these were the cases Wolfe had in mind when he referred to a

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384 Harrison, *supra* note #, at 530.

385 See Wolfe, *supra* note #, at 222-27 (discussing Trustees of the Univ. of N. Carolina v. Foy (1804); Bank of Wheaton v. Okely (1819); Taylor v. Porter (1843); Dartmouth Coll. v. Woodward (1819); Murray’s Lessee v. Hoboken Land Improv. Co. (1856); Wynehammer v. New York (1856); Scott v. Sanford (1857); Davidson v. New Orleans (1878); Hurtado v. California (1884)).

broader substantive reading of due process among the “early American courts,” though he does not provide a citation.\(^{387}\) Professor Harrison makes the identical error, dismissing the historical support for substantive due process almost entirely on the basis of authorities from the early nineteenth century or later; except for Justice Chase’s opinion in *Calder v. Bull*, Harrison, like Wolf, does not even mention, let alone discuss, the many eighteenth century authorities that invoked the classical understanding of law.\(^{388}\) Of course, neither Wolfe’s nor Harrison’s arguments on this point can be credited without their taking the eighteenth century decisions into account.\(^{389}\)

2. Counter-arguments from Context.
   a. *Usage in the 1787 Constitutional Text.* Professor Harrison gives the classical understanding of “law” the most extended treatment,\(^{390}\) though most of his discussion of the Fifth Amendment Due Process Clause is conceptual rather than historical, and none of it is originalist. He focuses virtually all of his discussion on the question whether there exists a contextual basis for believing that the Due Process Clause imposed substantive constraints on the definition or content of “law.”\(^{391}\)

\(^{387}\) Wolfe, *supra* note #, at 224.

\(^{388}\) See Harrison, *supra* note #, at 530 (mentioning but not discussing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.)).

\(^{389}\) See Wolfe, *supra* note #, at 226, 227.

\(^{390}\) See Harrison, *supra* note #, at 525 (“Maybe the word ‘law’ is the key. If all deprivations of life, liberty, and property must be with due process of law and if some purported source of authority for a deprivation is not law, then it is possible to say that the deprivation was without due process of law.”)

\(^{391}\) Harrison, *supra* note #, at 527, 529-30.
Harrison first observes that the classical understanding of “law” is directly contradicted by Article I, which defines as “law” any act of Congress passed by both houses of Congress and then signed by the President, allowed to become law without his signature, or re-enacted by a two-thirds margin after presidential veto. He also notes that the term “law” is used in basically its positivist sense in the Ex Post Facto and Supremacy Clauses. “Nowhere,” declares Harrison, “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.” Harrison concedes that the term “law” might have two senses, one positivist and one normative, but rejects this as confusing and irrational:

In drafting an amendment to a document that already said that an act of Congress is both a law and the law, no sensible person would try to convey that some acts of Congress are to be disregarded by asking the reader to infer that they are not law, even if there is a different sense of law to which the drafter might be appealing. Such a maneuver is too

Harrison acknowledges the possibility that legislation might not be “law” if it lacks certain formal characteristics, such as “generality, prospectivity, publicity, [or] intelligibility,” but ultimately concludes that it is difficult to squeeze “most of substantive due process” out of a formal concept of law. Harrison, supra note #, at 525.

Harrison, supra note #, at 530-31 (arguing that according to the classical understanding of “law,” the Due Process Clause “requires the courts to refuse to effect deprivations based on acts of Congress that are not law. The Constitution, however, indicates that there are no such acts of Congress,” because Article I unambiguously declares any congressional act that conforms to the requirements for law-making is “a Law”); accord Hyman, supra note #, at 12, 16 (arguing that the use of “law” in the Presentment and Supremacy Clauses is a positivist one that encompasses any congressional action that satisfies the formal constitutional requirements set forth in Article I).

See U.S. Const., Art I, §9, cl.3 (“No Bill of Attainder or ex post facto Law shall be passed.”) (emphasis added); id., Art. VI, cl.2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”) (emphasis added).

