The Lost Due Process Doctrines

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THE LOST DUE PROCESS DOCTRINES
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**INTRODUCTION: THE “LOST BATTALION”**

In October 1918, approximately five hundred fifty soldiers in the U.S. Army’s 477th “Liberty” Division, drawn principally from New York City and western states, took part in the Meuse-Argonne Offensive in World War I. Commanded by Major Charles Whittlesey, the troops advanced into the Argonne Forest in France, an area that the German army had seized during the early days of the war and had heavily fortified with dug-in defensive positions, machine guns, and artillery. Whittlesey’s troops spearheaded the division’s assault. Unfortunately for him and his soldiers, his chief superior officers—American Expeditionary Force Commander-in-Chief General John Pershing and Division Commander General Robert Alexander—failed to ensure that Allied forces would support the unit’s flanks. The result was that German infantry quickly surrounded the American troops. Cut off from reinforcements and supplies in a neck of the woods now known as “the pocket,” the American soldiers valiantly held out for five days, suffering heavy casualties in the process. A newspaper editor who learned of their plight dubbed the troops the “Lost Battalion” because the term had a nice ring to it, even though the unit was too small for that designation and certainly was not lost; higher-ups knew the unit’s location early in the battle. Fewer than two hundred soldiers emerged unscathed. The rest were killed, wounded, or taken prisoner. Soldiers in that unit, still known today as the “Lost Battalion,” received numerous citations for bravery. More than a dozen soldiers received the Distinguished Service Cross, and three were awarded the Medal of Honor.¹

The term “Lost Battalion” also could describe several distinct legal doctrines existing today that were birthed by the Due Process Clauses of the Fifth and Fourteenth Amendments. Beginning late in the nineteenth century and continuing to the present, the Supreme Court has often applied the Due Process Clauses to a host of different government actions, many of which, it turns out, were unimaginable when those clauses became law. Generally speaking, the Court has fit those decisions into one of two categories. The first one, known as procedural due process, involves efforts to regulate the rules that the government must use to deprive someone of his or her life, liberty, or property. The purpose of procedural due process is to ensure that the government’s rules satisfy minimum standards of acceptable fairness and lead to decisions with the degree of accuracy that society demands in different types of cases, a more rigorous standard in criminal cases than in civil. The other category, labelled “substantive due process,” contains decisions that limit the government’s ability to take or interfere with certain aspects of the life, liberty, or property every person enjoys. Those limitations bar the government from trespassing on one of those interests regardless of the procedural rules that the government may use to make its decision. Given that breakdown, it would seem that every decision of the Supreme Court of the United States interpreting the Due Process Clauses could be placed into one category or the other.

Close scrutiny of those cases, however, discloses a bucketful that does not neatly fit into either niche. Those cases deal with a host of subjects that arise with less frequency today than they

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did in the twentieth century: the jurisdiction of courts over non-resident defendants; the clarity of the definition of criminal laws; the ability of state courts, in lieu of state legislatures, to define state criminal law; and the delegation to private parties of law-making authority. The rules that the Supreme Court has adopted in each category are facially dissimilar from the law that the Court has developed in the procedural vs. substantive debate that the Court has pursued for the last one hundred years. As proof of that conclusion, rarely do the decisions in any of those five lines of cases rely on or cite precedent that clearly fits into the Court’s binary due process jurisprudence.

The doctrines noted above do not enjoy the same weight in the law today. One line of precedent has taken a severe beating from opponents, but has proved resilient and survives in a limited form. By contrast, the bench, the bar, and the academy have so firmly embraced the other categories that no one today would even question their legitimacy. At the same time, each doctrine shares one trait in common with the others. The Supreme Court sent each batch of decisions into American jurisprudence with little support in the language of the Constitution and even less concern whether that justification mattered. Nonetheless, the original problem with line of precedent remains unresolved: Where is their source in the constitutional text?

That question would not matter if there were unanimity that American constitutional law draws its legitimacy equally from both the text of the Constitution itself and certain original or evolving background principles that have been so deeply accepted by this nation that, like the water in which fish swim, they provide the necessary life-giving force for our society while remaining discretely but entirely oblivious to its members. Fortunately or unfortunately, however, there clearly is no such unanimity about the nature of the fundamental law governing American society, nor is there even a consensus about which of those two sources of law is preferable or legitimate. The Court’s substantive due process decisions have been battered over the last four decades, but they remain very much still alive, albeit now largely relegated to playing only a rear guard role in the Court’s twenty-first century constitutional controversies.²

How did that happen? Compared with the modern-day constitutions of other nations, our eighteenth century charter is quite laconic.³ The text of the Due Process Clause is deceptively straightforward. It forbids the federal, state, or local governments from “depriving” a “person” of his “life, liberty or property” without first affording the victim of the government’s action “due process of law.”⁴ Those ten words appear quite simple and straightforward.⁵ Yet, more than one hundred fifty years of judicial interpretation has proved the contrary. The Supreme Court has prohibited the federal, state, and local governments from undertaking a variety of different types of

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⁴ The text of the two clauses is effectively the same. See U.S. CONST. amend V (“No person shall be . . . deprived of life, liberty, or property without due process of law[.]”); id. amend XIV (“[N]or shall any State deprive any person of life, liberty, or property without due process of law[.]”). For convenience, this Article will use the singular form of that term—“clause”—unless the context dictates otherwise.

⁵ To some Justices, that simplicity is a virtue. See Kerry v. Din, 135 S. Ct. 2128, 2132-38 (2015) (plurality opinion). To others, it is a mirage. See Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
legislative, executive, and judicial actions that infringe on an interest that the Due Process Clause protects. The clause has spawned scores of decisions construing terms such as “depriving,” “person,” “liberty,” and “property.” For example, we now know that corporations, like human beings, are “persons,” that realty and personality are “property,” but so too are public welfare benefits created entirely by statute; and that depriving someone of his or her good name does not injure that person’s “liberty” or “property” interest. Rarely does a Supreme Court Term go by without the Court issuing some opinion addressing the meaning of the clause.\(^6\)

In order to render manageable the doctrinal development of the Due Process Clause, the Supreme Court over the last fifty years has attempted to fit its decisions into one of two distinct categories: procedural requirements that the government must satisfy before depriving someone of life, liberty, or property, and substantive limitations on exactly what deprivations the government may accomplish. Unfortunately, neither the law nor life can be so easily classified. The Court has decided numerous cases that defy its recent attempts to divide Gaul into two parts, not three (or more). Several due process doctrines seem to have been isolated from the main body of law that the Court has developed. Some could be at risk of being eliminated by falling into that collection of precedents often described as no longer being "good law.” But not all of them will suffer that fate, and the reasons why they will and should remain vibrant are relevant to the rationale for the other doctrines and help explain why they should not be set adrift.

Part I of this article will describe the two-fold divide between procedural requirements and substantive limitations that has dominated the discussion of the Due Process Clause. Part II will consider a few categories of due process case law that the Court has not attempted to fit into one or the other of those categories. Part III will discuss the provenance of the Magna Carta, a thirteenth century charter of liberties that later gave birth to the Due Process Clauses in our Constitution. Part IV will wrap up by considering whether there is a home in the Constitution for the Court’s Lost Due Process Decisions. In particular, Part IV will ask whether Magna Carta provides that home and can serve as a base for the ongoing development of constitutional law.

**I. TRENCH WARFARE: THE BATTLE OVER DUE PROCESS**

The best way to capture the ongoing legal debate over the meaning of the Due Process Clause is to imagine the following Super Bowl commercial: A man walks into a bar. The bar-

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\(^6\) See, e.g., Daniels v. Williams, 474 U.S. 327 (1986) (ruling that an injury caused by the state’s negligence does not “deprive” a person of an interest protected by the Fourteenth Amendment); Paul v. Davis, 424 U.S. 693 (1976) (ruling that state-caused defamation does not deprive a person of a “liberty” or “property” interest protected by the Fourteenth Amendment); Morrissey v. Brewer, 408 U.S. 471 (1972) (ruling that release on parole creates a “liberty” interest protected by the Fourteenth Amendment); Goldberg v. Kelly, 397 U.S. 254 (1970) (ruling that state welfare benefits are “property” protected by the Fourteenth Amendment); Santa Clara Cnty. v. So. Pac. R. Co., 118 U.S. 394 (1886) (ruling that a “corporation” is a “person” for purposes of the Fourteenth Amendment); cf. Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2427-28 (2015) (ruling that personality is “property” for purposes of the Fifth Amendment Takings Clause).

tender asks him for his “poison” and his opinion as to the legitimacy of substantive due process. After asking for the “usual,” the patron answers that there is no persuasive justification for the self-assumed practice of unelected, life-tenured judges holding unconstitutional legislation enacted by a democratically-elected, fairly-apportioned legislative branch, signed into law by a chief executive voted into office by a majority of voters in a polity with an extraordinarily impressive rate of voter registration and turnout. The patron adds that what is particularly insulting is a court’s decision to hold unconstitutional a statute that does not violate any clear limitation on the governing authority of the political branches based only on a four word phrase—“due process of law”—that is Delphic in the extreme.8 After handing the patron a beer, the bartender replies that substantive due process is a hallmark of Anglo-American liberty. He notes that the liberty Americans enjoy, purchased with two centuries’ worth of the blood of patriots, is freedom from “arbitrary” government, however fairly elected, however popular, in whatever way, shape, or form that government may take, whenever it seeks to restrain the natural rights given the public by the Almighty, not the state, or the long-accepted traditions of the people. The bartender also states that, because it is the public that bestows authority on the government, rather than the government granting liberty to the people, there is nothing unusual about restricting the power of any one branch of government, even if a different branch undertakes that task, such as the judiciary. Then, in a manner reminiscent of the “Tastes great!—Less filling!” advertisements seen on television commercials during NFL games, the bartender and patron scream invectives at each other and begin wrestling. The altercation continues without resolution until the commercial ends and the game resumes.

That is how contemporary legal debate over the legitimacy of substantive due process has played out for the last half century. Scholars have taken one side or the other in two-well known, deeply-entrenched, diametrically-opposed camps regarding the issue whether the Due Process Clause imposes substantive restraints on governmental legislative power or merely procedural constraints on the executive branch’s implementation of an otherwise valid law.9 Highly respected parties have lined up on both sides of that debate. Indeed, it would be difficult to find a professor of constitutional law at one of the nation’s law schools not in one camp or the other.

Some scholars believe that judicial reliance on principles of substantive due process as a ground for invalidating legislation is a natural, common law-like development growing out of the principle, accepted by everyone across the legal and political spectrum, that the Due Process Clause is a protection against the arbitrary action of government. Advocates for substantive due process review of legislation therefore view it as being as necessary a safeguard against a capri-


9 By “otherwise valid law” I mean a law that does not violate one of the explicit limitations non legislative power, such as the Ex Post Facto Clauses or the First Amendment. See, e.g., U.S. Const. art. I, § 9, cl. 3; id. § 10, cl. 1; id. amend. I (“Congress shall make no law . . . .”). For a discussion of the differences between constitutional provisions that limit actions by legislatures versus ones that apply to executive actions, see, for example, Nicholas Quinn Rosencrantz, The Objects of the Constitution, 63 Stan. L. Rev. 1005 (2011), and Nicholas Quinn Rosencrantz, The Subjects of the Constitution, 62 Stan. L. Rev. 1209 (2010).
cious legislature branch as it is against an autocratic executive. Others see substantive due process as a plague on the law. In their view, just as Marxism might make sense in theory but not in fact, because its theory assumes, contrary to human experience, that people will be motivated by “the better angels of our nature,” substantive due process can never be an objective undertaking because too many judges will succumb to external pressure or internal desire to use the lawmaking opportunity it provides to shape the law to fit their own political, social, economic, or personal preferences. Judges can vigorously and forever disclaim writing their personal preferences into the Constitution. In fact, the judges who willfully devise their own version of constitutional law are likely to be the ones most vociferously disavowing judicial activism. At the end of the day, however, the only rational explanation for finding in the Constitution nontextual rights such as the right to abortion is that, in a manner resembling how the Wailing Wall becomes filled with prayers: the judiciary didn’t find them in the wall, it placed them there.\footnote{Abraham Lincoln, First Inaugural Address (Mar. 4, 1861).}

Scholars have conducted that debate for quite some time. Neither side has scored a knockout blow, and neither one has cried “uncle.” Given the contentiousness with which this


\footnote{To use an analogy borrowed from Wittgenstein, see Ludwig Wittgenstein, Philosophical Investigations (G.E.M. Anscombe et al. trans. Rev. 4th ed. 2009), the dispute between advocates for and opponents of substantive due process bears a close family relationship to the debate over the proper methodology for interpreting the Constitution, sometimes characterized as a contest between “interpretivism” and “noninterpretivism,” see, e.g., Ely, supra note 12, at 1, or between “originalism” and “nonoriginalism,” see, e.g., Symposium: Originalism 2.0, 34 Harv. J. L. & Pub. Pol’y 5 (2010). For the last 25 years, members of the academy, profession, and bench have debated, re-debated, and re-re-debated the proper approach to constitutional interpretation. Entire forests have been decimated in the process. See, e.g., 1 Bruce Ackerman, We the People: Foundations (1991); 2 Bruce Ackerman, We the People: Transformations (1998); Akhil Reed Amar, America’s Unwritten Constitution: The Precedents and Principles We Live By (2012); Jack M. Balkin, Living Originalism (2011); Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (Rev. ed. 2014); Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (Vintage Books ed. 2006); Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Originalism: A Quarter-Century of Debate (Steven G. Calabresi ed., 2007); David A. Strauss, The Living Constitution (2010); Symposium: Originalism 2.0, 34 Harv. J. L. & Pub. Pol’y 5 (2010); Mitchell N. Berman,
controversy has been conducted, including its spillover into the appointments process for federal judges, the dispute has more closely resembled World War I trench warfare than an Oxford Debating Society event.

Advocates for substantive due process, however, have prevailed where it most counts: in the Supreme Court. For nearly 80 years—from (at least) Meyer v. Nebraska in 1923\(^\text{14}\) to Lawrence v. Texas in 2003\(^\text{15}\) to Obergefell v. Hodges\(^\text{16}\) in 2015—the Court has been willing to invalidate federal and state laws on the ground that they are an illegitimate or arbitrary exercise of lawmaking power. The Court has not gone down that path very often or very far, for fear of being accused of choosing one debatable social theory over another, a matter ordinarily thought best left to the political process.\(^\text{17}\) But the Court has refused to leave every controversial social

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\(^{14}\) 262 U.S. 390 (1923) (ruling that a state law prohibiting the teaching of German unconstitutionally interferes with parents’ right to instruct their children). Some substantive due process decisions predate Meyer. See, e.g., Lochner v. New York, 198 U.S. 45 (1905). Some earlier decisions insist quite strenuously that the Constitution does not permit what today would be seen as typical examples of economic regulation. See, e.g., Missouri Pac. R.R. Co. v. Nebraska, 164 U.S. 403, 417 (1896) (“The taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment . . . .”); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829) (“We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced. We are not prepared therefore to admit that the people of Rhode Island have ever delegated to their legislature the power to divest the vested rights of property, and transfer them without the assent of the parties. The counsel for the plaintiffs have themselves admitted that they cannot contend for any such doctrine.”); Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J., seriatim opinion) (“[A] law that takes property from A. and gives it to B. . . . is against all reason and justice . . . [and such power] cannot be presumed” to have been granted to the government by the people). Those cases, however, are rarely cited nowadays as examples of substantive due process, probably because they involve regulation of property rights, rather than “privacy,” the subject of contemporary substantive due process debate.

\(^{15}\) 539 U.S. 558 (2003) (creating a constitutional right to intercourse in the home with a partner of the same sex).

\(^{16}\) 135 S. Ct. 2584 (2015) (creating a constitutional right to same-sex marriage).

\(^{17}\) See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) (footnotes omitted) (“We refuse to sit as a ‘super legislature to weigh the wisdom of legislation,’ and we emphatically refuse to go back to the time when courts used the Due Process Clause ‘to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.’ Nor are we able or willing to draw lines by calling a law ‘prohibitory’ or ‘regulatory.’ Whether the legislature takes for its textbook Adam Smith, Her-
issue to the warp and woof of politics. On occasion, the Court has invalidated scores of state laws on the ground that they violate substantive due process principles. The Court has intervened—sometimes for the purpose of flexing its muscles decisively—to saw off certain limbs even while leaving the tree intact.

For example, late in the nineteenth and early in the twentieth centuries the Court intervened to hold unconstitutional certain pieces of economic regulation, on the theory that the property safeguarded by the Due Process Clause included the freedom to make whatever (supposedly) mutually beneficial economic arrangements that businesses and private parties found in their best interests. That was the time widely derided as the era of *Lochner v. New York*. Few

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18 For example, the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 110 (1973), had the effect of invalidating all fifty state abortion laws because none of those laws used the trimester system that Justice Blackmun created.

19 See Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 844-46 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.) (finding it necessary to reaffirm the constitutional right to abortion recognized in *Roe v. Wade*, 410 U.S. 113 (1973), because that right had been repeatedly challenged since it was first adopted).

19 I say “supposedly” to avoid needing to address the complications (and Marxist objections) raised by industries, such as natural monopolies (or businesses one time called “company towns”) where (at least it can be argued) that the absence of a free market made “negotiations” over wages and the like an entirely one-sided affair.

21 It may be the case, however, that some of the Supreme Court’s decisions in that period used the language of protecting property rights to avoid having to condemn what it saw or feared was the actual motivation for particular legislation. For example, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held unconstitutional a federal law delegating to private groups the power to establish binding codes of competitive conduct enforceable through the criminal law. On its face the decision appears to be an ordinary challenge to economic regulation, but for an argument that the Court’s *Schechter Poultry* decision was heavily influenced by the apparent anti-Semitic and anti-immigrant focus of the relevant New York City ordinance, see DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

members of the academy today would defend the Supreme Court’s case law during that period.\textsuperscript{23} The name of the case has even become more of a moniker for a “Supreme Court Gone Wild” video than a decision in the U.S. Reports, a fading memory of a doctrine that every responsible lawyer—certainly anyone seeking Senate confirmation to a position in the federal government or on the federal bench—must emphatically disavow.\textsuperscript{24} On the other hand, the Court has been willing rigorously to scrutinize laws that have regulated individual decisions on the subjects of family and sex, on the ground that those decisions are not fit subjects for popular control.\textsuperscript{25} Occasionally, the debate breaks out of the current focus on those subjects and returns to the subject of whether there are substantive limitations on the type of economic legislation that the government may impose on a party, especially a business. The final chapter has not been written on the development of the law governing economic liberties, but for now it can be said that the Court has been far more willing to allow the political branches to regulate business enterprises than personal liberties.\textsuperscript{26}


\textsuperscript{24} See David A. Strauss, Why Was Lochner Wrong?, 70 U. Chi. L. Rev. 373, 373 (2003) (“Would you ever cite [Lochner] in a Supreme Court brief, except to identify it with your opponents’ position? If a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?”); see also, e.g., Archibald Cox, The Court and the Constitution 135 (1987); Paul Kens, Judicial Power and Reform Politics: The Anatomy of Lochner v. New York 126-27 (1990) (“For more than thirty years [Lochner] served reformers as evidence of the conservative nature of the judiciary and as a striking example of its usurpation of political power.”); Robert McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34.