Harrison, supra note #, at 531; accord Hyman, supra note #, at 16.
confusing and too unlikely to be understood to attribute to a rational author.395

He makes particular reference to the Supremacy Clause’s use of the term, “law of the land,” in this regard:

Acts of Congress and treaties, the nonconstitutional sources of federal law, are not just the law of the land, but “the supreme Law of the Land.” Deprivations pursuant to them are pursuant to the “law of the land.” To deny this would be to assert that an entire phrase has different meanings when used in the Supremacy Clause and the Fifth Amendment. No rational person drafting this hypothetical Fifth Amendment, seeking to impose limitations on the legislature, would use words that already appear in the original document and hope to give them a new meaning.396

In sum, concludes Harrison, “law” should be understood in the Due Process Clause in the essentially positivist manner in which it is deployed elsewhere in the Constitution—namely, to signify “that which is legally binding,” and not to refer to any normative criterion.397

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395 Harrison, supra note #, at 531-32; accord id. at 532.

[S]ensible drafters [of an amendment containing the Due Process Clause] who wanted to . . . to add a new definition of legislative power or to take away some of the enumerated powers, would say so explicitly. If an amendment’s drafters wanted to change aspects of the Constitution that are already dealt with by fundamental provisions, they would make that clear. Packing it all into the word “law” hardly does that.

Id. Harrison is discussing the Fourteenth Amendment Due Process Clause here, but his conceptual and contextual arguments apply equally to the addition of the Fifth Amendment Due Process Clause to the Constitution in 1791.

396 Harrison, supra note #, at 546-47; accord Hyman, supra note #, at 19 (The Supremacy Clause clearly establishes that the “law of the land” includes “legislative acts.”).

397 Harrison, supra note #, at 547; accord MEYER., supra note #, at 146 (arguing that the “law of the land” in the Supremacy Clause “refers to the laws of the entire land, consisting of federal and state laws, and, among them, the United States Constitution, the acts of Congress made in pursuance thereof and the treaties are ‘supreme’ so as to supersede inconsistent laws of the states”); Hyman, supra note #, at 20 (“[T]he convention in Philadelphia in the summer of 1787 . . . decided what shall be a law and what shall be the supreme law of the land. The Due Process Clause is consistent with that functional definition of ‘law’ in the original unamended Constitution.”).
Initially, one must note that Harrison’s argument is not originalist, but textualist. He draws conclusions about the meaning of the Due Process Clause from how a disembodied and apparently contemporary reasonable person would understand the word “law” in the Constitution and Bill of Rights, not how the public in 1791 understood it. There are multiple explanations why the original understanding of “law” in the 1787 constitutional text says little about the original understanding of law in the 1791 Due Process Clause. First, the drafters of the Fifth Amendment were not intently focused on the how the language of the Due Process Clause would fit with the language of the 1787 Constitution, because they were hardly focused on the Bill of Rights at all. While the participants in the Philadelphia convention were careful indeed in drafting the 1787 Constitution, the members of the First Congress paid little attention to the whole matter of the Bill of Rights. Few members of Congress besides Madison cared about a bill of rights, and even he approached the project as a “nauseous” undertaking triggered mostly by the need to avoid a second constitutional convention. Following the introduction of the proposed amendments in early June 1789, the House did nothing with them until late July, when it referred them to committee only after Madison literally begged for their consideration. The House did not take up the amendments for debate until mid-August, and neither the House

398 FRIEDMAN, supra note #, at 102 (describing the 1787 constitutional text as “marvelously supple, put together with great political skill”).

399 See LEVY, supra note #, at 34; see also id. at 37-38 (noting that Madison’s original plan to place each amendment within the body of the existing Constitution was abandoned because the House did not wish to waste time debating such a “trifling” matter).

400 See LEVY, supra note #, at 12, 34.

401 See LEVY, supra note #, at 35.

402 See LEVY, supra note #, at 37.
nor the Senate spent more than a few days in debate and negotiation of the text before approving
the final version that Congress reported to the states in late September. Judge Bork observed
that the Bill of Rights “appears to have been a hastily drafted document upon which little thought
was expended,” and Professor Smith has aptly called the final product the “casual” Bill of
Rights. It is thus entirely plausible that “law” as used in the Supremacy and Due Process
Clauses might have ambiguous and conflicting meanings.

Second, the inattention to multiple uses of “law” is likely a consequence of the “due
process of law” and the “law of the land” having been understood during the revolutionary and
early independence periods as terms of art—that is, general, “catch-all” phrases prohibiting
arbitrary or otherwise unjust legislation designed to protect the residuum of liberty exemplified
by natural and customary fundamental rights.