II. NO MAN’S LAND: THE DUE PROCESS DOCTRINES THAT NEED A HOME

Throughout its history, the Supreme Court has invalidated numerous federal, state, or local laws on the ground that they violated the Fifth or Fourteenth Amendment Due Process Clause. There are a handful of separate lines of precedent, however, in which the high Court has invoked the clause without explaining exactly how each doctrine fits into the substance vs. procedural divide that has come to dominate the Court’s recent jurisprudence and the scholarly debate over whether that divide is legitimate. Each of those doctrines has become effectively self-contained. That is, the Court examines each new case in light of the precedents that it has decided in that specific context without explaining whether, and, if so, how and why those precedents should be classified as examples of substantive or procedural due process. As it turns out, those decisions make sense, but not in terms of the substantive-procedural dichotomy that the law has come to know. A different doctrine explains why those decisions are correct, but it requires an examination of the history of the Due Process Clauses.

A. THE GEOGRAPHIC REACH OF LEGAL AUTHORITY

The oldest of the doctrines (and therefore perhaps the most lost) involves the power of state courts over the parties to a lawsuit. The seminal case, decided in 1878, is Pennoyer v. Neff.\(^27\) Pennoyer involved a dispute over the title to land in Multnomah County, Oregon, between an Oregonian and a non-resident.\(^28\) The issue was whether a state court could exercise jurisdiction over an absent defendant, and the Court answered that question in the negative. The Court began its analysis by stating that a state court has jurisdiction only within the state’s territorial confines and that a judgment entered by a court without jurisdiction is null and void.\(^29\) A

\(^{27}\) 95 U.S. 714 (1878).

\(^{28}\) Marcus Neff hired John Mitchell, an attorney, to obtain land in Oregon from the federal government under the Donation Land Claim Act of 1850, Ch. 76, 9 Stat. 496 (1850), but did not pay Mitchell for his services. Mitchell sued Neff, won by a default judgment after Neff did not appear, and ultimately received title to the property after purchasing it at a public auction run by the local sheriff. Perhaps deciding to make a profit quickly, Mitchell sold the land to Sylvester Pennoyer, who was in possession of it when Neff sued him to recover title, alleging that he had not properly been served by Mitchell in the first lawsuit.

\(^{29}\) Id. at 720 (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.”); id. (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established.”). Those principles were noncontroversial in the nineteenth century and for some time thereafter. See, e.g., Baker v. Baker, Eccles & Co., 242 U.S. 394, 403 (1917) (“[T]o assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory.”); William F. Cahill, Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business within the Territory, 30 HARV. L. REV. 676, 677 (1917) (“The sovereign has jurisdiction of the persons and property within its territory altogether irrespective of the consent of those persons, or the owners of the property. They may be rebels denying the authority of the government or even anarchists. But so long as a government is recognized to be de jure by other nations, their governments acknowledge its right to exercise sovereignty over all persons and things rightfully within its borders, and recognize abroad the legality of this exercise.”); Austin W. Scott, Jurisdiction Over Nonresidents Doing Business Within a State, 32 HARV. L. REV. 871, 871 (1919) (“A personal judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes. An attempt to execute it is without justification; a sheriff levying upon property of the defendant is liable for conversion, and a purchaser of the property on execution sale gets no title to it. A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment. No action lies
court may not exercise jurisdiction extraterritorially, Justice Stephen Field concluded, because a tribunal lacks power beyond its borders, rendering any effort to regulate people or conduct in a different jurisdiction an interference with the co-equal sovereignty of the latter.30

That rule was a reasonable one for disputes over the title to stationary real estate in an agriculturally based economy. Over time, however, the flowering of the Industrial Revolution transformed the nation from an agrarian economy to an industrial-based one, an economy where, due to the emergence of the railroad and telegraph, goods could be shipped from coast to coast.31 As the economy matured, so, too, did the law of personal jurisdiction. Beginning in 1945 with the Supreme Court’s “canonical opinion”32 in *International Shoe Co. v. Washington,*33 it has been settled law that a state court may exercise jurisdiction over a person or property outside its borders if there are certain “minimal contacts” with the forum so as not to offend “‘traditional notions of fair play and substantial justice.’”34 Today, a plaintiff may sue a corporation in contract or tort in the company’s “home” state—that is, the state where the company is incorporated or has its principal place of business—or in a state where the corporation conducts the business that gave rise to the claim at issue.35

upon it either in the state wherein it is rendered or in any other state. It cannot be set up as a bar in a suit upon the original cause of action.”) (footnotes omitted).

30 See 95 U.S. at 722-23 (citations omitted); see also Shaffer v. 433 U.S. 186, 197 (1977) (“[Under Pennoyer,] ‘any attempt “directly” to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.’ ”); McDonald v. Mabee, 243 U.S. 90, 91 (1917) (“The foundation of the Fourteenth Amendment is fundamentally unfair to haul someone into court for conduct taking place elsewhere and having no material effect in another state.”) (Holmes, J.).


33 326 U.S. 310 (1945).


The Supreme Court has never decided the issue, but a strong argument can be made that the same principles should apply to the federal government though the Fifth Amendment. See, e.g., Lea Brilmayer & Charles Norchi, Federal Extraterritoriality and Fifth Amendment Due Process, 105 HARV. L. REV. 1217, 1244-45 (1992). After all, the terms of the Fifth and Fourteenth Amendment Due Process Clauses are the same. The principle that it is fundamentally unfair to haul someone into court for conduct taking place elsewhere and having no material effect on the forum state can just as easily be applied to the federal courts. As the Supreme Court has explained, “[t]he Due Process Clause protects an individual’s right to be deprived of life, liberty, and property only by the exercise of lawful power,” a restraint that no less limits “the power of the sovereign to resolve disputes through the judicial process than . . . to prescribe rules of conduct for those within its sphere.” J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2786 (2011). The “general rule” is that “neither statute nor judicial decree may bind strangers to the State,” meaning “those who live or operate primarily outside a State have a due process right not to be subjected to
B. THE SUBSTANTIVE EXERCISE OF LEGAL AUTHORITY

1. THE RULE OF LEGALITY

William Blackstone posited that every person enjoys three “absolute,” “principal,” or “primary” rights: namely, “the right of personal security, the right of personal liberty, and the right of private property[].”36 The right to liberty entailed the right to freedom of movement “without imprisonment or restraint, unless by due course of law.”37 An elementary principle of the criminal law is known as the “Rule of Legality.” Originally known by the Latin phrases “Nullum crimine sine lege” (“There is no crime absent a written law.”) and “Nulla poena sine lege” (“There is no penalty absent a written law.”), the rule provides that no conduct can be punished as a crime without a law38 prohibiting that conduct and affixing a penalty to it that came into existence in advance of the commission of that conduct.39 Otherwise, the government could retroactively outlaw and punish undesirable conduct, a practice that is forbidden by the Ex Post Facto Clauses.40 As Professor Jerome Hall has noted, “[t]he principle of legality is in some ways the most fundamental of all the [criminal law’s] principles.”41

2. THE “VOID-FOR-VAGUENESS” DOCTRINE

The rule of legality birthed two derivative doctrines. The first one is the “void-for-vagueness” doctrine. The doctrine assumes that a criminal law predates the charged conduct, and requires the text of that law be readily understandable by the average person. A statute that is unduly vague, that is so indefinite that the average person is forced to guess at its meaning, cannot qualify as a criminal law. The reason is that a vague law, like one that is kept secret or one that, like the laws of Caligula, is published in a location that makes it unreadable,42 is little judgment in its courts as a general matter.” Id. at 2787. One can substitute “federal government” for “state” in passages like that without losing anything in the translation.

36 1 WILLIAM BLACKSTONE, COMMENTARIES *9.

37 Id. at 11.

38 From 1660 to 1860, the English courts claimed the power to outlaw conduct that they deemed contra bonos mores. See Jerome Hall, Nulla Poena Sine Lege, 47 YALE L.J. 165, 165, 178 (1937). In our federal system, however, only Congress can create a crime. See United States v. Hudson & Goodwin, 11 U.S. (1 Cranch) 32 (1812); see also United States v. Evans, 333 U.S. 483, 485 (1948) (refusing to allow a criminal penalty to be imposed on conduct when Congress had outlawed it, but had not clearly defined what the penalty should be). State courts may have that power under state law, but they cannot exercise it in a manner that unduly expands the reach of the existing criminal code. See infra note 66.

39 See 1 BLACKSTONE, supra note 36, at 11 (“To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison[.]”). The rule of legality does not rest on the fiction that people will read the penal code before acting. Instead, the rule requires that, were someone to make that effort, the criminal statutes must be written with sufficient clarity that a reader could understand them. See McBoyle v. United States, 283 U.S. 25, 27 (1931).

40 See U.S. CONST. art. I, § 9, cl. 3; id. § 10, cl. 1.

41 JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 25 (2d ed. 1960); see also, e.g., Rogers v. Tennessee, 532 U.S. 451, 459 (2001) (“core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”) (emphasis deleted); id. at 467–68 (Scalia, J., dissenting); Jerome Hall, Nulla Poena Sine Lege, 47 YALE L.J. 165, 165 (1937).

42 See 1 BLACKSTONE, supra note 36, at *46 (noting that Caligula “wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people”); see also Screws v. United States, 325
better than no law at all.\textsuperscript{43} The government therefore must identify particular conduct as criminal so that the average person, without resort to legal advice, can comply with the law.\textsuperscript{44} As the Su-

U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’”); 5 JEREMY BENTHAM, WORKS 547 (1843) (“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he kept them from the knowledge of.”); Livingston Hall & Selig J. Seligman, \textit{Mistake of Law and Mens Rea}, 8 U. CHI. L. REV. 641, 650 n.39 (1940) (“[W]here the law was not available to the community, the principle of ‘nulla poena sine lege’ comes into play.”).

\textsuperscript{43} See, e.g., Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” (citations omitted)).


The Supreme Court explained in *Lanzetta v. New Jersey*, “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.” For that reason, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”

Although the Supreme Court has applied the void-for-vagueness doctrine for more than a century, the Court has never explained from whence this doctrine comes. In fact, in his separate opinion in *Johnson v. United States*, Justice Clarence Thomas recently chided his colleagues for never identifying the textual constitutional basis for holding statutes unconstitutional—vague. That shortcoming troubled him, because it left him with the distinct but uncomfortable impression that the void-for-vagueness doctrine was merely another example of the type of substantive due process analysis that the Court often criticizes. The majority, however, did not respond to that criticism, leaving still in doubt the parentage of that doctrine.

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47 The first case in which the Court relied on the void-for-vagueness doctrine to hold a law unconstitutional was *International Harvester Co. v. Kentucky*, 234 U. S. 216 (1914). The state antitrust law there render unlawful “any combination [made] . . . for the purpose or with the effect of fixing a price that was greater or less than the real value of the article.” *Id.* at 221.


49 *Id.* at 2566 (Thomas, J., concurring in the judgment).

50 *Id.* at 2567-72 (Thomas, J., concurring in the judgment).

51 *Id.* at 2556-63.
3. THE IMPERMISSIBLE JUDICIAL EXPANSION DOCTRINE

The other, closely related doctrine does not have a particular name, but it could be labeled the “Impermissible Judicial Expansion Doctrine.” It grows out of the void-for-vagueness doctrine and offers protection against the work of the judiciary similar to what the Ex Post Facto Clauses supply against the legislature. Just as a statute that is vague affords inadequate notice of what is a crime, so, too, a statute that is clear but the courts interpret in an unforeseeable manner outlaws conduct that no reasonable person would have thought criminal. The doctrine therefore prohibits courts from construing a criminal statute in a manner that makes an unforeseeable expansion of what that a reasonable person would understand to be a crime.

4. PROOF OF GUILT

The last three subdoctrines dealt with the front end of a criminal process; they require that a criminal law exist and be readily capable of interpretation in order for it to valid. The next line of cases deal with the back end of the criminal process—more specifically, with sufficiency of the government’s proof that a person has committed a crime. The three most important decisions are straightforward. The first decision, Thompson v. Louisville, held that the government cannot convict someone of a crime where there is no proof of wrongdoing—or, put simply, that proof of guilt actually requires proof. In re Winship expanded the decision in Thompson, ruling the government must prove a defendant’s guilt beyond a reasonable doubt. Finally, in Jackson v. Virginia the Court held that the Winship reasonable doubt standard requires not only that the jury reach a state of subjective near-certitude as to a defendant’s guilt, but also that the government introduce evidence sufficient to persuade a reasonable juror of the defendant’s guilt. Like

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52 See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); id. § 10 (“No State shall . . . pass any ex post fact Law[.]”).


56 That ruling technically added to the government’s burden, but the reasonable doubt standard had been settled law for quite some time. See, e.g., Holland v. United States, 348 U.S. 121, 138-40 (1954); Wilson v. United States, 232 U.S. 563, 570 (1914); Perovich v. United States, 205 U.S. 86 (1907); Dunbar v. United States, 156 U.S. 185, 199 (1895); Hopt v. Utah, 120 U.S. 430, 440-41 (1887); Miles v. United States, 103 U.S. 304, 312 (1881); People v. Strong, 30 Cal. 151, 155 (1866); Commonwealth v. Webster, 59 Mass. 295, 320 (1850). The result was that the principal effect of the Winship decision was to apply the reasonable doubt standard to cases like Winship itself, which involved charges of delinquency brought against a juvenile.


58 A different line of cases addressed a related issue involving the allocation and standard of proof in the criminal and civil justice systems. See, e.g., Smith v. United States, 133 S. Ct. 714, 719 (2013) (due process does not prohibit allocating to the defendant the burden of proving that he withdrew from a conspiracy because withdrawal does not “negate an element of the crime” of conspiracy); Dixon v. United States, 548 U.S. 1, 13-16 (2006) (due process does not prohibit placing on the defendant the burden of proving duress as a defense); Medina v. California, 505 U.S. 437 (1992) (ruling that due process permits the state to place on the defendant the burden of proving incompetency to stand trial); Martin v. Ohio, 480 U.S. 228 (1987) (ruling that Winship does not prevent the state from placing the burden of proof on the defendant on the issue of self-defense); Santosky v. Kramer, 455 U.S. 745
the doctrines implementing the Rule of Legality, those decisions give practical content to the respect for liberty that Coke and Blackstone discussed.

It could be argued that the Thompson, Winship, and Jackson decisions ultimately rest on procedural due process considerations. The argument would be that, like the other subdoctrines just discussed, due process requires adequate notice of whatever conduct is made a crime, and the government must be able to prove through evidence at trial exactly what a statute already makes a crime. The problem with that argument, however, is that the reasonable doubt standard did not become law for that reason.59

Ironically, the reasonable doubt standard became law in order to make it easier, not more difficult, to prove a defendant’s guilt. At first, the criminal process relied on one or more of three mechanisms to establish guilt or innocence where a defendant was not caught red-handed and refused to confess: the offering of competing oaths by the accuser and the accused, armed combat between them, or the “ordeal,” which was a polite term given to the use of torture to make the accused confess.60 The common law later abandoned those procedures and adopted presentation of evidence by the prosecution and the defense. Juries were reluctant to convict, however, because of their fear that sending an innocent man to the gallows would cause them to suffer eternal damnation. By the eighteenth century, legal and theological opinion had combined to eliminate that disincentive by directing jurors to convict only if they were convinced to “a moral certainly”—that is, beyond a reasonable doubt—of the accused’s guilt.61 Together, they gave birth to the reasonable doubt requirement in order to give jurors the confidence they needed that convicting a defendant would not expose them to the risk of an eternity in hell. Trial courts used the reasonable doubt standard to advise jurors that they would not forfeit their salvation by returning a guilty verdict if they had no reasonable doubt of the defendant’s guilt.62 The common law history of the reasonable doubt standard shows that it embodies at least as much a concern with the morality of a conviction as with the accuracy of the government’s accusations and

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62 See WHITMAN, supra note 59, at 186-200.
the jury’s verdict. The *Thompson, Winship*, and *Jackson* decisions therefore cannot easily be slotted into the procedural due process category.

C. THE DELEGATION OF LAWMAKING AUTHORITY TO PRIVATE PARTIES

The next category involves how the federal and state lawmaking processes must operate. Beginning early in the twentieth century, the Supreme Court addressed several attempts by a state or the federal government to delegate governmental authority of one type or another to private parties such parties. For example in *Eubank v. City of Richmond*63 the municipality passed an ordinance, enforceable by a fine, authorizing parties who owned two-thirds of the property on any street to establish a building line barring further house construction past the line and requiring existing structures to be modified to conform to that line. The Supreme Court ruled that the ordinance violated the Due Process Clause because it created no standard for the property owners to use, permitting them to act for their self-interest or even arbitrarily.64

The next case in this series was *Washington ex rel. Seattle Title Trust Co. v. Roberge.*65 In *Roberge*, a trustee of a home for the elderly poor sought to obtain a permit to enlarge the facility to allow additional parties to reside there. A Seattle zoning ordinance limited buildings in the relevant vicinity to single-family homes, public and certain private schools, churches, parks, and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented.66 The city building superintendent denied the permit because the adjacent property owners had not consented to the variance, and the trustee sued. Relying on *Eubank*, the Court held that, while zoning ordinances are generally valid, the Seattle ordinance was unconstitutional as applied in those circumstances because it enabled the nearby property owners to deny a variance for their own, capricious reasons.67

The last case in the series was *Carter v. Carter Coal Co.*68 *Carter Coal* involved delegation challenge to the Bituminous Coal Conservation Act of 1935.69 The act authorized local coal

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63 226 U.S. 137 (1912).
64 Id. at 140-44.
65 278 U.S. 116 (1928).
66 Id. at 50-51 & n. 1.
67 Id. at 121-22.
68 298 U.S. 238 (1936). Between *Roberge* and *Carter Coal* came *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). *Schechter Poultry* involved one of the early and preeminent pieces of New Deal legislation, the National Industrial Recovery Act (NIRA), ch. 90, 48 Stat. 195 (1933). The NIRA delegated to private parties the authority to define private codes of business conduct. The rationale for the legislation was that so-called “cut throat” interfirm competition lead to the demise of businesses, which aggravated the already unprecedented levels of unemployment in the national economy. Bucking the contemporary headwinds, the Supreme Court held that the delegation of federal lawmaking power to private parties was unconstitutional. Id. at 531-42. The NIRA contained a statement of its purposes, but he Court found it insufficient to limit the discretion of private parties. Id. at 537. The NIRA contained a requirement that the President approve an unfair competition code before it could take effect, which ostensibly made the final decision governmental in nature. The Court found that requirement of no moment, however, perhaps because it was obvious that President Roosevelt never reviewed them. See EPSTEIN, supra note 22, at 270 (“In the eighteen months between August 1933 and February 1935, the frenzied activities of the Roosevelt administration generated some 546 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders.”).
69 Ch. 824, 49 Stat. 991 (1935)
district boards to adopt a code fixing agreed-upon minimum and maximum prices for coal. The act also allowed producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and hour agreements. Shareholders of other coal producers argued, and the Supreme Court ruled, that the act vested federal lawmaking power in the hands of a party interested in the outcome of a business transaction.\(^70\) *Eubank, Roberge,* and *Carter Coal* therefore stand for the proposition that it is impermissible to vest governmental authority in private parties who are neither legally nor politically accountable to other government officials or to the electorate.\(^71\)

### D. The Incorporation Doctrine

The Federalists proposed the Bill of Rights to assuage the Anti-Federalists’ concern that the Constitution would empower the new federal government to deprive the people of certain fundamental liberties. In 1833, the Supreme Court made clear in *Barron v. Baltimore*\(^72\) what the Framers knew and intended with regard to the reach of the Bill of Rights: namely, that it applied only against the federal government, not the states.\(^73\) The *Barron* decision remained the law for decades.