Finally, Madison and the First Congress may well have chosen the “due process
formulation for the Fifth Amendment over its “law of the land” equivalent precisely to avoid the

403 See 2 SCHWARTZ, THE GREAT RIGHTS, supra note #, at 1012-66 (legislative history of
the Bill of Rights).

404 Robert Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.
REV. 1, 22 (1971).

405 Steven D. Smith, The Writing on the Constitution and the Writing on the Wall, 19
HARV. J.L. & PUB. POL. 391, 395 (1995); see also id. at 397 (describing how the Bill of Rights
was adopted “hastily, casually, virtually (it seems) without interest or reflection”).

63-66] supra.

“Law” is not the only constitutional term to which one can argue that the framers gave
multiple meanings. “Person” is obviously used differently in the Due Process Clause than it is in
the Fugitive Slave Clause and the other Clauses which euphemistically referred to slaves as
“other persons.”
confusion of positivism and natural rights that is at the center of Harrison’s argument. Professor
Miller explains that the phrase, “law of the land,” in the Supremacy Clause places enacted federal
law—the Constitution, treaties, and federal laws—above state constitutions and laws in the
hierarchy of American law. The context for the term “law” in the Supremacy Clause, in other
words, strongly suggests that it refers only to positive law enactments. “Yet, Magna Carta’s
“law of the land” was not restricted to—in fact probably did not even refer to—positive law, but
rather meant “common law.” This understanding created its own set of drafting problems,
since for the framers the possibility of federal common law jurisdiction, particularly for crimes,
was a controversial and intensely divisive issue in the years immediately after ratification of the
1787 constitutional text. At the same time, federal criminal trials had to be conducted in
accordance with some law. Accordingly, in Professor Miller’s words, “‘due process of law’
was the most appropriate language to use in the circumstances,” to require the conduct of federal
trials in accordance with the procedural requirements of due process, without projecting the
common law onto the meaning of the “law of the land” in the Supremacy Clause.

407 Charles A. Miller, The Forest of Due Process Law: The American Constitutional
Roland Pennock & John W. Chapman eds., 1977) [hereinafter Miller, Due Process].

408 Miller, supra note #, at 11.

409 Miller, supra note #, at 11.

410 Miller, supra note #, at 11; see, e.g., Henfield’s Case, ; St. George Tucker,
Of the Unwritten, or Common Law of England; and Its Introduction into, and Authority within
the United States of America, in BLACKSTONE’S COMMENTARIES, supra note #, Note E to App., at
378 (strenuously opposing federal common law jurisdiction).

411 Miller, supra note #, at 11.

412 Miller, supra note #, at 11.
One can take Professor Miller’s explanation as a premise without accepting his conclusion—that is, one can assume that Madison changed the language from “law of the land” to “due process of law” in the Fifth Amendment to avoid interpretive confusion with the Supremacy Clause, without agreeing that Madison chose the “due process” formulation because he wanted to confine the meaning of the Due Process Clause to procedure. Rather, one could equally argue that Madison chose the “due process” formulation precisely to preserve the broader substantive meaning that had long been associated with law of the land clauses in state constitutions, including protection for unenumerated natural and customary rights congressional encroachment, and not just fair federal criminal procedures. As I have mentioned, it is widely accepted that Americans in the late eighteenth century shared Coke’s equation of the “due process of law” and the “law of the land.”

Moreover, there is no evidence that Madison harbored any “plan to fashion new rights or depart from settled norms” in drafting the Due Process Clause or the Bill of Rights generally; indeed, the evidence is to the contrary, that his intention was to “formulate a document which reflected a consensus about widely held values.” Madison himself maintained that “‘[e]very thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided.’”

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413 See note 262 [Draft #20, p. 68] & accompanying text supra.

414 James Ely, supra note #, at 325; accord James Ely, supra note #, at 325 (“Since the view that ‘due process of law’ and ‘law of the land’ had the same meaning was broadly shared, it seems unlikely that Madison envisioned any departure from the general understanding of this concept.”); Riggs, supra note #, at 992-993 (arguing that there is no reason to believe that the Fifth Amendment’s use of due process, rather than the “law-of-the-land phraseology appearing in every state constitution having such a provision, was intended to change the meaning”)

415 James Ely, supra note #, at 325 (quoting Letter from Madison to Jefferson dated May
If this account is correct, then Madison would almost certainly not have used “due process of law” in the Fifth Amendment if doing so would have been understood as a significant departure from the reach of the state “law of the land” clauses. Because these state clauses were generally understood to protect unwritten natural and customary substantive rights, as well as procedural rights, then the Due Process Clause can be assumed to have had the same reach at the time it was drafted and ratified.