Just shy of the new century, however, the law began what has become almost a complete about-face. Numerous Bill of Rights guarantees now apply to the states as well as the federal government: the First Amendment Free Speech,\(^74\) Free Press,\(^75\) Free Assembly,\(^76\) Establish-

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\(^70\) 298 U.S. at 311.

\(^71\) See also *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976) (noting and distinguishing the *Eubank* and *Roberge* cases without criticizing them or suggesting that they no longer are good law). The private delegation issue arose again in cases such as *Cusak v. Chicago*, 242 U.S. 526 (1917), *New Motor Vehicle Bd. v. Fox Co.*, 439 U.S. 96 (1978), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). The laws at issue in those cases, however, left final decisionmaking authority in the hands of a state official. In *Cusak*, a Chicago ordinance prohibited the erection of billboards in residential communities without the consent of a majority of the residents on both sides of the relevant street. *Id.* at 527. The Court distinguished *Eubank* on the ground that the Richmond ordinance allowed a majority of local residents to impose a restriction, while the Chicago ordinance allowed a majority of local residents to lift an otherwise valid prohibition. 242 U.S. at 527, 531. *New Motor* rejected a due process delegation challenge to a state law directing a state agency to delay vehicle franchise establishments and locations when an existing dealer objects. 439 U.S. at 108–09. Relying on *New Motor*, *Midkiff* rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process. 467 U.S. at 243 n.6. None of those decisions conflicts with *Eubank* and *Carter Coal*.

\(^72\) 32 U.S. (7 Pet.) 243 (1833).

\(^73\) The specific issue in *Barron* was whether Baltimore had violated the Fifth Amendment Takings Clause by performing municipal construction that had the effect of depositing a large quantity of soil in front of the plaintiff’s wharf, which had the effect of making the water there too shallow for ships to dock, thereby damaging his business. The plaintiffs sued the city, claiming that the municipal government’s conduct amounted to the taking of private property without just compensation. Finding that “[t]he question thus presented is, we think, of great importance, but not of much difficulty,” 32 U.S. at 247, the Court, per Chief Justice John Marshall, explained that “it is universally understood, it is a part of the history of the day, that the great revolution which established the constitution of the United States, was not effected without immense opposition,” due to the “[s]erious fears” held by “the patriot statesmen, who then watched over the interests of our country,” that “those powers . . . deemed essential to union . . . might be exercised in a manner dangerous to liberty.” *Id.* at 250. The Founding fathers did not fear the actions of the states, and, if they did, they could have amended any threatening provision in each state’s own constitution without the need to invoke the “unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states.” *Id.*

ment,\textsuperscript{77} and Free Exercise\textsuperscript{76} Clauses; the Second Amendment right to bear arms;\textsuperscript{79} the Fourth Amendment Reasonableness\textsuperscript{80} and Warrant Clauses;\textsuperscript{81} the Fifth Amendment Double Jeopardy,\textsuperscript{82} Self-Incrimination,\textsuperscript{83} and Just Compensation\textsuperscript{84} Clauses; the Sixth Amendment Right to Speedy Trial,\textsuperscript{85} Public Trial,\textsuperscript{86} Jury Trial,\textsuperscript{87} Confrontation,\textsuperscript{88} Compulsory Process,\textsuperscript{89} and Counsel\textsuperscript{90} Clauses; the Eighth Amendment Excessive Bail\textsuperscript{91} and Cruel and Unusual Punishments\textsuperscript{92} Clause; and the Ninth Amendment.\textsuperscript{93} Today, there are few such provisions not applicable to the states.\textsuperscript{94}

Yet, the Supreme Court has never explained whether its Incorporation Doctrines decisions are examples of substantive or procedural due process—perhaps because they clearly are the former. Only the Sixth Amendment guarantees—and not all of them—bear on the accuracy of a decision. A lawyer will help an innocent party avoid conviction; religious freedom won’t. A speedy trial will increase the likelihood that witnesses will accurately recall the event; a ban on cruel and unusual punishments won’t. A public trial may prevent a defendant from being railroaded; the just compensation requirement won’t. Explaining the incorporation doctrine as another instance of substantive due process is easy; justifying those decisions as examples of procedural due process is an uphill climb.

\begin{itemize}
\item \textsuperscript{75} See \textit{Near v. Minnesota ex rel. Olson}, 283 U.S. 697 (1931).
\item \textsuperscript{76} See \textit{De Jonge v. Oregon}, 299 U.S. 353 (1937).
\item \textsuperscript{77} See \textit{Everson v. Bd. of Educ}, 330 U.S. 1 (1947).
\item \textsuperscript{78} See \textit{Cantwell v. Connecticut}, 310 U.S. 296 (1940).
\item \textsuperscript{79} See \textit{McDonald v. Chicago}, 561 U.S. 742 (2010).
\item \textsuperscript{80} See \textit{Wolf v. Colorado}, 338 U.S. 25 (1949).
\item \textsuperscript{81} See \textit{Aguilar v. Texas}, 378 U.S. 1 (1964).
\item \textsuperscript{82} See \textit{Benton v. Maryland}, 395 U.S. 784 (1969).
\item \textsuperscript{83} See \textit{Malloy v. Hogan}, 378 U.S. 1 (1964).
\item \textsuperscript{84} See \textit{Chicago, B.&Q. R. Co. v. Chicago}, 166 U.S. 228 (1897).
\item \textsuperscript{86} See \textit{In re Oliver}, 333 U.S. 257 (1948).
\item \textsuperscript{87} See \textit{Duncan v. Louisiana}, 391 U.S. 145 (1968).
\item \textsuperscript{88} See \textit{Pointer v. Texas}, 380 U.S. 400 (1965).
\item \textsuperscript{89} See \textit{Washington v. Texas}, 388 U.S. 14 (1967).
\item \textsuperscript{90} See \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963).
\item \textsuperscript{91} See \textit{Schlib v. Kuebel}, 404 U.S. 357 (1971).
\item \textsuperscript{92} See \textit{Robinson v. California}, 370 U.S. 660 (1962).
\item \textsuperscript{93} \textit{Griswold v. Connecticut}, 381 U.S. 479, 487-99 (1965) (Goldberg, J., concurring). The Supreme Court also has ruled that the Fifth Amendment Due Process Clause incorporates equal protection principles that, textually speaking, apply only against the states—a so-called “reverse incorporation” doctrine. See, e.g., \textit{United States v. Windsor}, 133 S. Ct. 2675, 2695 (2013); \textit{Bolling v. Sharpe}, 347 U.S. 497, 499 (1954)
\item \textsuperscript{94} The only Bill of Rights provisions not incorporated are the Third Amendment’s protection against quartering of soldiers, the Fifth Amendment Grand Jury Clause, the Seventh Amendment right to a civil jury trial, and the Eighth Amendment’s prohibition on excessive fines. See \textit{McDonald}, 561 U.S. at 765 n.13.
\end{itemize}
E. A BACKSTOP GUARANTEE OF FUNDAMENTAL FAIRNESS

The best description for the last (and largest) body of cases will be familiar to all baseball fans. It is common to see parties invoke the Due Process Clause as a backstop for challenging a particular government practice or action that they deem fundamentally unfair but does not fit under a more specific constitutional guarantee.95 Given the incorporation of most of the Bill of Rights’ provisions against the states, the Supreme Court has had numerous occasions to define what those provisions mean. Most often at issue is the meaning of one of the explicit textual requirements of the Fourth,96 Fifth,97 Sixth,98 and Eighth Amendments.99 Although the Court has

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97 See, e.g., Kastigar v. United States, 406 U.S. 441, 453 (1972) (holding that the Fifth Amendment self-incrimination clause requires “use immunity” in order for the government to compel a person to testify over a self-incrimination claim); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring that a person in custody be advised of his right to remain silent and to speak with an attorney before being questioned in order for any statement to be admissible); Griffin v. California, 380 U.S. 609, 612–13 (1965) (holding that the self-incrimination clause prohibits a prosecutor from commenting on the defendant’s decision not to testify at his trial); Green v. United States, 355 U.S. 184, 188 (1957) (holding that the Fifth Amendment double jeopardy clause bars retrial of an acquitted defendant).

98 See, e.g., Crawford v. Washington, 541 U.S. 36, 50–51 (2004) (holding that the Sixth Amendment Confrontation Clause guarantees a defendant the right to be confronted with the witnesses against him and therefore limits use at trial of out-of-court statements); Apprendi v. New Jersey, 530 U.S. 466, 483–84 (2000) (holding that the Sixth Amendment Jury Trial Clause guarantees a defendant the right to have the jury make all findings necessary for a sentence to be imposed in excess of the statutory maximum); Massiah v. United States, 377 U.S. 201, 204–05 (1964) (holding that the Sixth Amendment Counsel Clause prohibits the police from deliberately eliciting incriminating statements from a charged suspect in the absence of counsel or a waiver); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment Counsel Clause guarantees an indigent defendant charged with a felony the right to the appointment of trial counsel at state expense); see generally Perry v. New Hampshire, 132 S. Ct. 716, 716 (2012) (discussing Sixth Amendment fair trial guarantees).

99 See, e.g., Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding that the Eighth Amendment Cruel and Unusual Punishments Clause prohibits imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim); Roper v. Simmons, 543 U.S. 551, 569–75 (2005) (same, imposing the death penalty on minors); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (same, imposing the death penalty on mentally retarded defendants); Harmelin v. Michigan, 501 U.S. 957, 997–1001 (1991) (Kennedy, J., concurring) (ruling that the Eighth Amendment prohibits only grossly disproportionate terms of imprisonment); Gregg v. Georgia, 428 U.S. 153, 179 (1976) (rejecting the claim that the death penalty is invariably a cruel and unusual punish-
given some of those terms—such as “search” or “seizure”—an expansive reading, there still are occasions in which they do not embrace a particular type of government conduct that the Court finds troubling. For that reason, the Supreme Court has held that various federal or state trial procedures violate the Due Process Clause because a challenged procedure leads to a fundamentally unfair trial outcome or effectively denies a defendant of what American law has come to deem a “trial.”

100 See, e.g., Terry v. Ohio, 392 U.S. 1 (1968) (ruling that a brief detention for questioning is a “seizure”); Camara v. Municipal Ct., 387 U.S. 523 (1967) (ruling that an administrative inspection of a business is a “search”).

101 See, e.g., Rochin v. California, 342 U.S. 165, 172-74 (1952) (ruling that the forcible use of an emetic to pump a suspect’s stomach so “shock[ed] the conscience” as to require suppression of the morphine capsules thereby obtained).

102 See, e.g., Holmes v. South Carolina, 547 U.S. 319 (2006) (ruling that state court violated due process by forbidding defendant from introducing evidence to show that someone else committed the crime); Crane v. Kentucky, 476 U.S. 683 (1986) (state court violated due process by excluding at trial evidence showing that the defendant’s confession was coerced); United States v. Lovasco, 431 U.S. 783, 790 (1977) (noting that the delay in bringing charges against a defendant can violate due process if the government acted for an improper reason and the defendant was prejudiced by the delay); Gardner v. Florida, 430 U.S. 349 (1977) (ruling that due process bars the state from testifying at trial due to obstructive conduct); North Carolina v. Pearce, 395 U.S. 711 (1969) (due process forbids the prosecution from increasing the charges against a defendant if the government acted for an improper reason and the defendant was prejudiced by the delay); Hutto v. Davis, 429 U.S. 28, 30 n.3 (1976) (suggesting that due process forbids the admission at trial of a defendant’s withdrawn guilty plea).

103 See, e.g., Holmes v. South Carolina, 547 U.S. 319 (2006) (ruling that state court violated due process by forbidding defendant from introducing evidence to show that someone else committed the crime); Crane v. Kentucky, 476 U.S. 683 (1986) (state court violated due process by excluding at trial evidence showing that the defendant’s confession was coerced); United States v. Lovasco, 431 U.S. 783, 790 (1977) (noting that the delay in bringing charges against a defendant can violate due process if the government acted for an improper reason and the defendant was prejudiced by the delay); Gardner v. Florida, 430 U.S. 349 (1977) (ruling that due process bars the state from sen-
An example of the former is the first decision in this series, *Brown v. Mississippi*\(^{104}\). There, the Supreme Court held that the Due Process Clause prohibited the admission at trial of the confession taken from a defendant who, when he was brought into the courtroom, still exhibited the burn marks around his neck from having been hung until he confessed.\(^{105}\) Another such example is the line of decisions evaluating the permissibility of police practices used to identify a suspect, such as a photo display, a lineup, or a “showup” (viz., taking a suspect alone to a witness for identification).\(^{106}\) The Court has also held that the Due Process Clause requires the government to act in a fundamentally fair manner at other stages of the criminal justice process that every state and the federal government use today, such as the appellate process,\(^{107}\) and probation or parole revocation proceedings,\(^{108}\) but that were unknown at common law.\(^{109}\)

\(^{104}\) 297 U.S. 278 (1936).

\(^{105}\) Id. at 281.

\(^{106}\) See *Perry v. New Hampshire*, 132 S. Ct. 716, 721 (2012) (“Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array.”); id. at 722-30 (upholding the admission of an eyewitness identification when the witness spotted the suspect while being questioned); see also, e.g., *Manson v. Braithwaite*, 432 U.S. 98 (1977) (ruling that the use of a one-photograph display was inadmissible as long as there are sufficient indicia of reliability); *Neil v. Biggers*, 409 U.S. 188 (1972) (same, for a police station showup); *Simmons v. United States*, 390 U.S. 377, 382-85 (1968) (ruling that law enforcement use of a photographic display is not necessarily unconstitutional by being unduly suggestive); *Stovall v. Denno*, 388 U.S. 293, 298-302 (1967) (ruling that a showup is not necessarily so suggestive as to be unconstitutional even though the handcuffed suspect was the only African-American in the room); *Foster v. California*, 394 U.S. 440 (1969) (ruling that it violates due process to use at trial the results of a police-staged, unduly suggestive identification procedure).

\(^{107}\) See, e.g., *Evitts v. Lucey*, 469 U.S. 333 (1985) (ruling that a state appellate courts cannot dismiss an offenders first appeal of right when the failure to comply with appellate procedure is due to the ineffective assistance of
An example of the second category—actions that effectively deny a defendant a trial as we know it—would be the Supreme Court’s decision in Moore v. Dempsey.110 There, the Court seemed “troubled” (to put it kindly) by the possibility that the state had convicted a defendant and sentenced him to death after a trial that would have made Robespierre blush.111 Another ex-

counsel); Douglas v. California, 372 U.S. 353 (1963) (ruling that the Fourteenth Amendment requires the state to provide an indigent offender with counsel on his first appeal as of right); see also, e.g., Evitts, 469 U.S. at 393 (citing cases requiring the state to provide an indigent offender with a free trial transcript).

108 See, e.g., Superintendent v. Hill, 472 U.S. 445 (1985) (ruling that there must be “some evidence” of misconduct before a state can revoke earned good-time credits); Black v. Romano, 471 U.S. 606 (1985) (ruling that a trial judge need not consider alternatives to incarceration when deciding whether a probationer has violated a condition of his release); Bearden v. Georgia, 461 U.S. 660 (1983) (ruling that due process and equal protection principles bar a trial judge from sentencing an indigent offender to prison for nonpayment of a fine); Wolff v. McDonnell, 418 U.S. 539 (1974) (ruling that due process requires procedural safeguards before an inmate can be deprived of good-time credits); Douglas v. Buder, 412 U.S. 430 (1973) (ruling that due process prohibits a probation revocation when there is no underlying proof that the probationer violated a condition of his release); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (ruling that due process requires fundamentally fair procedures to be used when the state revokes a probationer’s release); Morrissey v. Brewer, 408 U.S. 471 (1972) (ruling that due process requires fundamentally fair procedures to be used when the state revokes a parolee’s release); see also, e.g., Young v. Harper, 520 U.S. 143 (1997) (ruling that Oklahoma’s “Preparole Conditional Supervision Program” was tantamount to parole and an offender was therefore entitled to the same procedural protections before his release could be revoked).

109 At common law, there was no right to appeal a judgment of conviction or the sentence. For example, the Judiciary Act of 1789, § 14, 1 Stat. 81, did not establish a right to appeal a conviction in a criminal case. Congress did not create a general right to appeal in federal capital cases until 1889, Act of Feb. 6, 1889, § 6, 25 Stat. 655, 656, and Congress did not extend that right to all criminal cases until 1891, the Circuit Courts of Appeals (Evarts) Act, § 5, 26 Stat. 827 (1891). In part for that reason, the Supreme Court has repeatedly held that a defendant does not have a constitutional right to challenge his conviction or sentence on appeal, even in a capital case. See, e.g., Goeke v. Branch, 514 U.S. 115, 120 (1995); Bergeman v. Backer, 157 U.S. 655 (1895); Andrews v. Swartz, 156 U.S. 272 (1895); McKane v. Durston, 153 U.S. 684 (1894).


110 261 U.S. 86 (1923).

111 See id. at 88-90 (“Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. . . . [T]he petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—atkins being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The [defense counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live
ample in this category would be cases in which the Court prohibited the government from trying a defendant who, because of a mental disease or defect, is incapable of understanding what a trial is or that he is on trial, or from being able to consult with defense counsel. Perhaps two other similar lines of cases would be the Court’s decisions barring the state from using perjured testimony to prove the defendant’s guilt and the Court’s decisions holding that certain constitutional errors cannot be harmless under any circumstances.  

Decisions in the first category of cases could be readily described as examples of procedural due process. The second category of decisions, however, does not easily fit into that category. At common law, a sheriff and community members that caught a suspect red-handed as part of the “hue and cry” could string him up immediately without even the pretense of a trial. The Constitution forbids that practice today, of course. The ultimate reason why, however, is

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112 See, e.g., Drope v. Missouri, 420 U.S. 162 (1975) (ruling that a defendant has a right not to be tried if he is mentally incompetent and cannot understand the nature of the proceedings or assist in his defense); Pate v. Robinson, 383 U.S. 375 (1966) (discussing procedures necessary at a hearing held to determine whether a defendant should be psychiatrically examined for his competency to stand trial); Dusky v. United States, 362 U.S. 402 (1960) (adopting standard to determine whether a defendant is competent to stand trial).

113 See, e.g., Napue v. Illinois, 360 U.S. 264 (1959) (ruling that due process forbids a prosecutor from knowingly allowing a witness’s perjury to go uncorrected at trial); Pyle v. Kansas, 317 U.S. 213 (1942) (ruling that due process forbids a prosecutor from intentionally using perjured testimony to convict a defendant); Mooney v. Holohan, 294 U.S. 103 (1935) (ruling that due process forbids a prosecutor from proving a defendant’s guilt entirely through perjured testimony); cf. Giglio v. United States, 405 U.S. 150 (1972) (ruling that due process forbids the prosecution from not disclosing to the defense evidence that impeaches the credibility of a prosecution witness); Brady v. Maryland, 373 U.S. 83 (1963) (ruling that due process forbids the prosecution from not disclosing to the defense exculpatory evidence on the issues of guilt or innocence).

114 The current rule is that most constitutional errors that occur before or at trial can be found harmless in a given case. See, e.g., United States v. Marcus, 130 S. Ct. 2159, 2164–66 (2010) (ruling that a jury instruction allowing defendant to be convicted for conduct predating enactment of the relevant statute, in violation of the Ex Post Facto Clause, can be harmless); Rivera v. Illinois, 556 U.S. 148 (2009) (same, denial of defense right to exercise a peremptory challenge to a potential juror); Rivera v. Illinois, 556 U.S. 148 (2009) (same, denial of defense right to exercise a peremptory challenge to a potential juror); Arizona v. Fulminante, 499 U.S. 279 (1991) (same, admission of a coerced confession). Nonetheless, there are some errors that cannot be harmless. See Sullivan v. Louisiana, 508 U.S. 275, 279–82 (1993) (a constitutionally deficient jury instruction on the “reasonable doubt” standard of proof); id. at 279 (identifying as nonharmless errors total deprivation of representation by defense counsel at trial and trial before a biased judge, citing Gideon v. Wainwright, 372 U.S. 335 (1963), and Tumey v. Ohio, 273 U.S. 510 (1927)); Gomez v. United States, 490 U.S. 858, 876 (1989) (district court’s unauthorized delegation of jury selection to a magistrate); McKaskle v. Wiggins, 465 U.S. 168 (1984) (right to self-representation at trial); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in the selection of grand jurors); cf. Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984) (suggesting that the denial of the right to a public trial cannot be harmless). Those errors—mistakes that the Court has termed “structural,” Washington v. Recuenco, 548 U.S. 212, 218 (2006)—defy harmless-error analysis for one of three reasons: (1) they are so egregious as render a trial a nullity; (2) they so alter the trial record that appellate review of their effect is impossible; or (3) they would be harmless as a matter of law in every case, making appellate review useless. See, e.g., Fulminante, 499 U.S. at 306–12. There is a fourth category of errors where harmless-error analysis is unavailable—viz., claims that require a defendant to establish prejudice in order to make out a violation. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984) (ineffective assistance of counsel). It makes no sense to ask whether an error was harmless if the defendant had to establish prejudice in order to establish his claim of a constitutional violation.

115 See United States v. Shipp, 203 U.S. 563 (1906) (lynching a person charged in state court with rape can be prosecuted as contempt for violating a federal district court’s order in a habeas corpus proceeding). Not surprisingly, the
not that a lynch mob is likely to make a mistake when deciding which defendants to hang, although that is true, but is that the Constitution guarantees every defendant, the guilty no less than the innocent, a “trial,” and lynching a defendant before trial deprives the accused of just that. If so, the argument goes, so too does holding a Soviet era “show trial,” one at which the parties read their assigned roles from a script, or using a proceeding so obviously deficient in what we today would deem a “trial” that the proceeding is really just a charade. How that category of cases should be characterized—as procedural or substantive due process—is not at all obvious.

III. THE EFFECT OF LEAVING THOSE DOCTRINES IN NO MAN’S LAND

If we rely solely on the Supreme Court’s decisions, we can see that the only Lost Due Process Doctrine that could fairly be treated as an application of procedural due process is the last one, the Due-Process-as-Backstop Doctrine. What is also true, however, is that the Court has not explained why that is true. Start with the Rule of Legality and its offspring—the void-for-vagueness, unforeseeable-expansion, and proof-of-guilt doctrines. Each body of Supreme Court case law has developed largely without reference to the others, as if each one had “heard another call.” The closest that the Supreme Court has come to grounding those doctrines in due process theory or relating those doctrines to each other is by stating that they implement the requirement that the government must offer the public adequate notice of what the law forbids before a person can be held liable for violating a criminal statute. As the Supreme Court explained in *Bouie v. City of Columbia*, “a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.” *Bouie* explains that the unforeseeable-expansion doctrine grows out of the void-for-vagueness doctrine, but does not fit either one into either the procedural or substantive branch of due process. That explanation is informative, but also of limited use.

Perhaps, the Court avoided discussing the pedigree of each line of precedents in its procedural or substantive due process doctrines, or even mentioning that, given its precedents and logic, each case had to fit within one or the other fonts, because the Court was trying to treat its substantive due process decisions as the bastard stepchild that the justices hoped they had become. Consider the provenance of those decisions. As Justice Thomas recently detailed, the Void-for-Vagueness Doctrine superficially bears a strong family resemblance to the Court’s now-despised pre-New Deal era precedents—*Lochner* is the principal felon in this gang—striking down the political branches’ efforts to rearrange social and economic arrangements through legislation. The Court may have hoped that it had put to rest what it then regretted as a sad and unfortunate judicial review frolic-and-detour into substantive due process and therefore

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*Shipp* case is still good law. See United States v. Lanier, 520 U.S. 259 (1997) (a state court judge who coerces sexual favors from a civil litigant can be criminally prosecuted in federal court as a civil rights violation).


117 See, e.g., Rogers v. Tennessee, 532 U.S. 451, 459 (2001) (“core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”) (emphasis deleted).


119 Id. at 352.

refused even to acknowledge that such a branch of its jurisprudence had once even existed. Due process was concerned only with the fairness of the procedures that the government used to take away someone’s life, liberty, or property for violating one of the rules of the game. Grant that premise—which is essentially the rule of legality—and the rest of the doctrines fall in line. If it is grossly unfair to punish someone for noncompliance with a rule that did not exist, it is not a big step to the ancillary rule that it is also unfair to penalize someone for violating a rule that technically did exist because it was on the statute books, but was so far beyond the ken of the average person that penalizing someone for noncompliance was more akin to playing “gotcha” than to a fair assessment of how he played the game. If so, it then is unfair regardless of whether the legislature or a court has created the rule. And if all that is true, then it also is unfair to punish someone for violating a known and clearly understandable rule if anything, even just an allegation, constitutes “proof” of a violation. The upshot is that, if even the past existence of substantive due process must be avoided like the plague, the rule of legality and its children can all be justified nonetheless as an aspect of procedural due process.

The issue in the personal jurisdiction case, however, is one of power, not process. The question is not whether the pretrial, trial, and appellate procedures in the forum court satisfy some agreed-upon notion of fundamental fairness and ensure that the civil justice system can accurately find the facts and apply the law in an evenhanded manner. The ultimate issue involves the attempt by a court in State A to enter a judgment enforceable against a defendant in State B who has studiously avoided entering State A and thereby making himself subject to the jurisdiction of its courts. Avoiding notions of substantive due process is a far more difficult task when the issue has little to do with any reasonable understanding of the fairness of playing a game.

What is particularly interesting about the personal jurisdiction doctrine, therefore, is what the Supreme Court does not say. Take the Court’s recent decision in Daimler AG v. Bauman. The plaintiffs, residents and citizens of Argentina or Chile without any connection to the United States, initiated a federal court lawsuit in California against a German company, Daimler AG, seeking relief for the allegedly tortious activities of one of its subsidiary corporations, Mercedes-Benz Argentina. The plaintiffs alleged that the subsidiary had collaborated with Argentine security forces during that country’s 1976-1983 “Dirty War” to detain, kidnap, torture, and kill Argentine nationals employed by (or related to employees of) Mercedes-Benz Argentina, injuries that occurred entirely within Argentina. The decision canvasses the relevant Supreme Court precedents and offers an exhaustive discussion of the historical development of the case law governing personal jurisdiction. Any first-year law student—or layman for that matter—can readily understand Court’s simple and straightforward explanation why the plaintiffs, who were complete


121 The Full Faith and Credit Clause of the Constitution would require the courts in State B to give effect to a judgment entered by a court in State A. See U.S. Const. art. IV, § 1 (“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”); Baker v. General Motors Corp., 522 U.S. 222, 231-34 (1998).

122 Occasionally, silence is quite illuminating. See Arthur Conan Doyle, Silver Blaze, in THE COMPLETE SHERLOCK HOLMES 335, 347 (1930).

123 134 S. Ct. 746 (2014).

124 Id. at 751-52.
strangers to California, could not go forward with their lawsuit in that forum. Little if anything could be added to the discussion. Yet, nowhere in the Court’s discussion of the personal jurisdiction doctrine does the Court explain why the Due Process Clause limits the power of a court to adjudicate a particular dispute. The Court explains in detail the due process limitations on the exercise of personal jurisdiction, and the Court identifies the Due Process Clause as the source of those limitations. What the Court never explains, however, is why the Due Process Clause serves that role.

Courts and scholars have traditionally divided due process law into procedural and substantive components. The former seeks to enhance the accuracy of adjudications, while the latter addresses the substantive limitations on the government’s law-making authority. Only one of those two concerns was present in Daimler AG, and it is readily apparent which one that was. The Court’s opinion makes clear that it was not concerned that the federal district court might enter a judgment on the plaintiffs’ claims that would be inaccurate. Instead, the Court was troubled by the prospect that any judgment entered in the case would be illegitimate and therefore void. Yet, despite the lengthy discussion of the Court’s precedent describing the personal jurisdiction doctrine, the Court said nothing about why the Due Process Clause is the relevant limitation on state authority. Perhaps, the Court found that explanation unnecessary because its decisions have so uniformly relied on the Due Process Clause as the basis for defining limits on personal jurisdiction that the Court saw no justification as necessary. But that rationale ultimately begs the question whether the Court has ever justified its reliance on due process as the ground for limiting state action. Most scholarship on personal jurisdiction also focuses on the substantive rules and principles in the doctrine, rather than on its origin. When that question is pursued, it turns out that the Court’s attempt in Daimler AG to craft a definitive presentation of the personal jurisdiction doctrine is an intriguing example of Hamlet without the Prince of Denmark.

Like the Personal Jurisdiction Doctrine, the Private Delegation Doctrine is mute on the source. It is possible to justify the doctrine on the ground that delegating decisionmaking or lawmaking power to private parties is inherently likely to result in a fundamentally unfair outcome whenever the recipients have a personal interest in the outcome. The government cannot base a

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125 See Austin W. Scott, Jurisdiction Over Nonresidents Doing Business Within a State, 32 HARV. L. REV. 871, 871 (1919) (“A personal judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes. An attempt to execute it is without justification; a sheriff levying upon property of the defendant is liable for conversion, and a purchaser of the property on execution sale gets no title to it. A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment. No action lies upon it either in the state wherein it is rendered or in any other state. It cannot be set up as a bar in a suit upon the original cause of action.”) (footnotes omitted).


judge’s salary on the number of guilty judgments he enters and credibly argue that the judge will remain impartial between the prosecution and the defense.\(^{128}\) For much the same reason, it would be unreasonable to delegate the power to define “unfair methods of competition” to a portion of a particular industry or to allow some industry rivals to set industry-wide wage and maximum-hour agreements while expecting that the beneficiaries would not use that power for their own benefit.\(^{129}\) But procedural due process principles cannot resolve every private delegation case because the rationale for the doctrine would apply even if Congress gave the same power to a retired Supreme Court Justice, the Pope, or the most recent inductees into Cooperstown.\(^{130}\) In those cases, there would be no risk that the decisionmaker would be a partisan, making it impossible to fault the delegation on procedural due process grounds. If the only alternative is to label the delegation as a substantive due process violation, a Court committed to avoiding even the spectre of *Lochner* leaving its grave would simply avoid labelling private delegation as either type of due process flaw.

Turn now to the Incorporation Doctrine. Characterizing the Court’s decisions as examples of procedural due process is not remotely plausible. The First Amendment Free Speech, Free Press, Free Exercise, and Establishment Clauses; the Second Amendment Right to Bear Arms; the Fourth Amendment Reasonableness and Warrant Clauses; the Fifth Amendment Self-Incrimination, Double Jeopardy, and Takings Clauses; the Eighth Amendment Cruel and Unusual Punishments and Excessive Fines Clauses—none of those provisions safeguards the accuracy, reliability, or fairness of the criminal, civil, or administrative processes. Each one is a flat or conditional prohibition on a particular type of government conduct that is unrelated to the accuracy of the decision whether to take those actions. We could not have boiled Charles Manson or Usama bin Laden in oil even if the entire nation had voted in favor of that penalty because that punishment would have been cruel and unusual.\(^{131}\) Here, too, the Court likely saw silence as being preferable to candor as far as the source of incorporation is concerned.

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The upshot of the foregoing is this: There are several Supreme Court doctrines that claim to rest on the Due Process Clause but cannot readily be labelled as procedural or substantive even


\(^{129}\) See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding unconstitutional a provision in the Bituminous Coal Conservation Act of 1935, Ch. 824, 49 Stat. 991 (1935), that, among other things, allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and maximum working hour agreements); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (holding unconstitutional a provision in the National Industrial Recovery Act, Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933), that delegated to trade or industrial groups the authority to define “unfair methods of competition” that later were to be approved by the President.).


\(^{131}\) Of course, maybe some of the Court’s incorporation decisions could be depicted as designed to enhance the procedural accuracy of a trial. The Sixth Amendment Counsel Clause likely would be suggested as just such an example. *See Stovall v. Denno*, 388 U.S. 293, 297-98 (1967). But even the Sixth Amendment is not entirely a fairness-enhancing guarantee. *See DeStefano v. Woods*, 392 U.S. 631, 633-34 (1968) (refusing to apply retroactively *Duncan v. Louisiana*, 391 U.S. 145 (1968), which held that the Sixth Amendment Jury Trial Clause applies against the states; “As we stated in *Duncan*, ‘We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.’”) (quoting *Duncan*, 391 U.S. at 158).
though the dichotomy is longstanding. The Supreme Court has never attempted to ground those doctrines in one category or the other, perhaps because it has been afraid to admit that it has been engaging in unreconstructed (but carefully obscured) substantive due process analysis while also decrying that type of judicial review in the context of social and economic legislation. The question, then, is whether those doctrines can be justified without needing to slot them into one category or the other. As explained below, that task can be done.

IV. THE SIGNIFICANCE OF MAGNA CARTA

Justice Oliver Wendell Holmes, Jr., once remarked that “a page of history is worth a volume of logic.” His aphorism is particularly apt when the subject at issue has roots in the common law, like Magna Carta. To understand where the Great Charter fits into contemporary jurisprudence, one must first examine the events from whence Magna Carta came. They illustrate why Magna Carta was created and what purposes it was to serve.

Two of those purposes are particularly important. One is known as “the rule of law,” the proposition that those who govern, like those who are governed, are subject to the law. The other is the principle that long-established traditions can form the constitution of a society, whether or not they are formally adopted by the relevant chief governing body. Both of purposes help us understand why America broke from England in 1776 and why Magna Carta still plays an important role in contemporary American jurisprudence.

A. THE PRE-MAGNA CARTA EVOLUTION OF ENGLISH LAW

The constitutional history of Magna Carta, like that of England itself, has Teutonic roots. Early English “law” reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both “rough and crude.” The laws of the folk, the ‘folkright,’ could vary among ancestors and from community to community. Unlike today’s laws, Anglo-Saxon customs were rarely written. The “men of the folk,” especially “the old and

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133 See John Phillip Reid, The Ancient Constitution and the Origins of Anglo-American Liberty 5-6 (2005) (hereafter Reid, Ancient Constitution), quoted infra at note 166; Thomas Pitt Taswell-Langmead, English Constitutional History 1 (2012) (1875). What we know begins in the seventh century, id. at 1-2, although the next several hundred years are “but partially and fitfully lit.” Frederick W. Maitland & Francis C. Montague, A Sketch of English Legal History 16 (1915). Before the seventh century, “the trail stops, the dim twilight becomes darkness” because “we pass from an age in which men seldom write their laws, to one in which they cannot write at all. Beyond lies the realm of guesswork.” Id.

134 Frederick Pollock, The Expansion of the Common Law 139-40 (1904); see also, e.g., J.H. Baker, An Introduction to English Legal History 1-2, 8-9 (4th ed. 2007); Daniel Hannan, Inventing Freedom: How the English-Speaking Peoples Made the Modern World 70-81 (2013); Edward Jenks, A Short History of English Law 3 (1912) (“The so-called Anglo-Saxon laws date from a well-recognized age in the evolution of law. They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom.”); Hall & Seligman, supra note 42, at 644 (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”).


136 See Christopher Brooke, From Alfred to Henry III, 871-1272, at 45 (1961) (“The written laws of Anglo-Saxon kings were not comprehensive codes. The main body of law was customary and unwritten. When customs had to be altered, or clarified, or emphasized, it might be put in writing. The result is that the law-books from King Ethelbert of Kent to King Cnut are at once very particular and very precise and very fragmented.”); Jenks, supra note 132, at 4 (“Why trouble to record that which every village elder knows?”). At one time there were twelve sepa-
The “essence” of early English law was its “popular” nature, which had two features. It “represented custom, of which any man with a good memory might be the repository, and local opinion,” a valuable feature given that most people were illiterate, and it was “popular” because it was made in meetings of the entire community. Like today’s laws, Anglo-Saxon customs sought to prevent wrongs and to redress grievances. Unlike today’s laws, however, Anglo-Saxon traditions operated in the only way possible in a land of multiple, decentralized communities given to tribal loyalty and intertribal disputes and lacking a central government: paying off the kinfolk of the victim to avoid a blood feud. It took years before even a rough criminal code emerged.

rate “kingdoms” in England, but there was only one by the tenth century. England was divided into “shires” or counties (supervised by “shire-reeves,” today’s sheriffs, appointed by the king), which were further subdivided into “hundreds,” and then again to “tithings” in the country and “boroughs” in villages. See Baker, supra note 132, at 6-8.