b.  Placement among the Procedural Guarantees of the Bill of Rights. Professor Wolfe attaches significance to the placement of the Due Process Clause in the middle of what he contends are unambiguously procedural guarantees in the text of the Bill of Rights. He observes that the Fifth Amendment is preceded and followed by texts guaranteeing protections for the accused in criminal proceedings, such as freedom from unreasonable searches and seizures, and rights to issuance of a search or arrest warrant only upon probable cause, to a speedy and public trial by an impartial jury, to confrontation of witnesses, to compulsory process, and to assistance of counsel. Within the Fifth Amendment itself, the Due Process Clause is immediately preceded by declarations of rights to indictment by grand jury and freedom from

27, 1789, in 12 PAPERS OF JAMES MADISON 272 (Charlottesville: University Press of Virginia, Robert A. Rutland & Charles F. Hobson, eds. 1979)); accord Graber, supra note #, at 38 (quoting James Madison to Samuel Johnston dated June 21, 1789, in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY HISTORY FROM THE FIRST FEDERAL CONGRESS 254 (Baltimore, Md.: Johns Hopkins University Press, Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds. 1991); see also Graber, supra note #, at 42 (“Madison repeatedly asserted that the proposed amendments should be limited to those that were sufficiently uncontroversial as to guarantee passage.”).

416 Wolfe, supra note #, at 217 (“[T]he Bill of Rights has at least some rough order—it is not a mere grab bag of rights.”).

417 Wolfe, supra note #, at 217-18.
double-jeopardy prosecutions and self-incrimination, and immediately followed by the right to just compensation when one’s property is taken by the national government for public use.\textsuperscript{418} Wolfe takes this as powerful evidence that the framers did not understand the Due Process Clause to have a broad substantive meaning,\textsuperscript{419} concluding rather that the Clause was understood merely to require that a person faced with a deprivation receive the process specified by prevailing law, positive or otherwise.\textsuperscript{420} Professor Berger made a similar argument, arguing that the federal Due Process Clause must have protected procedural rights because its state law of the land analogues were generally placed with criminal procedure protections.\textsuperscript{421} Both arguments are weak.

First, it is unlikely that textual placement in late-eighteenth century rights declaration was thought to have interpretive significance. For example, the declarations of both Pennsylvania

\begin{footnotesize}
\textsuperscript{418} Wolfe, \textit{supra} note \#, at 217-18.
\end{footnotesize}

\begin{footnotesize}
\textsuperscript{419} Wolfe, \textit{supra} note \#, at 218 (rejecting the understanding that the Due Process Clause imposed “the whole of 1789 legal process as a limit on all three branches of government,” and the even broader understanding of natural law—“at least as regards legal procedure”—as such a limit).
\end{footnotesize}

\begin{footnotesize}
\textsuperscript{420} Wolfe, \textit{supra} note \#, at 218.
\end{footnotesize}

For support of this argument, Wolfe also draws on Blackstone’s placement of common law “process” in the midst of a discussion on criminal law which appears to identify “process” as the common law procedures by which a defendant is brought before the court. Wolfe, \textit{supra} note \#, at 220-21. Wolfe himself observes, however, that Blackstone’s \textit{Commentaries} had only just been published at the time of the Revolution, and that Coke remained the more influential commentator in the United States even when the Bill of Rights was drafted and ratified. Wolfe, \textit{supra} note \#, at 221; \textit{see also} Riggs, \textit{supra} note \#, at 973 (arguing that Blackstone never equated “process” with “due process,” and that “other commentators, notably Coke, whose works were current in colonial and revolutionary America, appeared to equate ‘due process’ with ‘law of the land’”).

\begin{footnotesize}
\textsuperscript{421} BERGER, \textit{GOVERNMENT BY JUDICIARY}, \textit{supra} note \#, at 223.
\end{footnotesize}
and North Carolina placed their law of the land clauses in the midst of criminal procedure guarantees, yet this did not bar judicial constructions of those clauses that incorporated substantive rights guarantees based upon the classical understanding of “law.” The very distinction between “procedural” and “substantive” rights has no eighteenth century resonance, and there is no evidence that Madison attempted to separate the rights enumerated in the Bill of Rights into “substantive” and “procedural” groupings.