137 MAITLAND & MONTAGUE, supra note 131, at 16; see also BROOKE, supra note 134, at 68-69 (“The essence of early English law is that it was ‘popular’ law. The people at large were the repositories of law; they were the judges in the public courts. Law represented custom, of which any man with a good memory might be the repository, and public opinion[,]”).

138 BROOKE, supra note 134, at 68-69.

139 Id.

140 Id.; TASWELL-LANGMEAD, supra note 131, at 5-6.

141 See JENKS, supra note 132, at 13 (“The ‘penal law of ancient England is not, to, ‘to use the English technical word,’ a ‘law of Torts.’ It is a law which, with rare exceptions, recognizes merely the root idea of a wrong; it does not distinguish between crime, tort, and breach of contract. These sharp distinctions will come later on[,]”) (footnote omitted). Over time criminal jurisdiction extended to any breach of the king’s “peace,” with civil jurisdiction stemming from the king’s role as a feudal lord dispensing justice for his tenants. See Baker, supra note 132, at 9.

142 JENKS, supra note 132, at 7-8, 10 (“Doubtless the ordinary offence, even the violent offence, was looked upon, primarily, as a wrong to the party specifically injured and his kindred.”); MAITLAND & MONTAGUE, supra note 131, at 15. Originally, there were a dozen separate kingdoms in England, a number that was later whittled to three (Wessex, Mercia, and Northumbria), one of which (Wessex) became the sovereign under Alfred and Edgar. At the time of the Norman Conquest, the Angles, Saxons, Jutes, and Danes had coalesced into one (albeit loosely defined) nation. TASWELL-LANGMEAD, supra note 131, at 8-11.

143 See JENKS, supra note 132, at 8-10 (“Only with the advent of a strong monarchy was it possible to stamp out the extra-judicial distress, or at least to confine it to claims by a lord against his vassal. . . . . . . . A great step is gained when the King takes [the] place [of private vengeance]. Not only are ‘bōtelas’ offenses”—crimes too serious to be punished by only financial compensation to the victim—“more promptly punished; but the list of them can be indefinitely extended. The change was clearly marked in England by the time of Cnut; by the time of the Conquest, the list of the ‘King’s rights’ had greatly extended. Thus the land saw the beginnings of a true criminal law.”) (footnotes omitted). The transition from private vengeance to public justice is never abrupt. See Frederick Pollock, The King’s Peace in the Middle Ages, 13 HARV. L. REV. 177, 177 (1899) (“All existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished. First, revenge approved as no more than adequate, or disapproved as excessive, by rough public opinion, and, even when deemed legitimate, constantly leading to reprisals and fresh feuds; next, revenge limited by customary rules and tempered by the alternative of accepting compensation of a fitting amount; then a rule compelling the injured party, or his kindred if he was slain, to be content with compensation on the proper scale if duly tendered and secured; then the addition of punishment, or substitution of punishment for compensation, turning the avenger into a prosecutor who must hand over the business of execution to public authority; finally the staying of the private avenger’s hand, and the repression of crime by direct application of the power at the disposal of the State: all this may be seen, or more or
The English King Ethelbert drafted the first written code in approximately 600 A.D.\textsuperscript{144} Consisting of only “ninety brief sentences,”\textsuperscript{145} Ethelbert’s code—composed of dooms (“decrees”) not leges (“laws”), because the concept of “law” was as yet unknown in England\textsuperscript{146}—was essentially a tariff,\textsuperscript{147} a schedule of fines, payable in money known as the wergild or in-kind, that a wrongdoer was obliged to give to the victim of a crime or his kin, principally for murder, mayhem, other acts of violence, or cattle-thievery. The hoped-for goal was to forestall violent retaliation and intertribal warfare.\textsuperscript{148}

Parties sought relief at the primary local court, known as the “shire moot,” “hundred moot,” or hundred.\textsuperscript{149} Supervised by the sheriff (a crown appointee) or some similar figure, the hundred met once monthly. Each hundred moot more closely resembled an “ill-managed” open-air town meeting than a modern day judicial proceeding.\textsuperscript{150} Jurisdiction rested on the consent of the parties because there was no modern-day subpoena process to compel someone to appear.\textsuperscript{151}

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less distinctly traced, in the history of criminal jurisdiction and law in many lands, and is abundantly exemplified in our own.”
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\textsuperscript{144} See BAKER, supra note 132, at 2-3; MAITLAND, supra note 133, at 1.

\textsuperscript{145} MAITLAND & MONTAGUE, supra note 131, at 6.

\textsuperscript{146} See POLLOCK, supra note 132, at 147. The word “law” did not exist in England until the Danes brought the “Danefalaw” with them in the eleventh century. MAITLAND & MONTAGUE, supra note 131, at 16. The term “common law” did not appear until the reign of Henry II during the twelfth century. See HANNAN, supra note 132, at 77.

\textsuperscript{147} Ethelbert’s “code” was that only in a loose sense of that term, because it is unclear to what extent Ethelbert’s dooms were intended to serve as a complete exposition of the Anglo-Saxon customs. See BROOKE, supra note 134, at 45; POLLOCK, supra note 132, at 148.

\textsuperscript{148} See MAITLAND & MONTAGUE, supra note 131, at 6; see id. 193-99 (the Code of Ethelbert); POLLOCK, supra note 132, at 148-49, 153-54. In the case of a homicide, for example, the offender was responsible for paying the deceased’s family the victim’s “wergild,” the deceased’s worth or price. MAITLAND & MONTAGUE, supra note 131, at 19. Because private or clan vengeance did not distinguish between actions done intentionally, negligently, or accidentally, Anglo-Saxon customs also drew no such distinctions. See POLLOCK, supra note 132, at 153.

\textsuperscript{149} See BAKER, supra note 132, at 3-4, 7-9; MAITLAND & MONTAGUE, supra note 131, at 30; POLLOCK, supra note 132, at 30, 139-40.

\textsuperscript{150} See BAKER, supra note 132, at 3-4, 7-9; MAITLAND & MONTAGUE, supra note 131, at 30; POLLOCK, supra note 132, at 30, 139-40. Germanic clans, predecessors to the Angles and Saxons, had made their decisions in the same manner. See HANNAN, supra note 132, at 81; TASWELL-LANGMEAD, supra note 131, at 5-6.

\textsuperscript{151} See HENRY OF HUNTINGTON, THE HISTORY OF THE ENGLISH PEOPLE, 1000-1154, at ix (Diana Greenway trans. 2002) (1154); MAITLAND & MONTAGUE, supra note 131, at 9-13; POLLOCK, supra note 132, at 145. There also were no judges, no lawyers, and no administrative personnel such as clerks and bailiffs. The only learned participants were bishops, abbots, and ecclesiastics. See id. at 145. Ecclesiastics gradually acquired the authority to hold their own courts. See MAITLAND & MONTAGUE, supra note 131, at 39-42; POLLOCK, supra note 132, at 141. Institutions such as the grand or petit jury, representation by lawyers, and rules of evidence lay well in the future. See MAITLAND & MONTAGUE, supra note 131, at 45-50 (trial by jury). There also were no formal rules of procedure and evidence. Parties proved or defended a case by offering oaths—that is, the personal endorsements—of supporters, not their testimony. See POLLOCK, supra note 132, at 28, 139, 143. Cases were resolved not by sifting and weighing the evidence but based on the number of oath-givers, which varied according to the status of each party, and whether they precisely followed the formula for taking an oath. See POLLOCK, supra note 132, at 139, 143, 149-50. Disagreements among oaths, particularly in criminal cases, were left for God to resolve. See, e.g., MAITLAND & MONTAGUE, supra note 131, at 47-49. In the case of larger or more important disputes, a party could seek relief from the county court, which met biannually, or from the king himself, who would render judgment after consulting with his council of wise men, known as the “witan.” It was rare, however, for the king to become involved in such
The payment of tariffs was the only alternative to corporal punishment then available to avoid interclan warfare.\textsuperscript{152} The refusal to pay rendered an offender an “outlaw,” someone beyond the protection of the law, with the victim’s kin obliged to kill him, burn his house, and waste his land.\textsuperscript{153}

English customs survived the Norman Conquest. The Normans brought no written laws with them and William the Conqueror chose to respect indigenous customs, also known as the “customary practice” or “common conviction of the community,” to avoid making his succession feel oppressive and risk a rebellion.\textsuperscript{154} No system of law is static, however, and the English legal matters. See MAITLAND & MONTAGUE, supra note 131, at 11-13, 143. Up until the Norman invasion, the only penalties known to English law were the blood feud, the wergild, and outlawry. See MAITLAND & MONTAGUE, supra note 131, at 20. When one side finally prevailed, there was no institutional method for enforcing a judgment. Courts, as they were, had no administrative personnel or marshals to enforce their “judgments,” which left enforcement to the honor of the losing side or by forfeiture of whatever property, usually cattle, one party had taken from the other as a security. See HENRY OF HUNTINGTON, supra note 149, at ix; MAITLAND & MONTAGUE, supra note 131, at 9-13; POLLOCK, supra note 132, at 146.

\textsuperscript{152}See POLLOCK, supra note 132, at 150-51.

\textsuperscript{153}See MAITLAND & MONTAGUE, supra note 131, at 19-20, 66-69. For a concise discussion of the growth of English common law criminal procedure, see, for example, LANGBEIN, CRIMINAL TRIAL ORIGINS, supra note 58; LANGBEIN, CRIMINAL TRIAL ORIGINS, supra note 58; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 424–41 (5th ed. 1956); Pollock, supra note 141.

\textsuperscript{154}See BAKER, supra note 132, at 12 (“The Norman invaders were warlike, uncultured and illiterate... [T]hey had no refined body of jurisprudence to bring with them.”); RALPH C. DAVIS, THE NORMANS AND THEIR MYTH 122 (1976) (“[T]he paradox of the Normans... is that in the long run the conquest of England turned them into Englishmen.”); HANNAN, supra note 132, at 77, 105 (“The Normans and their European confederates numbered perhaps eight thousand after the Conquest. They could hardly govern a nation of more than a million people other than through its existing officials, from reeves to parish priests.”); HENRY OF HUNTINGTON, supra note 149, at xi; JENKS, supra note 132, at 17 (“It was part of the policy of the Conqueror to persuade his new subjects that he was heir to the kingdom of Edward the Confessor by lawful succession. The fiction must have been almost too gross for belief, even in an unlettered age; but the motive which prompted it led William to promise respect for ‘the law of the land,’ [i.e.] for the ancient customs of the people.”), 26-27; MAITLAND, supra note 133, at 3, 7; MAITLAND & MONTAGUE, supra note 131, at 9-13, 26-27; DORIS M. STENTON, AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES 4 (1965). Some revisions were necessary, of course, because there the customs differed “from place to place and from class to class” with no authoritative collection of what passed for Anglo-Saxon law existing. See JENKS, supra note 132, at 17. William adopted the “murder fine,” a payment to be made by the inhabitants of any district where a Norman was murdered if the killer was not found. See MAITLAND, supra note 133, at 46. He also introduced the notion of “trial by combat” to the criminal process. See MAITLAND & MONTAGUE, supra note 131, at 27-28, 49-50; POLLOCK, supra note 132, at 144. A later development was the “ordeal,” such as sinking a person into cold water (floating was a sign of guilt), requiring that he plunge his arm into a vat of boiling water or that he hold a red-hot iron for a set period of time before the arm was bandaged and examined a week later (infection was a sign of guilt). The ordeal was conceived as “the judgment of God,” and the Catholic Church adopted the procedure as its own, but the papacy ended trial by ordeal in the twelfth century by ordering clerics not to participate in them. See MAITLAND & MONTAGUE, supra note 131, at 48-49; POLLOCK, supra note 132, at 144. Nonetheless, William chose to alter Anglo-Saxon law very little. See HANNAN, supra note 132, at 77; POLLOCK, supra note 132, at 27 (“Edward I.’s judges, though fully aware that they were improving both law and procedure, certainly did not suppose that they were starting a new system of law different from that of Henry III. or Henry II., and certainly there is a sense in which we can now say that the law of King Edward VII., or of the State of Connecticut, is the same as the law of King Edward I.”). William was pleased now to be a king, not merely the duke he had been in Normandy, and he enjoyed the benefits given to the crown by Anglo-Saxon law under Edward the Confessor. See MAITLAND & MONTAGUE, supra note 131, at 27, 31-32.
The most important development for our purposes was the birth of common law decisionmaking. 156

155 See Jenks, supra note 132, at 39-54; Joseph Biancalana, For Want of Justice: Legal Reforms of Henry II, 88 COLUM. L. REV. 433 (1988). On his accession to the throne, Henry I, to satisfy a “campaign promise” he made to the barons for their support, issued a Charter of Liberties or Coronation Charter, which has “the distinction of being the first charter of liberties that was ever granted by a monarch of England.” GOTTFRIED DIETZE, MAGNA CARTA AND PROPERTY 8 (1965); id. at 15-16. It renounced “all the evil customs by which the realm of England was unjustly oppressed” and sought to protect the property of the barons and the church. Id. at 10-11. Yet, “[i]mportant as the Coronation Charter is as a recognition of freedom under law, freedom did not yet flourish under it.” Id. at 15. “It is a preamble to English constitutionalism rather than a binding norm.” Id. Henry II adopted the practice of issuing ordinances known as “assizes.” An assize was a formal regulation of official business that ostensibly issued from the Crown, but likely was prepared by subordinate royal officials and issued in the king’s name. See JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 23 (2004) (hereafter REID, RULE OF LAW). A famous example was the Assize of Clarendon of 1166, which served as the foundation for English criminal procedure. Among other things, the assize sought to substitute a formal inquiry by sworn men drawn from the local community, the forerunner of today’s grand jury, for the ancient “hue and cry” as the mechanism for identifying offenders in the community. Id. at 23, 40-41. (For a description of the “hue and cry,” see Jon C. Blue, High Noon Revisited: Commands of Assistance by Peace Officers in the Age of the Fourth Amendment, 101 YALE L.J. 1475, 1479-84 & n.21 (1992.).) The assize also enabled a party to remove a dispute from a local court to the king’s court, where twelve knights drawn from the vicinage would resolve the matter rather than for the parties to undergo trial by combat. See MAITLAND & MONTAGUE, supra note 131, at 53-54 & n.1. That practice was an ancient forerunner of the modern-day jury trial. See id. at 56-58.

156 Second in line is the progressive centralization of the administration of justice by the Crown. In the days of King Cnut, a person could not seek justice from the King if it was available from one of the Barons. William and his successors did not formally eliminate that system, but Henry I and his grandson Henry II established one alternative, centralized, royal judicial system. The royal system was decidedly superior to the decentralized baronial system. The substantive law and procedure varied from one baronial court to another; the royal courts developed uniform law and rules. Enforcement of baronial court decrees was not guaranteed; “the king’s judgments could not be questioned or ignored.” BAKER, supra note 132, at 15. Accordingly, because the royal courts “enjoyed a special position” because they preserved “the use and custom of its law at all times and in all places with constant uniformity,” they eventually became far more a far more attractive forum for litigants than the baronial versions. Id. at 12-13; HANNAN, supra note 132, at 69; JENKS, supra note 132, at 39; HENRY OF HUNTINGTON, supra note 149, at xi-xii; Biancalana, supra note 153, at 433-34. (The centralized judicial system was also a step taken to eliminate rampant criminality prevalent throughout England during the run-up to Henry I’s reign. “Society was ‘lawless’, not in the sense that it had no law—very far from it—but because crime and violence were regarded as normal excesses, not as occasional signs of ill-health in the society.” BROOKE, supra note 134, at 67.) Henry II instituted a system in which judges appointed by the king rode resolved disputes at Westminster or traveled around the kingdom—later known as “riding circuit”—to protect the crown’s interests and to seize the opportunity of creating a new forum to collect fees as the price of resolving disputes. See Klopfer v. North Carolina, 386 U.S. 213, 222-23 (1967); BAKER, supra note 132, at 14-17; STENTON, supra note 152, at 4. That practice may have been inspired by one used by the Frankish monarchy. French kings would send officers out into the kingdom to conduct an inquest. William used that procedure to compile his Doomsday Book in 1086, a compilation of the holdings of his subjects and their value for tax purposes. See MAITLAND & MONTAGUE, supra note 131, at 51-52. This new device also did not displace the local courts, but it did have the king’s imprimatur. “[Henry II] concentrated the whole system of English justice round a court of judges professionally expert in the law. He could thus win money—in the Middle Ages no one did justice for nothing—and he could thus win power; he could control, and he could starve, the courts of their feudatories. In offering the nation his royal justice, he offered a strong and sound commodity.” MAITLAND & MONTAGUE, supra note 131, at 36. The regularization of justice, for example, benefitted landowners, who came to value the royal legal system more than the old baronial one. See J.C. HOLT, THE MAKING OF MAGNA CARTA 50 (1965) (hereafter HOLT, MAKING MAGNA CARTA).

Of course, the replacement of baronial royal justice by royal justice may only have substituted one set of injustices for another. See DIETZE, supra note 153, at 19. But history did not work out that way. The king did not use his new judicial system to overthrow the customs that had prevailed before the Norman Conquest. “[T]he king’s
Today, a large number of statutes, regulations, ordinances, judicial or administrative opinions, treatises, law journal articles, and the like will instruct or advise a judge how to interpret a law and apply it to the facts. Late in the twelfth century, however, the cupboard was bare. There was no Parliament, let alone regulatory agencies with lawmaking power, and there were no written sources of law, such as treatises, to which a judge could turn. All that existed were pre- and post-Norman customs, also known as the “customary practice,” the “common conviction of the community,” or the “general custom of England.” It would be unfair to say that judges came to rely on those customs just as a drunk grasps a light post, not for illumination, but for desperate support. But judges did invoke those customs as the justification for their actions. In turn, those rulings fixed guideposts for later adjudications. “The judgment looks forward as well as backward,” Pollock wrote. It not only ends the strife of the parties but lays down the law for similar cases in the future.

Over time, judicial opinions and their underlying customs evolved into a body of rules that became the primary source of unwritten law throughout Eng-

The new system, however, did have the important and valuable consequence that over time judges began to see themselves less as the king’s representatives than as professional adjudicators. See Brooke, supra note 134, at 185; Henry of Huntington, supra note 149, at ix; Maitland & Montague, supra note 131, at 9-13. As a tradition of professionalism became more deeply entrenched, judges also came to see their function as that of providing an independent adjudication of a dispute, even when the crown was a party. See Pollock, supra note 132, at 46 (“Opinions might plausibly differ, before the Revolution of 1688, as to the amount of power which the law conferred on the king; but even in the worst of times only the weakest and the worst of lawyers could be found to give any countenance to the extreme royalist pretensions that would fain have set the king above the law.”). According to Frederick Pollock, “[p]rofessional tradition and public spirit were too strong for royal influence. As early as the thirteenth century the judges were the servants of the law first and the king afterwards.” Id. The delegation of decisionmaking authority to the judiciary eventually became irrevocable, as James II learned when he attempted to reclaim that authority for himself. See Pollock, supra note 132, at 77-79.

See Maitland & Montague, supra note 131, at 103 (“The desire for continuous legislation is modern. We have come to think that, year by year, Parliament must meet and pour out statutes; that every statesman must have in mind some programme of new laws; that if his programme once became exhausted he would cease to be a statesman.”); Pollock, supra note 132, at 50 (“One reason why judicial precedents acquired exclusive authority was the absence of any other source of law capable of competing with them. Legislation was still exceptional and occasional, and there was no independent learned class. When the king’s court began to keep its rolls in due course, the rolls themselves were the only evidence of the principles by which the court was guided; and the earliest treatises on the common law were produced by members of the judicial staff, or under their direction.”).

See Maitland, supra note 131, at 17; Pollock, supra note 132, at 49 (“The law of the thirteenth century was judge-made law in a fuller and more literal sense than the law of any succeeding century has been.”); see also id. at 48 (noting that the terms “the general custom of England” and “the common law” “are synonymous in our books . . . [and] must be taken to be”).

Pollock, supra note 132, at 48.

Maitland & Montague, supra note 131, at 87; see also Holt, Making Magna Carta, supra note 154, at 51-52; Pollock, supra note 132, at 49-50.
land, the “common law,” the body of rules that were obligatory because they “developed through the common custom of the realm.” The common law was “a law common to the whole land,” a “set of rights and obligations immanent in the country, growing incrementally” that were “passed down as part of the patrimony of each new generation.” As understood in England, law was “the property of all, not a device of the ruler.”

That understanding of law’s nature is critically important. After a judge resolves a case, the court will issue a judgment ordering one party to imprison another, to write a check to his adversary, to refrain from pursuing certain conduct (or to initiate it), and so forth. That judgment is the command of the sovereign. A party must comply with it or face being held in contempt by the judge, a power that can include imprisonment, the second-most severe sanction that a government official law may impose. But the law that justified the entry of the judgment is not the sovereign’s command because it is not the sovereign’s to own. It is only his to apply.

It necessarily follows that even the Crown is subject to the law. According to Bracton, one of the earliest authorities for the doctrine of the “rule of law,” English law empowered the crown, with the result being that “the supreme authority in political society was not that of the ruler, but that of the law.” The “rule of law” therefore emerged as serving a dual role. It empowered a king to govern a nation, while also limiting the power that the king may exercise. The law therefore served as a protection against anarchy and despotism, a formal authorization to protect the realm and an essential safeguard of personal liberty for those being governed. The “broad, indeterminate yet vital doctrine of constitutionalism” was as important to the legitimacy of a government as the principle of consent through representation.

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161 See MAITLAND, supra note 133, at 17; POLLOCK, supra note 132, at 49 (“The law of the thirteenth century was judge-made law in a fuller and more literal sense than the law of any succeeding century has been.”); see also id. at 48 (noting that the terms “the general custom of England” and “the common law” “are synonymous in our books . . . [and] must be taken to be”).

162 MAITLAND, supra note 133, at 13.

163 HANNA, supra note 132, at 65, 78. The “common law” was more than “the sovereign’s decree; nor was it yet an interpretation of Holy Scripture. The law, rather, was a set of inherited rights that belonged to every freeman in the kingdom. The rules did not emanate from government, but stood above it, binding the King as tightly are they bound the poorest ceorl. If the monarch didn’t uphold the ancient laws and customs of his realm, he could be removed.” Id. at 65.


165 REID, RULE OF LAW, supra note 153, at 11.

166 GOODHART, supra note 160, at 27.


168 REID, ANCIENT CONSTITUTION, supra note 131, at 4; see id. at 5-6 (“Sometimes called the gothic constitution, the ancient constitution was the putative aboriginal political structure of Anglo-American governance, the origins of which are discernable in the mythology of the forests of prehistoric Germany. It was the supposed norm of government for the Angles, the Saxons, and the Jutes when they were said by ancient constitutionalists to have been free people living under elected kings, vested with limited authority, and confined by the rule of customary law. For lawyers, constitutionalists, and parliamentarians of the sixteenth and seventeenth centuries, the ancient constitution provided a standard with which to argue against the actions, programs, laws, and decrees of contemporary
As noted, the common law achieved preeminence in part due to the absence of any competing authority. Scarcity is not the only reason, however, why the common law came to be seen as “the only authentic interpretation” of the law.\(^1\) There were three other explanations as well. One was that the royal courts established under Henry II became increasingly prominent and powerful, thereby centralizing the administration of justice in judges appointed by the Crown, rather than in the separate baronial courts.\(^2\) Another explanation was that the common law was based on the customs established in England for centuries.\(^3\) Equally important was the common understanding that judges could make law only by reason, however imperfect it may be, never by fiat.\(^4\) Judges were obliged to decide cases by reason without contradicting earlier decisions and in conformity with the principles underlying those precedents. The concepts of reason-based decisionmaking and stare decisis contributed heavily to the respect attributed to the common law.\(^5\)

Over time the common law achieved canonical status through the works of the scholars who compiled it—Ranulf de Glanville in the twelfth century; Henry de Bracton in the thirteenth century; Thomas de Littleton, the fifteenth; Sir Edward Coke, the seventeenth; and Blackstone, the eighteenth.\(^6\) Yet, it was the Magna Carta that, in the thirteenth century, fully elevated the customs and law of England to constitutional status. It achieved that result by providing a written, concrete representation of the principle that the customs and law of England governed not only the subjects of the realm, but the king as well, a principle that has come to be known as “the rule of law.”

### B. The Origin of Magna Carta

Magna Carta, also known as the Great Charter,\(^7\) was an extraordinary legal and political document. Like the Declaration of Independence, Magna Carta was the product of a rebellion.\(^8\)

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\(^1\) See id. at 47.

\(^2\) See id. at 48.

\(^3\) See, e.g., 1 BLACKSTONE, supra note 36, at *67 (“Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or lex non scripta, of this Kingdom.”).

\(^4\) See id. at 47, 109 (“[T]his external standard of reasonableness, which enables the law to keep in close touch with the moral and practical sense of mankind in the affairs of life” became “the life of the modern Common Law[.]”).

\(^5\) See id. at 49.

\(^6\) See MAITLAND & MONTAGUE, supra note 131, at 2, 31.

\(^7\) William I exercised than any of his predecessors, and his subjects sought from him formal grants of rights. William would grant rights and resolve claims in a formal document known as a “charter.” See JENKS, supra note 132, at 22. Edward Coke called Magna Carta “the Great Charter” not because of its length, but “in respect of the great importance, and weightiness of the matter.” 2 EDWARD COKE, INSTITUTES ON THE LAWES OF ENGLAND 4 (1798). In truth, Coke took some poetic license in so describing the agreement. The document did not call itself, or even contain the term, contain the term “Magna Carta” and did not acquire that name until 1217. Even then, the term “Magna Carta” came into being as “a scribal insertion above a line in the chancery rolls, prompted by the second thought of a drafting clerk,” to distinguish that charter from the contemporaneous, smaller Charter of the Forest. The notion that Magna Carta was normatively “great” did not arise until the cusp of the fourteenth century. See
The comparison, however, largely ends there. Unlike the Declaration of Independence, Magna Carta was neither a declaration of universal human rights nor a lofty statement of principled political justifications for a revolt. Although Magna Carta’s sixty-three articles incorporated and endorsed various features of the common law, none of its signatories intended Magna Carta to function as a legal treatise. Finally, neither the barons nor the Crown intended Magna Carta to reflect their shared belief in “the universal brotherhood of man.” Aside from the fact that it “certainly did not offer equal protection of the law to all of the king’s subjects,” Magna Carta “was, in many ways, a selfish document in which the baronial elite looked after its own interests.”

Magna Carta was at bottom a peace treaty, and, like all such agreements, it hoped to accomplish the very practical result of ending a civil war. The charter was “a grand compromise” containing “nothing whatever of the glamour of romance.” In return for ending their hostilities, the barons demanded that King John reaffirm the rights that the barons believed they already enjoyed under English law. Magna Carta was born during a time of great political tumult triggered by John’s military failures in expensive overseas wars, his never-ending politi-

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**Footnotes:**

177 See Holt, Making Magna Carta, supra note 154, at 3.

178 Carpenter, supra note 174, at viii; see also id. at 24 (“The Charter was above all about money. Its overwhelming aim was to restrict the king’s ability to take it from his subjects.”).

179 Goodhart, supra note 160, at 63 (“The whole impression given by the Charter is that it is trying to produce concrete answers for concrete problems.”).

180 Frederick W. Maitland & Francis C. Montague, A Sketch of English Legal History 78 (1915).

181 Wm. S. McKechnie, Magna Carta (1205-1915), in Malden, supra note 174, at 10.

182 “While democratic enthusiasts in France and America have often sought to found their liberties on a lofty but unstable basis of philosophical theory embodied in Declarations of Rights, Englishmen have occupied lower but surer ground, aiming at practical remedies for actual wrongs, rather than enunciating theoretical platitudes with no realities to correspond.” William Sharpe McKechnie, Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction 121-22 (2d ed. 1914); see id. at 382 (“The object of the barons was to protect themselves and their friends against the King, not to set forth a scientific system of jurisprudence.”). At the same time, “[t]he text resulting from the negotiations at Runnymede was not simply a shopping list of particular grievances without widely applicable principles, but a broad reform programme.” Ralph V. Turner, Magna Carta 67 (2003); see id. at 67.

183 William the Conqueror held land in Normandy that was later passed down to his great-grandson and successor Henry II. Henry II acquired additional French land from his marriage to Eleanor of Aquitaine. King Philip II of France successfully recovered those territories after defeating John in battle. “The financial burdens placed on England to defend and recover the continental empire were the single most important cause of Magna Carta. Had John been content with ruling England and dominating Britain and Ireland, there would have been no charter.” Carpenter, supra note 174, at 70.
cal intrigue, and his repeated personal cruelties.\textsuperscript{184} Angry and rebellious barons, initially supported by the church, renounced their feudal obligations to King John and gathered their forces

\textsuperscript{184} The thirteenth century “comprises at once the gloomiest and the most auspicious period of English history. During that century the English people were oppressed by a foreign and conquering race, were ruled by two of the worst kings that ever ascended the English throne, and were in large numbers reduced to a condition of slavery. Yet during that same period the foundations of the English parliament, the English constitution, and the science of the English common law were laid.” Charles E. Shattuck, \textit{The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”} 4 \textit{Harv. L. Rev.} 365, 369-70 (1891); see also, e.g., Holt, \textit{Making Magna Carta, supra} note 154, at 22-33; Holt, \textit{Magna Carta, supra} note 174, at 188–89; Howard, \textit{The Road from Runnymede, supra} note 174, at 2, 6; James K. Wheaton, \textit{The History of the Magna Carta} 4–8 (2011). The period following the death of King John’s predecessor and brother Richard I in 1189 was tumultuous. “The kings of England had to rule over, as well as by means of, a group of men who were themselves trained in combat, had at their disposal armed followers and the wealth to support them, and were educated with a high sense of their own dignity and honour.” Robert Bartlett, \textit{England Under the Norman and Angevin Kings}, 1075-1225, at 51 (2000). The barons had made a tradition of opposing the crown, rebelling against every king since William I. “Civil war was often the continuation of political intrigue by other means.” Holt, \textit{Making Magna Carta, supra} note 154, at 7. By 1215, King John had lost English-held lands in Normandy to the King of France in expensive wars with the French King Philip, which, by showing his military weakness, also had cost John the barons’ support. See Holt, \textit{Making Magna Carta, supra} note 154, at 23 (“England became the milch cow for the Angevin empire.”), 22-27. John had also recently waged a rancorous and unsuccessful fight with Pope Innocent III over his claimed power to appoint the Archbishop of Canterbury. At one point Innocent III excommunicated John and placed England under an “interdiction,” a ban on the administration of sacraments and religious ceremonies, including marriage and last rites. Adding to John’s weakened position was his reputation as “the cruelest and most tyrannical of English kings.” \textit{Id.} at 6; Hannon, \textit{supra} note 132, at 109. To save his crown, John pledged fealty to the pontiff, who appointed Stephen Langdon, the Archbishop of Canterbury, to absolve John. As part of that absolution, John swore (inter alia) that “he would restore the good laws of his ancestors, and especially the laws of King Edward, that he would remove abuse, and would judge all his men according to the just judgments of his court and restore to each his rights.” C.H. McIlwain, \textit{Due Process of Law in Magna Carta}, 14 Colum. L. Rev. 27, 36-37 (1914) (citation omitted). John nevertheless demanded that the barons supply him with additional soldiers and funds for a new war in France. “The barons, resentful at the king’s arbitrary taxes, and confiscations, angry at his rejection of their advice, and bitter about his promotion of foreigners, took to the field against him.” Hannon, supra note 132, at 109. When the northern barons refused, John marched his army northward to show them who was king. Langdon intervened, threatening to excommunicate John’s soldiers unless he abided by his promise not to take arms against his subjects except as ordered by a court. John backed down. The barons, now supported by Langdon, again pursued their favorite outdoor sport: they rebelled. Past rebellion has been in support of an alternative for the throne, but this time there was no heir apparent, so the barons united behind their common desire to prevent King John from further abusing royal authority, which was perhaps John’s favorite indoor sport. See Dietze, supra note 163, at 21 ("His reign abounded with abuses of power.") (footnote omitted). John’s abusive untrustworthy character was legendary. He was described by contemporaries as “brim full of evil,” “a cruel, godless tyrant,” possessed of “a fractured personality, suspicious, untrustworthy, aggressive and cruel.” See Carpenter, supra note 174, at 83 (internal punctuation omitted), 87, 93. One person who knew him well wrote that “The foulness of Hell is defiled by John’s foulness.” \textit{Id.} at 88.

The barons demanded that John confirm certain laws and liberties granted by John’s predecessors Henry I and Edward, right that he had guaranteed them as part of his oath of absolution. In a counteroffer, John agreed with the barons that he “will neither arrest nor disseize them or their men, and . . . will not go upon them by force or by arms, except according to the law of the realm or pursuant to the judgment of their peers in our court . . . .” McIlwain, supra, at 39 (citation omitted); see also William Blackstone, \textit{The Great Charter and Charter of the Forest} iii-ix (1759); Brooke, supra note 134, at 220-23; McKechnie, supra note 180, at 34 (quoting text of King John’s assurance). John added the condition, however, that the final judgment would reside with a body of nine men, four chosen each by him and the barons, with the ninth member chosen by the Pope. \textit{Id.}; McIlwain, supra, at 39. The barons rejected John’s counteroffer because it gave the deciding vote to the Pope, whom the barons feared was on John’s side. McKechnie, supra note 180, at 35. The barons marched on London, which welcomed the barons, who then prepared to meet John in battle. John finally consented to the barons’ demands as
to oppose his continued arbitrary reign. Once the city of London—the capital, largest city, and “queen of the whole kingdom”\(^\text{185}\)—announced its support for the rebellion, the barons gained the upper hand. They took advantage of their position of strength by immediately demanding that the politically weakened king agree to their numerous petitions for relief, set forth in a document called the Articles of the Barons.\(^\text{186}\) Perhaps recognizing that discretion is the better part of valor, King John acceded to the barons’ demands in 1215 “in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of [his] reign.”\(^\text{187}\)

Given its very practical purpose, Magna Carta was originally thought to be a failure. The civil war resumed almost before the royal wax seal had hardened, transforming the charter from a document marking the end of civil war into one defining its start.\(^\text{188}\) Had that conflict continued to a military resolution, the Charter might have become as noteworthy in history as the Kellogg-Briand Pact.\(^\text{189}\) But Magna Carta was destined for greater things. King John’s unexpected death in 1216 left the throne to his nine-year-old son and successor Henry III, who, along with his advisors, reissued a shortened, revised version of Magna Carta known as the Charter of Liberties of 1216 as a peace offering. The new charter quelled further conflict, and Edward III remained on the throne.\(^\text{190}\)

Time has been good to the Great Charter. It has become a foundational document in Anglo-American legal history, a written guarantee of fundamental liberties. English law came to

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\(^{185}\) Carpenter, supra note 174, at 117-18.


\(^{187}\) Carpenter, supra note 174, at 69 (quoting signature section of Magna Carta). June 15 was the day that John personally impressed the royal seal on Magna Carta. The formal version of the original charter, however, was revised in some details over the next few days and was not finalized until June 19. Wm. S. McKechnie, *Magna Carta (1205-1915)*, in Malden, supra note 174, at 5.

\(^{188}\) See Wm. S. McKechnie, *Magna Carta (1205-1915)*, in Malden, supra note 174, at 22.

\(^{189}\) King John found Chapter 61 of Magna Carta particularly irritating because it established a council of barons that could overrule actions taken by the king in violation of the charter’s guarantees. John entreated the papacy for support, and Pope Innocent III issued the papal Bull of August 24, 1215, siding with John and declaring Magna Carta invalid because the pope saw the council of barons as a rival challenger to papal authority over the crown. A new war quickly broke out, known as the First Baron’s War. The barons even offered the English crown to the son of Philip II, the French king. “Denounced by the pope, rejected by the king, discarded by the rebels, by the end of 1215 Magna Carta was surely dead.” Danny Danziger & John Gillingham, 1215: The Year of Magna Carta 267 (2003); Dietze, supra note 153, at 50-51; G.B. Adams, *Innocent III and the Great Charter*, in Malden, supra note 174, at 26; Wm. S. McKechnie, *Magna Carta (1205-1915)*, in Malden, supra note 174, at 5-7 (discussing aftermath of the signing). The First Baron’s War ended in 1216, however, with John’s death.

\(^{190}\) See, e.g., Stenton, supra note 152, at 16-21; Wheaton, supra note 182, at 8-9, 52-53.
treat Magna Carta as “the Torah” of English legal traditions or the “Bible of the English Constitution.” Sir Edward Coke considered Magna Carta “declaratory of the principal grounds of the fundamental laws of England,” and as “sacred and unalterable.” In his words, “Magna Carta is such a fellow, that he will have no ‘Sovereign,’” including Parliament. According to William Stubbs, an influential Victorian-Era historian, “[t]he whole of the constitutional history of England is little more than a commentary on Magna Carta.” To be sure, Magna Carta technically was intended to serve only as a peace treaty, and its sixty-three articles sought to remedy individual examples of the arbitrary exercise of royal power by King John. Yet, to view Magna Carta in that narrow, limited way is to miss the forest for the trees. The power of Magna Carta lies in the document when considered as a whole, particularly King John’s agreement to what it guaranteed. “The value of the Charter . . . is more than the mere sum of the values of its terms or any or all of its provisions”; that value lies in the fact that the agreement “enunciated a definite body of law, claiming to be above the King’s will and admitted as such by John.”