Second, one cannot draw firm conclusions from the order and placement of rights enumerated in the Bill of Rights, because Madison’s original plan was to interlineate the proposed Amendments into the text of the 1787 Constitution; it was only later that Congress decided to group them together as a set of stand-alone amendments. Thus, the order in which rights appear in the Bill of Rights was not dictated by the content of the rights themselves, but rather by the order in which they were originally proposed to be inserted into the 1787 constitutional text. For example, the first three amendments on Madison’s initial list were an

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422 Pennsylvania’s law of the land clause comes at the end of a section listing criminal procedure rights, and the section itself immediately follows a section dealing with unlawful searches and seizures, and immediately precedes a section listing rights against indictment by information and double-jeopardy. See Pa. Const., Art.IX, §§ 8-10 (1790), reprinted in Poore, supra note #, at 1554-55. North Carolina’s law of the land clause is set by itself in its own section, but is immediately preceded by numerous recitations of criminal procedure rights, and immediately followed by two sections listing rights to trial by jury and speedy review of lawfulness when one has had his or her liberty restrained. N.C. Const., Declaration of Rights, Arts.VII-XIV, reprinted in 2 Poore, supra note #, at 1409-10.


424 See McCormack, Economic Substantive Due Process, supra note #, at 399, 404 (observing that due process originated in American constitutional law as a “unitary concept,” and that the distinction between “substantive” and “procedural” due process did not emerge until after the New Deal, “to describe that the [Supreme] Court believed that it was no longer doing”); see also id. at 404 (noting that the phrase “substantive due process” did not appear in a Supreme Court majority opinion until 1954, and in any opinion until 1948).
addition to the preamble expressly stating that the purpose of government is to protect the natural rights of the people, a provision defining the maximum number of people that a member of the House could represent, and a prohibition on Congress’s increasing its own compensation until an election intervened. (This last proposed amendment was finally ratified in 1992 and is now the Twenty-Seventh Amendment.) Wolfe’s argument about the “procedural context” of the Due Process Clause and the Fifth Amendment generally is blunted by the fact that most of the rights in the current Bill of Rights were proposed to be inserted between two enumerations of substantive rights in Article I, section 9 of the 1787 constitutional text: the prohibition on bills of attainder and ex post facto laws in clause 3, and the prohibition on direct taxes in clause 4. This copied the grouping in the recently enacted Northwest Ordinance.

Finally, even if one assumes that the particular placement of the Due Process Clause in the larger text of the Bill of Rights has interpretive significance, this placement would support the substantive reading as much as the procedural one. Noting the Takings Clause’s direct prohibition of the government taking of property except for “public use” and upon payment of a “just compensation,” Professor Wolf concedes that this Clause “might be read to deal not with procedure but with the substance of law as it affects property rights, since it would preclude a legislative act authorizing the taking of private property for public purposes without just

425 2 SCHWARTZ, THE BILL OF RIGHTS, supra note #, at 1026.
426 2 SCHWARTZ, THE BILL OF RIGHTS, supra note #, at 1026.
427 2 SCHWARTZ, THE BILL OF RIGHTS, supra note #, at 1026.
428 2 SCHWARTZ, THE BILL OF RIGHTS, supra note #, at 1026-27.
429 See Riggs, supra note #, at 996.
compensation (and also, presumably a law authorizing the taking of private property for private purposes).” He acknowledges that the substantive focus of the Takings Clause suggests “a less rigorously procedural context for the foregoing due process clause.” He nonetheless insists that the context for the Due Process Clause is procedural by noting that a semi-colon separates it from the immediately following (and substantive) Takings Clause, while only a comma separates it from the immediately preceding (and procedural) Self-Incrimination Clause, thereby implying that the text associates the Due Process Clause more closely with the former procedural right than the latter substantive one.

This is all a bit much to for a single comma to carry, especially given the loose syntax of the founding era even among highly educated persons like the framers. Certainly it is insufficient in the face of the multiple judicial opinions and arguments of counsel that imply or expressly invoke the classical understanding of “law” and the substantive reading of due

430 Wolfe, supra note 3, at 225.

431 Wolfe, supra note #, at 225. Wolfe speculates that the Takings Clause might even have been placed directly after the Due Process Clause to prevent reading the substantive limitations of the Due Process Clause as “a barrier to the power of eminent domain.” Id.

432 Cf. Riggs, supra note #, 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 limitations on takings that follow? Logically it could partake of both, which is the way the clause is currently interpreted.

Id.

process. Believing that the textual placement of the Due Process Clause has interpretive significance presupposes the kind of conceptual organization and meticulous drafting that simply did not obtain in the introduction and ratification of the Bill of Rights. In the end, the textual placement argument simply cannot do the interpretive work that is asked of it.

c. Redundance. Professor Harrison argues that the original meaning of the Due Process Clause is redundant if it is understood to include unenumerated natural and customary rights as limits on congressional act. If such rights were thought to have constitutional status even though unenumerated, Harrison argues, then neither the federal Due Process Clause nor the state law of the land clauses added any constitutional rights not already protected as natural or customary law:

If there is an unwritten constitution, then it is part of the law of the land, just like the written constitution. If there is no unwritten constitution, then the written constitution contains all of the law of the land that is of constitutional status. In any event, the outcome under a law of the land clause is entirely determined by the answer to the prior question whether there is an unwritten constitution. The clause adds nothing.

Once again, Harrison makes a textualist rather than an originalist argument. Moreover, redundancy is a weak (and ironic) interpretive argument in any legal context. As Professor Curtis has aptly observed, “Lawyers say everything at least twice,” and this was no less true in the late eighteenth century than it is today. The particular context of the Due Process Clause, moreover, compels rejection of any interpretive argument based on redundancy. First, the

\[434\] See Parts III-C-3 & IV-B-2.

\[435\] See Harrison, supra note #, at 548-49.

\[436\] Harrison, supra note #, at 549-550.

Federalists had expressly argued that the entire Bill of Rights was redundant. The Antifederalists disagreed, believing that the Bill of Rights would make otherwise unenumerated natural and customary rights more secure—a position to which even Madison was eventually persuaded in drafting the Bill of Rights. Both arguments presuppose the existence and force of natural and customary rights independent of any textual enumeration. That the Federalists were ultimately willing to accommodate the Antifederalist concern to obtain ratification of the Constitution does not show that anyone understood the Due Process Clause to protect only rights to judicial procedure.

Second, Harrison’s redundancy argument proves too much; it leads to exceedingly strange conclusions about the procedural rights that the Due Process Clause is purportedly limited to protecting. For example, trial by jury is guaranteed in criminal cases by Article III, and in civil cases by the Seventh Amendment. Accordingly, on Harrison’s view, the right to trial by jury cannot be protected by the Due Process Clause, because that would be redundant of its protection elsewhere in the Constitution. Yet, it is beyond dispute that eighteenth century Americans understood trial by jury to be perhaps the most important right protected by the concept of due process. Acceptance of Harrison’s redundancy argument would exclude from the original understanding of the Due Process Clause a right which was originally understood to be at the core due process.

CONCLUSION

In his battles with the Stuart kings, Coke maintained that Magna Carta’s “law of the land” was synonymous with the “due process of law,” and that both phrases symbolized the preeminence of substantive common law rights over the royal prerogative. Coke’s higher-law
constitutionalism was deployed by the colonists in their revolutionary struggle against Britain, and incorporated into their constitutional thinking, as evidenced by their revolutionary rhetoric, their conceptualization of their new state constitutions as primarily frames of government that recognized but did not create fundamental rights, and the ratification controversy over the lack of a bill of rights in the federal Constitution.

Higher-law constitutionalism forms the necessary background to any consideration of the original meaning of the “due process of law” in the Fifth Amendment. The newly independent American states adhered to the classical definition of “law” from the natural law tradition, which held that an unjust legislative act is not truly a “law.” In their constitutional understanding, adherence to the classical definition meant that legislative acts that violated natural or customary rights—or, what amounted to the same thing, that exceeded higher-law limits on legislative power—were void and unenforceable under state law of the land clauses and the federal Due Process Clause, because they effected deprivations of life, liberty, or property without conforming to the “law” of the land or the due process of “law.”

The classical definition of law, and the substantive reading of the due process of law that it underwrites, are evident in legal dictionaries of the era and implicit (and occasionally explicit) in judicial opinions discussing the nullity and voidness of “unconstitutional” legislation. They are also evident in majority and *seriatim* judicial opinions in the years immediately before and after the ratification of the Due Process Clause as part of the Bill of Rights in 1791. Finally, there is little authority that contradicts either the classical definition or a substantive reading of the federal Due Process Clause.