191 HANNAN, supra note 132, at 110.

192 “In 1770 William Pitt the Elder called it ‘the Bible of the English Constitution’ . . . . In 1956 the English judge, Lord Denning, described it as ‘the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.’” HOLT, MAGNA CARTA, supra note 174, at 277–78. See also, e.g., id. at 21; HOWARD, THE ROAD FROM RUNNYMEDE, supra note 174, at 24; WHEATON, supra note 182, at 28–32; Shattuck, supra note 182, at 370 (“It was, according to Lord Coke, confirmed no less than thirty-two times by subsequent monarchs.”). In 1297, King Edward I placed Magna Carta on the Statute Books of England. See HOLT, MAKING MAGNA CARTA, supra note 154, at 55. Though denominated as a statute, Magna Carta was treated as a unique law, more akin to a constitution than a statute. See Radin, supra note 174, at 1067–68 (“The last time Magna Carta is mentioned in a statute is in 1429, during the reign of Henry VI. But collections of statutes had already been made and in nearly all of them, Magna Carta was placed first. This is true of those appearing both at the very beginning of the fourteenth century and those, nearly stereotyped in content, that appear thereafter. The latter are the collections which become the vetera statuta, when printed copies appear. Most of these printed copies bear on their title page in large capitals, Magna Carta cum Statutis. This does not mean that the Charter was not considered a statute — the later editions negative this view — but that it was a special kind of statute to be taken apart from the others and put in first place.”) (footnotes omitted). In 1368 Parliament effectively bestowed on Magna Carta the status of a constitution by providing that it would nullify the terms of any inconsistent law. See 42 Edward III, c. 1 (1368) (“[Magna Carta shall be] holden and kept in all points; and if any Statute be made to the contrary that shall be holden for none.”), reprinted in HOWARD, THE ROAD FROM RUNNYMEDE, supra note 174, at 9.

193 Grey, Origins, supra note 10, at 852.

194 GOODHART, supra note 160, at 68 (citation omitted).

195 See 2 COKE, supra note 174, (unpaginated); 3 COKE, supra note 174 *Il. (stating that an act of Parliament violating the Magna Carta would be “holden for none”).

196 TURNER, supra note 180, at 2 (footnote omitted).

197 See, e.g., Radin, supra note 174, at 1071 (“It is not quite accurate to say that they were concessions wrung from a defeated king by a victorious baronage. Nor does it seem any more accurate to deal with the Charter as a treaty between these two great powers in the feudal state, involving, as do all treaties when one of the two contestants is not completely crushed, a number of compromises. We may indeed speak of the agreement that such a Charter be drawn up as a treaty, but the Charter itself is properly to be regarded as a clarified statement of what most persons regarded as fundamental feudal law. Its nearest congener is to be found in the Lombard Libri Feudorum. It is a code of feudal law which takes the fact of feudal organization for granted and stresses the ‘liberties’ of feudal vassals against the king.”) (footnote omitted).

198 MCKECHNIE, supra note 180, at 123.
It is difficult to overstate the importance of Magna Carta in the development of Anglo-American law. It implemented a new theory of “law.” Roman law was based on the premise that the law was the order of the sovereign, encapsulated in the phrase “quod placuit principi legis habet vigorem”—or “what is pleasing to the prince is the law.” In the Middle Ages, the Roman Catholic Church advanced the theory, set forth in St. Thomas Aquinas’ *Summa Theologica*, that God’s law or natural law governs everyone. Magna Carta added a third concept: the governing law could consist in the historic consensus practices of the realm, the longstanding English legal traditions left largely unchanged by William, but now enforced through the crown’s existing legal institutions, largely adopted by John’s father Henry II. Those customs formed an unwritten British constitution that became the “law of the land.” What is more, the barons also forced on King John at Runnymede the corollary principle that the “law of the land” would apply not only to the people of England but to King John and his successors as well. This new theory defined law not as a human or divine command, and certainly not as the exercise of potentially capricious royal favor, but as that set of rules representing the collective judgment of the community developed over time, rules that bound everyone in the kingdom, including the king himself, embodied in a written document.

Magna Carta came to stand as proof that a written document could make notable revisions to the law, could fend off tyrannical government officials, could restrain executive power, and could grant rights to the entire community, not merely to specific favored individuals. In

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199 See, e.g., Hannan, *supra* note 132, at 110 (“Lord Denning, the most celebrated of all twentieth-century English jurists, declared: ‘Magna Carta is the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.’”).

200 Albeit, a theory traceable to Aristotle. The *Basic Works of Aristotle, Politica* 1202 (Benjamin Jowett trans. & Richard McKeon ed., 1941) (“And the rule of law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made guardians and ministers of the law. . . . The law is reason unaffected by desire. . . . It is evident that in seeking for justice men seek for the mean or neutral, for the law is the mean. . . . Customary laws have more weight, and relate to more important matters, than written laws, and a man may be a safer ruler than the written law, but not safer than the customary law.’”)


202 See Brooke, *supra* note 134, at 45 (“Human law was felt to be a reflection of divine law. [King] Alfred had the conviction that that divine law was the source of first principles; and that the Bible, which contained the divine law, might provide texts of more particular application too.”); Goodhart, *supra* note 160, at 26.

203 Goodhart, *supra* note 160, at 26. Some have argued that the concept underlying Magna Carta was a logical development from Roman and canon law. See Andrew Cunningham Mclaughlin, *The Foundations of American Constitutionalism* 107 (1932) (“The belief in the law of nature, antedating society and permanent in its obligation, is a very old belief; it can be found, as we have seen, in ancient Roman philosophy. It played a very important role through the whole history of political philosophy. Five hundred years before the Declaration of Independence, Thomas Aquinas said substantially this: ‘Every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law; it is but a perversion of law.’ This sounds very modern, if we supplant the words ‘law of nature’ by the word ‘constitution.’ And this statement is not essentially different from Locke’s declaration: ‘The law that was to govern Adam was the same that was to govern all his posterity, the law of reason.’”) (footnote omitted).

204 Id. at 27-28; Pollock, *supra* note 132, at 63 (the text of Magna Carta demonstrates that “the king’s justice is no longer a matter of favour” but of right).

205 See Dietze, *supra* note 153, at 6 (“In tune with its emphasis upon general, freedom, Magna Carta also recognizes the general rule of law. It not only proscribes specific arbitrary abuses of royal power by specific norms but leaves
all three respects, Magna Carta foreshadowed our Constitution and Bill of Rights. As Professor Ralph Turner put it, Magna Carta “has fostered, first among the English, and later among North Americans and British settlers in the Antipodes, a tradition of opposing government threats to individual liberties that all peoples throughout the world now seek to imitate in their struggles against tyranny.” Or, as “the first document which made explicit the principle of limited government,” Magna Carta “soon gave momentum to the perfecting of constitutional government in England as well as other parts of the world.”

Article 39 is the best-known feature of Magna Carta. “It is very short, but it is doubtful whether any other thirty-seven words have ever given rise to more debate or have had a greater practical effect.” Article 39 is a concrete guarantee against capricious rule. Seeking to restore the customary rights of Englishmen and prevent the crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime, a not uncommon occurrence under King John. Article 39 provided that “[n]o free man shall be taken or imprisoned or disseised or...
outlawed or exiled or in any way ruined, nor will we go send against him, except by the lawful
determination of his peers or by the law of the land.”

Article 39, “a plain, popular statement of the most elementary rights,” what we today call the “rule of law,” was designed to prevent
the crown from acting in an arbitrary, despotic manner. As one scholar put it, Magna Carta re-
quired the king to govern “by law and custom, not by the caprices of his evil heart.” The guar-
antee that the crown could administer punishment only in accordance with “the law of the land”
meant, according to Coke, that “no man [could] be taken or imprisoned, but per legem terrae,
that is, by the Common Law, Statute Law, or Custome of England,” a concept familiar to the
barons at Runnymede. Blackstone saw Article 39 as protecting the “absolute rights of every

kings might almost be described as irresponsible despotism, tempered by fear of rebellion.”

HOLT, MAGNA CARTA, supra note 174, app. 6, at 461.

Shattuck, supra note 182, at 373; see 1 BLACKSTONE, supra note 36, at *127-28 (“[T]he great charter of liberties contained very few new grants: but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England.”); MAITLAND & MONTAGUE, supra note 331, at 79 (“[E]ven in the Great Charter there is not much new law; indeed, its own theory of itself (if we may use such a phrase) is that the old law, which a lawless king has set at naught, is to be restored, defined, covenanted, and written.”); ROGER TWEYDEN, CERTAINE CONSIDERATIONS UPON THE GOVERNMENT OF ENGLAND 15 (John Mitchell Kemble ed. 1829)
(1655) (noting that the kings of England ruled in accordance with the “customes, laws, and constitutions of the kingdom” because the king was “sub Deo et Lege”); id. at 87 (listing the restraints imposed on the English crown by virtue of those liberties); id. at 89 (“This maxime, that the king cannot alone alter the law, etc. is (I conceive) the basis or ground of all the liberty and franchise of the subject.”).

See Reid, Rule of Law, supra note 153.

The “law of the land” clause also came to stand for one of the most English of the elements of the rule of law doctrine: namely, the principle that the government may not impose any significant sanction or remedy upon a person for the violation of an existing rule without “due notice” to that person and a “fair opportunity” be heard by an “independent and impartial court or similar tribunal.” See Reid, Rule of Law, supra note 153, at 15.

In the twelfth and thirteenth centuries, the English barons “were versed in the custom of the realm, by which they meant the good old law of Edward the Confessor and Henry I, not the Angevin kings’ innovations.” TURNER, supra note 180, at 51. Moreover, “[b]y a long-standing tradition, a new king swore at his coronation to keep Church and people at peace, to put down iniquity, and to show justice and mercy in his judgments. From time to time the coronation oath was developed into a charter, such as that issued by Henry I, which was known to the barons[.]” BROOKE, supra note 134, at 222. The principle that the king was subject to the law was not invented at Runnymede; it had been a precept of English law that predated the Norman Invasion. As Professor John Phillip Reid has explained, “We should . . . resist the temptation to think of Magna Carta as a beginning, even as a beginning of rule of law. It is better to think of it as a codification—or, as Winston Churchill termed it, a ‘reaffirmation’—of the good old law, or, better still, of Bracton’s summing up the good old law. That was its most important function—as a code or statute. ‘By making Magna Carta into a statute,’ William Huse Dunham points out, ‘men preserved it as an idea whose potency increased as both bench and bar cited, interpreted, misinterpreted, and extended its original meaning. In this way, through the courts, the Great Charter became associated with the great principles of modern constitutionalism—contract and the rule of law—and augmented their force, virtue, and effect.” Reid, Rule of Law, supra note 153, at 13 (footnotes and internal punctuation omitted).
Englishman,” viz., the right to life, personal security, personal liberty, and private property.219 Expressed in today’s language, Article 39 protected “life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, not all individual rights), and property.”220 As one scholar has noted, “[t]he main point in this [document], the chief grievance to be redressed, was the King’s practice of attacking the barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his curia.”221 Article 39 sought to end that state of affairs by forcing on the king the same laws that governed everyone else in England.222

Magna Carta has come to represent several tenets in Anglo-American law: First, law, particularly a fundamental or constitutional law, is the best hope to prevent despotism and secure liberty by restraining the power of the sovereign, who is “not under man, but under God and the law.”223 Second, the ultimate source for the rule of law is the “ancient constitution”224 of the

219 1 BLACKSTONE, supra note 36, at *123, *125. Blackstone defined “the right of personal liberty” as “the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” Id. at *125, *130.

220 Shattuck, supra note 182, at 373 (footnote omitted).

221 See McIlwain, supra note 182, at 41-43.

222 See BARTLETT, supra note 182, at 65; Hon. Daniel Hannan, Magna Carta: Eight Centuries of Liberty, WALL ST. J., May 29, 2015, http://www.wsj.com/articles/magna-carta-eight-centuries-of-liberty-1432912022 (“The very success of Magna Carta makes it hard for us, 800 years on, to see how utterly revolutionary it must have appeared at the time. . . . What Magna Carta initiated, rather, was constitutional government—or, as the terse inscription on the American Bar Association’s stone puts it, ‘freedom under law.’”) It takes a real act of imagination to see how transformative this concept must have been. The law was no longer just an expression of the will of the biggest guy in the tribe. Above the king brooded something more powerful yet—something you couldn’t see or hear or touch or taste but that bound the sovereign as surely as it bound the poorest wretch in the kingdom. That something was what Magna Carta called “the law of the land.”). At a broader level, Article 39 the liberty that Englishmen deemed part of their heritage. See JACK P. GREENE, THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION 7 (2011) (footnote omitted) (“For Englishmen, liberty was, thus, not just a condition enforced by law but the very essence of their emerging national identity.”). Article 39 prevented the crown from effectively turning Englishmen into what seventeenth-century political theory described as slaves. The primary meaning of “liberty” in the eighteenth century was governance according to law, not the dictates of the sovereign. The latter was seen as a form of slavery because a slave was outside of the law and subject to his master’s whim or caprice. “[S]lavery was the absence of law: law that protected the individual and law that limited the authority of both private masters and public rulers. JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 48, 55 (1988) (hereafter REID, CONCEPT OF LIBERTY); id. (“[A] vague and indefinite obedience to the fluctuating and arbitrary will of any superior, is the most abject and complete slavery.”) (footnote and internal punctuation omitted).

223 2 BRACHTON, supra note 263, at 33; see also CHARLES McILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 67-87 (rev. ed. 1947) (hereafter McILWAIN, CONSTITUTIONALISM); REID, ANCIENT CONSTITUTION, supra note 131, at 7 (“Together with the other main forms of forensic history—contractarianism and original intention—ancient constitutionalism was the instrument that lawyers, constitutionalists, and parliamentarians used over several centuries to neutralize arbitrary power by placing a rein on discretionary decision making. By helping to limit prerogative and executive discretion, the forensic history of ancient constitutionalism both reinforced the rule of law and protected law itself from the politics of an arbitrary state.”); REID, CONCEPT OF LIBERTY, supra note 219, at 56 (quoting GEORGE CAMPBELL, THE NATURE, EXTENT, AND IMPORTANCE, OF THE DUTY OF ALLEGIANCE: A SERMON PREACHED AT ABERDEEN, DECEMBER 12, 1776, BEING THE FAST DAY APPOINTED BY THE KING, ON ACCOUNT OF THE REBELLION IN AMERICA 24-25 (1777) (“[W]hen men are governed by established laws which they know, or may know, if they will, and are not liable to be punished by their governors, unless when they transgress those laws, we say they are under a legal government. When the contrary takes place, and men are liable to be harassed at the
English people, the customs and traditions that had been accepted, handed down, and carried forward as the common law. Third, the law serves two complementary functions: It grants government officials the legitimacy to restrict the freedom of individuals, while also reining in the power government officials may exercise in the performance of their duties. And fourth, every person is entitled to enjoy certain “inalienable rights”—fundamental legal guarantees that everyone enjoys and that no government official, high or low, may take away. Every contemporary constitution that guarantees those rights owes a debt to Article 39, as do modern-day figures such as Mahatma Gandhi and Nelson Mandela, who invoked Magna Carta in their struggle for freedom.

The Crown and Parliament have reaffirmed the core guarantees of Magna Carta on more than forty occasions since 1215. In the fourteenth century, Parliament revised Magna Carta in

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pleasure of their superiors, tho’ guilty of no transgression of a known rule, we say properly they are under arbitrary power. These are the only distinctions I know between free and slavish, legal and arbitrary, as applied to governments.”

224 See Reid, Ancient Constitution, supra note 131, at 5-6.

225 See Reid, Ancient Constitution, supra note 131, at 9 (“The doctrine of the ancient constitution was then [in the eighteenth century] considered the original theoretical basis for English law and for English constitutional principles that constituted the concept of liberty as liberty had come to be defined over the previous three centuries.” The ancient constitution was the cornerstone of the arch supporting the various rules, rights, maxims, and dogmas that, collectively, can be summarized as the jurisprudence of English and American liberty.” (emphasis in original)); see also John G.A. Pocock, Virtue, Commerce, and History: Essays on the Political Thought and History, Chiefly in the Eighteenth Century 94 (1985); Reid, Rule of Law, supra note 153, at 13, 15, 75; Radin, supra note 174, at 1072 (“The historical tradition which made it the exemplar of the Bill of Rights was, therefore, correct. There is this difference, however. Magna Carta did not list, as did the Bill of Rights, merely the fundamental rights of citizens. It did profess, directly or by implication, to list all feudal rights, and in nearly every instance it was assumed that these were fully established and uncontroverted rights, not newly created by the Charter.”).

226 See Blackstone, supra note 36, at *141 (“the law is in England the supreme arbiter of every man’s life, liberty, and property”); see also 2 Bracton, supra note 163, at 33 (“The king must not be under man but under God and under the law, because law makes the king.”); Goodhart, supra note 160, at 62 (“[T]he chief lesson of chapter 39 of Magna Carta was there need be no unlimited powers of government.”); 1 Frederick Pollock & Frederick W. Maitland, The History of English Law Before the Time of Edward I, at 173 (2d ed. 1909) (“[I]t means this, that the king is and shall be below the law.”).

227 See Holt, Making Magna Carta, supra note 154, at 46-48 (“[M]en were demanding for the community of the realm what they had sought hitherto only for local communities. In so doing, they were moving beyond the concept of individual privilege to the idea of public right, for many of the privileges stated in the Charter could only be held by the community as a whole. . . . The progression from individual or local liberties to general liberties carried deep implications. Local or individual privileges could be viewed as exceptions which proved the rule, as acts of grace which did not infringe the general superiority of the Crown. Liberties granted to the community as a whole could not be so viewed. . . . This involved a permanent and general definition of the power of the Crown. This was why the issue of the Great Charter could only be resolved by war.”) (footnote omitted).

228 See Turner, supra note 180, at 8; Radin, supra note 174, at 1066 (“I need scarcely insist on the fact that the relation of Magna Carta to all other forms of positive law, as conceived by medieval English publicists, thus was made to resemble closely the relation of the Constitution of the United States to all other laws.”).

229 Carpenter, supra note 174, at viii.

230 See, e.g., Turner, supra note 180, at 3; Radin, supra note 174, at 1063-68. Over time, some articles were deleted. Article 39 survived, but was renumbered as Article 29. See Dietze, supra note 153, at 58-59.
two ways; one was important, the other was not. Parliament declared that the guarantees contained in Magna Carta were promised to the English people for all time and any statute that infringed on those guarantees was declared to be null and void. In so doing, Parliament effective elevated Magna Carta to the level of a constitution, or at least rendered it superior to any independent act of the Crown. In addition, Parliament changed the phrase “per legem terrae” or “the law of the land” to “due Process of Law.” That revision, however, did not alter its meaning, effect, or significance.