On balance, the historical evidence shows that one widespread understanding of the Due
Process Clause of the Fifth Amendment in 1791 included judicial recognition and enforcement of unenumerated natural and customary rights against congressional action. This understanding not only textually grounds important unenumerated rights against the federal government, it effectively rebuts the conventional wisdom that substantive due process was the belated invention of an activist federal judiciary intent on writing its personal value preferences into constitutional law. Perhaps most important, an original understanding of the Fifth Amendment Due Process Clause that includes substantive due process places on opponents of the doctrine the burden of explaining how that understanding was lost by the time that the Fourteenth Amendment was drafted and ratified in the late 1860s.

A shift in the burden of proof, of course, is not itself proof. There remain crucial additional questions that must be answered before one might venture the conclusion that substantive due process is plausibly within the original understanding of the Fourteenth Amendment as well as that of the Fifth. These include whether the list of unenumerated natural and customary rights protected by the Fifth Amendment Due Process Clause was thought to be expandable by progressive common law development, or instead was confined to those particular unenumerated rights recognized or contemplated in 1791;\textsuperscript{438} whether the ubiquitous and unwritten “general constitutional law” of the antebellum state courts interacted with\textit{Swift v. Tyson} and other antebellum understandings of federal jurisdiction to create the conditions for an

\textsuperscript{438} See generally Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that the jurisdictional grant of the federal Alien Tort Claims Act of 1790 was not restricted to causes of action recognized under the law of nations as it existed at the time the law was enacted, but also included causes of action not recognized until the later elaboration and development of the law of nations); Thomas W. Merrill, \textit{The Common Law Powers of Federal Courts}, 52 U. Chi. L. REV. 1, 64 (1985) (posing the “vexing question . . . whether the framers, in adopting common law precepts in the Bill of Rights, intended to federalize an evolving body of common law or simply
expansion of substantive due process;\textsuperscript{439} and how these and other questions might affect our understanding of the debates surrounding the report and ratification of the Fourteenth Amendment Due Process Clause.\textsuperscript{440}

These, however, are questions for another day. It is enough to have shown that substantive due process was one plausible understanding of the Due Process Clause of the Fifth Amendment when it was ratified in 1791.


\textsuperscript{440} See generally CURTIS, \textit{supra} note # (arguing that the Fourteenth Amendment was intended to apply the Bill of Rights to the states).
APPENDIX

CERTAIN ATTRIBUTES OF STATE CONSTITUTIONS ADOPTED FROM 1776 THROUGH 1801


<table>
<thead>
<tr>
<th>State (years in force) (name of document)</th>
<th>Rights Protected (other than Chapter 29 Analogue)</th>
<th>Declaration or Bill of Rights Separate from Frame of Government (Names, where applicable)</th>
<th>Chapter 29 Analogue (Citation)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut (1776-1818) (&quot;Constitution&quot;)</td>
<td>Equal justice, bail—under affirmation</td>
<td>No; affirmation of colonial charter</td>
<td>Yes (Constitution ¶2)</td>
</tr>
<tr>
<td>Delaware (1776-92) (&quot;Constitution, or system of government&quot;)</td>
<td>Common law, anti-slavery, anti-establishment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Delaware (1792-1831) (&quot;Constitution&quot;)</td>
<td>Extensive enumeration</td>
<td>Yes</td>
<td>Yes (Art. I, §7)</td>
</tr>
<tr>
<td>Georgia (1777-89) (&quot;Constitution&quot;)</td>
<td>Free exercise, excessive fines &amp; bail, habeas corpus, press, jury trial</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Georgia (1789-98) (&quot;Constitution&quot;)</td>
<td>Press, jury trial, habeas corpus, free exercise, no entailment of estates</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Georgia (1798-1861) (&quot;Constitution&quot;)</td>
<td>Press, jury trial, no ex post facto laws, no imprisonment for debt, habeas corpus, free exercise, anti-establishment</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Kentucky (1792-99) (&quot;Constitution&quot;)</td>
<td>Extensive enumeration</td>
<td>Yes (last Article of Constitution)</td>
<td>Yes (Art. XII ¶10)</td>
</tr>
<tr>
<td>Kentucky (1799-1850)</td>
<td>Extensive enumeration</td>
<td>Yes (last Article of Constitution)</td>
<td>Yes (Art. X, §10)</td>
</tr>
<tr>
<td>Maryland (1776-1851) &quot;A Declaration of Rights, and the Constitution and Form of Government&quot;</td>
<td>Extensive enumeration</td>
<td>Yes &quot;A Declaration of Rights&quot; “Constitution, or Form of Government, &amp;c.&quot;</td>
<td>Yes (Declaration of Rights Art. XXI)</td>
</tr>
<tr>
<td>State (years in force) (name of document)</td>
<td>Rights Protected (other than Chapter 29 Analogue)</td>
<td>Declaration or Bill of Rights Separate from Frame of Government (Names, where applicable)</td>
<td>Chapter 29 Analogue (Citation)</td>
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<tr>
<td>Massachusetts (1780 to present) (“Constitution”)</td>
<td>Extensive enumeration</td>
<td>Yes “A Declaration of Rights” “The Frame of Government”</td>
<td>Yes (Declaration of Rights Art. XII)</td>
</tr>
<tr>
<td>New Hampshire (1776-84) (“Constitution”)</td>
<td>Protestant free exercise--under colonial charter</td>
<td>No; affirmation of colonial charter</td>
<td>No</td>
</tr>
<tr>
<td>New Hampshire (1792 to present) (“Constitution”)</td>
<td>Extensive enumeration</td>
<td>Yes “Bill of Rights” “Form of Government”</td>
<td>Yes (Bill of Rights Art. 15)</td>
</tr>
<tr>
<td>New Jersey (1776-1844) (“Constitution”)</td>
<td>Free exercise, anti-establishment, common law, jury trial</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>New York (1777-1821) (“Constitution”)</td>
<td>Free exercise, jury trial, common law, attainder</td>
<td>No</td>
<td>Yes (Art. XIII)</td>
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<tr>
<td>North Carolina (1776-1861) (“Constitution”)</td>
<td>Extensive enumeration</td>
<td>Yes “A Declaration of Rights, &amp;c.” “The Constitution, or Form of Government”</td>
<td>Yes (Declaration of Rights Art. XII)</td>
</tr>
<tr>
<td>Pennsylvania (1776-90) (“Constitution”)</td>
<td>Extensive enumeration</td>
<td>Yes “A Declaration of Rights” “Plan or Frame of Government”</td>
<td>Yes (Declaration of Rights Art. IX)</td>
</tr>
<tr>
<td>Pennsylvania (1790-1838) (“Constitution”)</td>
<td>Extensive enumeration</td>
<td>Yes (last Article of Constitution)</td>
<td>Yes (Declaration of Rights Art. IX, §9)</td>
</tr>
<tr>
<td>Rhode Island (until 1842)</td>
<td>Free exercise--under colonial charter</td>
<td>No action; continued under colonial charter</td>
<td>No</td>
</tr>
<tr>
<td>South Carolina (1778-90) (“Constitution”)</td>
<td>Free exercise, press</td>
<td>No</td>
<td>Yes (Art. XLI)</td>
</tr>
<tr>
<td>State (years in force) (name of document)</td>
<td>Rights Protected (other than Chapter 29 Analogue)</td>
<td>Declaration or Bill of Rights Separate from Frame of Government (Names, where applicable)</td>
<td>Chapter 29 Analogue (Citation)</td>
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<td>----------------------------------------</td>
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</tr>
<tr>
<td>South Carolina (1790-1861) (&quot;Constitution&quot;)</td>
<td>Free exercise, no bills of attainder or ex post facto laws, no impairments of contracts, no excessive bail, no cruel or unusual punishments, jury trial, press</td>
<td>No</td>
<td>Yes (Art. IX, §2)</td>
</tr>
<tr>
<td>Vermont (1777-86)(^{441})</td>
<td>Extensive enumeration</td>
<td>Yes “Declaration of Rights” “Plan or Frame of Government”</td>
<td>Yes (Ch.I, Art.X)</td>
</tr>
<tr>
<td>Vermont (1786-93)</td>
<td>Extensive enumeration</td>
<td>Yes “Declaration of Rights” “Plan or Frame of Government”</td>
<td>Yes (Ch.I, Art.XI)</td>
</tr>
<tr>
<td>Virginia (1776-1830) &quot;Bill of Rights&quot; “Constitution”</td>
<td>Extensive enumeration</td>
<td>Yes “Bill of Rights” “Constitution”</td>
<td>Yes (Bill of Rights §8)</td>
</tr>
</tbody>
</table>

\(^{441}\) Vermont was not admitted as a state until 1790, after Massachusetts, New Hampshire, and New York formally renounced their respective claims to its territory. However, prior to statehood Vermont had functioned as a separate political entity with its own government since before independence.