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231 Radin, supra note 174, at 1075 (“As printed in Halsbury [3 Stat. of England 33-34 (1929)], the statute contains as its fourth, chapter the following: ‘We will and grant for Us and our Heirs, that all Clerks and Laymen of our realm shall have all their laws and liberties and free customs as freely and wholly as they were used to have them at any time when they had them best and most fully; and if any statutes have been made by us and our ancestors, or any customs brought in contrary to them or contrary to any article contained in the present charter we will and grant that such statutes and articles be void and none forever.’ If we are to take literally the statement made that the Statutum de Tallagio was an addition to the Charter, we have an announcement that past statutes as well as administrative acts in violation of it are void and “unconstitutional,” two generations before the assertion in 1367, and the position of the Charter as a super-statute would be established from the very beginning of the fourteenth century.”).

232 Radin, supra note 174, at 1090-91 (“There is, of course, no doubt now that Magna Carta could be abolished by Act of Parliament. I am fairly convinced Chapter 29 will not be. And it seems to me clear that what will prevent its abolition is the sense that, since at least 1297, it has been something more than a statute; it has been an assertion of the existence of fundamental rights of men, however differently they might have been listed at different periods.”). As whether the unwritten English constitution or Parliament was sovereign became an issue in the event leading up to the American Revolution, when the Colonists took the position that both the Crown and Parliament were subordinate to the English constitution.

233 28 Edw. III, c. 3 (1354), reprinted in THE STATUTES OF THE REALM 345 (Dawsons of Pall Mall 1963) (1810); see MCKECHNIE, supra note 180, at 111; McIlwain, supra note 182, at 49 (“The men of 1368 were not far wrong in calling it [viz., “the law of the land”] l’auncien leye de la terre, and the Parliament of 1350 do not depart from the ancient meaning of per legem terrae when they paraphrase it par voie de la lei, nor the Parliament of 1354 in making it ‘par due process de lei,’ whence it has come, no doubt, largely through the influence of Coke’s writings, into our federal and state constitutions as ‘due process of law.’”) (footnotes omitted).

234 See, e.g., Walker v. Sauvinet, 92 U.S. 90, 93 (1875) (“Due process of law is process due according to the law of the land.”); HOWARD, MAGNA CARTA, supra note 174, at 15 (“[A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century ‘due process of law’ and ‘law of the land’ were interchangeable.”); id. at 14-15 (“In Magna Carta’s ‘law of the land’ we can find the early origins of the concept of ‘due process of law,’ one of the cornerstones of our jurisprudence.”); Shattuck, supra note 182, at 369 (“it is well settled that ‘due process of law’ and ‘law of the land’ are identical in meaning” (footnote omitted)). The English Petition of Right of 1628, 3 Car. 1, c. 1, reaffirmed the 1354 act and again used the term “due process of law,” instead of “the law of the land.” See LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 4 (1999).

All the above is not to deny that the barons who forced John to comply with their demands at Runnymede were acting out of self-interest. Magna Carta was hardly a revolt of the masses akin to the Russian Revolution of 1917. The barons have sought to prevent the Crown from arbitrarily depriving them of life, liberty, and property, but in no wise sought to restrain themselves from pursuing the same sorry adventures against the people in their own baronies. See CARPENTER, supra note 174, at 107-15 (explaining that Magna Carta did not improve the life of serfs). No one treated Magna Carta as a charter of liberties, the argument goes, until Sir Edward Coke willfully misinterpreted it in that manner in order to help establish parliamentary supremacy in the seventeenth century. See, e.g., BROOKE, supra note 134, at 222-23; Wm. S. McKechnie, Magna Carta (1205-1915), in Malden, supra note 174, at 12 (“The Great Charter, as enshrined in the imaginations of the parliamentary leaders of the Puritan Rebellion, was, to a great extent, the creation of Coke’s legal intellect.”); Sir P. Vinogradoff, Magna Carta, C. 39, in Malden, supra note 174, at 79 (noting the argument that “the barons who forced the Charter on John Lackland were guided by class interests and aimed at reaction and anarchy rather than at legality and progress”); Edward Jenks, The Myth of Magna Carta, 4 INDEP. REV. 260 (1904). According to that view, “Magna Carta is an ancient fetish, a sort
Like the eleventh and twelfth century events that culminated in Magna Carta, the seventeenth century witnessed a tumultuous fifty-year period that began with a bloody revolution and ended with an invasion leading to a bloodless transition of royal power that re-established the importance of English constitutionalism. Indeed, the events that occurred in English political history between 1642 and 1689 read like a Shakespearean tragedy. The first stage in that period began in 1642 with the Civil War between the forces of the monarchy (known as Cavaliers) and those of Parliament (known as Roundheads) over who enjoyed superior authority. That stage ended in 1649 when Parliament impeached, deposed, and beheaded King Charles I. The nation then suffered an eleven-year period, called the Interregnum, of martial government under Lord Protector Oliver Cromwell and (briefly) his son Richard. Having grown weary of military rule, in 1660 Parliament replaced Richard with Charles II, the exiled son of the executed monarch, which began the period known as the Restoration. Ironically, the next three decades witnessed continuous political battles between Parliament and its chosen monarch, Charles II, followed by his successor, James II, both of whom sought to re-gain the royal powers that Parliament had taken from Charles I. Seeking to prevent another bloody civil war, Parliament in 1688 invited William III of Orange, the military (but not political) leader of the Dutch republic and James II’s son-in-law, to become the new monarch. William accepted and landed in England unopposed toward the end of the year. Fearing that he would suffer the same fate as Charles I, James II fled the nation. Parliament then installed William and his wife Mary, James II’s daughter, as the new king and queen, their coronation capping what is known as the Glorious Revolution of 1688-1689.

Historians dispute the role that religion played in those events. The monarchs, Charles I, Charles II, and James II, were Catholic, while the members of Parliament belonged to the Church of England, so there was a strong religious overtone to the separation of powers battles between those two groups. Historians agree, however, that the final stage of this process, the Glorious Revolution of 1688-1689, was “restorative not innovative, conservative not radical.” They concur with Edmund Burke that “the glory of the Revolution of 1688-89 was precisely that it

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236 See, e.g., HANNAN, supra note 132, at 157-201; PINCUS, GLORIOUS REVOLUTION, supra note 234, at 6; Gedicks, supra note 12, at 612.

237 PINCUS, GLORIOUS REVOLUTION, supra note 234, at 6.
changed so little, it restored the English ancient constitution that had been threatened by a Catholic tyrant, with a minimum of constitutional and social disruption.”

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Where does that summary of the history of English constitutionalism leave us? With this: By 1215, England had adopted an unwritten constitution based on the long-accumulated customs of the nation, traditions reaching back at least six hundred years. That constitution was committed to advancing liberty by coralling the power of the crown. The means used was the law, particularly the fundamental unwritten constitution of the nation that incorporated and reflected English traditions going back centuries. The English saw those longstanding rules and principles as necessary safeguards for their lives, liberty, and property against royal predations. That unwritten constitution withstood political intrigue and civil wars in the thirteenth century, and it would overcome similar travails more than four hundred years later. In addition, Magna Carta was a signal achievement of English constitutionalism. To be sure, the English people also held in great esteem other landmark guarantees of civil liberties, such as the Petition of Right of 1628,\textsuperscript{239} the Habeas Corpus Acts of 1640\textsuperscript{240} and 1679,\textsuperscript{241} the Triennial Act of 1641,\textsuperscript{242} and the Bill of Rights of 1869.\textsuperscript{243} But Magna Carta was the first such landmark protection. Given its embodiment in a written charter containing King John’s express guarantee that he, his successors, and his agents would be governed by law now and forever, Magna Carta was the first Anglo-American guarantee of government by and under law. It therefore is entitled to be treated as primus inter pares.

That is where English law stood not only when the Colonists began their journeys to America, but also when, one hundred fifty years later, Americans began to redefine their understanding of English constitutional law and to re-evaluate their relationship to their Mother Country.

C. THE AMERICAN ADOPTION OF MAGNA CARTA

Along with food, clothes, and other supplies, the American colonists carried with them the English common law,\textsuperscript{244} once described as “the accumulated expressions of the various judi-

\textsuperscript{238} Id.

\textsuperscript{239} 3 Car. 1, c. 1 (“The Petition Exhibited to His Majestie by the Lordes Spirituall and Temporall and Commons in this present Parliament assembled concerning divers Rightes and Liberties of the Subjectes: with the Kinges Majesties Royall Aunswere thereunto in full Parliament”).

\textsuperscript{240} 16 Car. 2, c. 10 (“An Act for the Regulating the Privie Councell and for taking away the Court commonly called the Star Chamber”).

\textsuperscript{241} 31 Cha. 2, c. 2 (“An Act for the better secureing the Liberty of the Subject and for Prevention of Imprisonments beyond the Seas”).

\textsuperscript{242} 12 Cha. 1, c. 12 (“An Act for prevention of inconveniences happening during the long intermission of Parliaments”).

\textsuperscript{243} 1 Wm. & Mary Sess. 2, c. 2, (“An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown”).

cial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.” The Colonists did not see English common or constitutional law as an imposition or burden. To them, it was their birthright, a hard-won protection against arbitrary rule in the Old World that they hoped would serve the same function in the New World, no less important to this nation’s early settlers than it was to those who remained in the Mother Country. Indeed, “the systems of law and liberty that, contemporary English and many foreign observers seemed to agree, distinguished English people from all other peoples on the face of the globe” was more important to them than England’s combined military and commercial power.

Early American legal history shows the importance to our nation of the constitutional protection of liberty. In order to persuade people to settle in America, the organizers of the Colonies “not only had to offer them property in land but also property in rights by which English people had traditionally secured their real and material possessions.” The colonial charters therefore granted colonists the rights of Englishmen. Eleven of the thirteen colonies enacted so-called “receiving statutes,” which incorporated the common law as colonial law. One state—New Jersey—adopted the English common law via its constitution, and the last state—

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245 Kansas v. Colorado, 206 U.S. at 94; see also, e.g., 1 James Kent, Commentaries on American Law 471 (2010) (1826) (“The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.”). 246 See Greene, supra note 220, at 4-5; Edmund S. Morgan, The Birth of the Republic, 1763-89, at 6-7 (4th ed. 2013); H.D. Hazeltine, The Influence of Magna Carta on American Constitutional Development, 17 Colum. L. Rev. 1, 6 (1917). 247 “One principle upon which all Englishmen then agreed was the rule of law. When in the late eighteenth century, they spoke of the ‘liberties of free-born Englishmen, the rule of law was in the back of their minds: resistance to Charles I in the name of law, vindication of law against James II. Colonial leaders were familiar with the works of Algernon Sydney, [James] Harington, and [John] Locke, who urged every Englishman to resist every grasp for power; to stand firm on ancient principles of liberty, whether embalmed in acts of Parliament or adumbrated in the ‘Law of Nature.’” Samuel Eliot Morison, The Oxford History of the American People 180 (1965); see also, e.g., William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830, at 13 (1994) (“One of the most intense concerns of Americans in the prerevolutionary period was to render individuals secure in their lives, liberties, and properties from abuses of governmental power.”). 248 Greene, supra note 220, at 6 (footnote omitted). 249 See id. at 141-42 (“[T]he restraint of governmental power and the security of individuals in their lives, liberties, and property were among the most intense concerns of free colonial British Americans of all social classes and that in Massachusetts they managed, to an extraordinary degree, to construct a polity that thoroughly reflected these concerns.”); John Philip Reid, In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution (1981) (hereafter Reid, Defiant Stance). 250 Id. at 9. 251 See, e.g., Hazeltine, supra note 235, at 6-8. The Colonists saw royal charters as a direct compact with the King. Id. at 8.
Connecticut—adopted the common law by judicial decision. Here, as in England, the common law served as the default rule of law until a colonial assembly replaced it with a statute.

Magna Carta had been an important part of the English common law and was to play a critical role in American constitutional law. Belief in the principles that law traced its legitimacy to the unwritten customs of the people and could protect against government tyranny had become part of the shared heritage of the English. The Colonists shared those beliefs with their countrymen. Familiar with Coke, the Colonists saw Article 29 of Magna Carta as an example


253 See, e.g., Bellia & Clark, supra note 27, at 29. That proposition, however, raises a host of other issues that the receiving statutes themselves did not answer. Did the receiving statutes incorporate only the decisions of the English courts or a body of law known as “the English common law,” which included the principles driving those decisions? How should American courts treat English court decisions during the immediate run-up to or after the Revolution? Was the incorporated law static or dynamic? Should the American common law be the same throughout the states or could—and would—different state courts adapt that law to their own peculiar conditions and cultures? How should the new federal courts treat the common law—that is, should they have the power independently to define the common law or should they be bound by what the state courts adopted? How should a state or federal court that deems itself bound by its own precedent treat the precedent of other state or federal courts?

American courts have worked out the answers to those questions over the ensuing two centuries. See, e.g., Murdock v. Hunter, 1 Brock. 135, 17 F. Cas. 1013 (Cir. Ct. Va. 1808) (Marshall, Circuit Justice); compare, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (Story, J.), with, e.g., Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (Brandeis, J.); see generally Herbert Pope, The English Common Law in the United States, 24 HARV. L. REV. 6 (1910) (discussing that development).

254 See, e.g., Hazeltine, supra note 235, at 1-33.

255 See Hurtado v. California, 110 U.S. 516, 530 (1884) (“The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history[,]”); HANNAN, supra note 132, at 107 (“English exceptionalism was defined with reference, not to racial characteristics, military prowess, or island geography, but to law, liberty, and representative institutions.”); GREENE, supra note 220, at 141 (“For Britons on either side of the Atlantic during the pre-Revolutionary crisis, . . . the law did not always mean command or will, and legal theorists, judges, and lawyers did not necessarily associate law with sovereignty. Rather, in the context of British and British-American legal traditions, law in the 1760s and 1770s was still thought of as being as much custom and community consensus as sovereign command. As a result, eighteenth-century law throughout the British world was considerably less coercive and considerably more dependent for its enforcement upon community support than most earlier historians have recognized.”) (footnote omitted); id. at 180-81 (“In English jurisprudence, as [Professor] Reid explains, custom obtained the force of law through a combination of time and precedent. Whatever had been from time immemorial in a community was legal; whatever had been abstained from was illegal. Historical fact was the source of constitutional custom, and, according to contemporary English practice well into the late eighteenth century, rights established by custom and proven by time were legal rights that, as [Professor Thomas] Grey notes, were judicially enforceable, even against the highest legislative and executive organs of government.”) (footnote and internal punctuation omitted); see also REID, DEFiant STANCE, supra note 176; Grey, Origins, supra note 10.

256 See, e.g., Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (“Edward Coke['s] . . . Institutes 'were read in the American Colonies by virtually every student of law[,]’”’”) (quoting Klofver v. North Carolina, 386 U. S. 213, 225 (1967)); DAnZiger & GILLINGHAM, supra note 187, at 272; HOWARD, MAGNA CARTA, supra note 174, at 22-23; WOOD, supra note 233, at 299-300; Gedicks, supra note 12, at 614 (“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 height, Coke exerted a strong influence on colonial law. A large number of seventeenth-century American lawyers studied law in England, where Coke's Reports and Institutes were a staple of legal education, just as they were in the American colonies until the publication of Blackstone's Commentaries in 1765.”). Coke had extolled the virtues of Magna Carta in his Institutes of the Laws of England, a highly influential four-
of “the broader concept of higher-law constitutionalism,” which bound the Crown and Parliament alike to follow the “natural and customary rights recognized at common law.” To implement their understanding of constitutional law, the Framers’ generation used the phrase “the law of the land” or “due process of law” in numerous important political statements, such as the Virginia Resolutions of 1769 and the Declaration and Resolves of the First Continental Congress of 1774, and in contemporary legal documents, such as statutes passed by colonial assemblies, resolutions enacted by the Continental Congress, the Declaration of Independence, and later-enacted state constitutions. The Fifth and Fourteenth Amendments to the federal Constitution later used the phrase that we know today, “due process of law.” That term, like its ancestor in

volume common law treatise published between 1628 and 1644. See DANZIGER & GILLINGHAM, supra note 187, at 272; PLUCKNETT, supra note 151, at 25 (“The great commentary on [Magna Carta] by Sir Edward Coke in the beginning of his Second Institute became the classical statement of constitutional principles in the seventeenth century, and was immensely influential in England, America and, later still, in many other countries as well.”) (footnote omitted); HOWARD, MAGNA CARTA, supra note 174, at 28 (Coke “eulogized Magna Carta”). Blackstone published his Commentaries more than a century after Coke’s Institutes and almost a century after the Glorious Revolution. Unlike Coke, Blackstone believed in Parliamentary Supremacy, and the Framers were quite familiar with his work too. See, e.g., Alden v. Maine, 527 U.S. 706, 715 (1999); Schick v. United States, 195 U.S. 65, 69 (1904). Nonetheless, the Colonists continued to rely on Coke’s theories of constitutional law. See Gedicks, supra note 12, at 614 (“Even after Blackstone, Coke's higher-law constitutionalism remained the more influential school of thought before and during the Revolution, when the arguments of Locke and the Whigs of the Glorious Revolution dominated legal and political thought in the colonies.”) (footnotes omitted), 632 (“Coke may not actually have 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 belief was a cornerstone of their constitutional argument against British control of the colonies.”) (footnote omitted); WOOD, supra note 233, at 162-63.

257 Gedicks, supra note 12, at 614.

258 See, e.g., Hazeltine, supra note 235, at 22.

259 See, e.g., Oberegefell v. Hodges, 135 S. Ct. 2584, 2633 & n.3 (2015) (Thomas, J., dissenting); HOWARD, THE ROAD FROM RUNNYMEDE, supra note 174, at xi, 15-16, 211-15, 19, app. B, at 397 (listing charters); Gedicks, supra note 12, at 622-23 (“The Declaration [of Independence] follows its natural law introduction with a long list of common law rights and liberties which George III was alleged to have either violated, neglected, or failed to secure against parliamentary encroachment. The Declaration even accused the King of conspiring 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 did to refer to fundamental laws that limited government[.]”) (footnotes omitted), 627 (“[E]ight 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 life, liberty, property, or privilege, except by the ‘lawful judgment of their peers or the law of the land.”); Hazeltine, supra note 235, at 25; Howard, Magna Carta’s American Journey, in HOLLAND, supra note 116, at 103-17.

260 See, e.g., Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta. Lord Coke, in his commentary on those words . . . says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, ‘but by the judgment of his peers, or the law of the land.’ The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words.”); see also, e.g., Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (plurality opinion); Daniels v. Williams, 474 U.S. 327, 331 (1986); Twining v. New Jersey, 211 U.S. 78, 100 (1908 (noting “the proposition universally accepted by American courts on the authority of Coke, that the words ‘due process of law’ are equivalent in meaning to the words ‘law of the land,’ contained in [Magna Carta Article 39”), overruled in part on other grounds, Malloy v. Hogan, 378 U.S. 1 (1964); Hovey v. Elliott, 167 U.S. 409, 415-17 (1897); Davidson v. New Orleans, 96 U.S. 97, 101 (1877) (“The equivalent of the phrase ‘due process of law,’ according to Lord Coke, is found in the words ‘law of the land,’ in the Great Charter, in connection with the writ of habeas cor-
Magna Carta, has played a major role in the development of American constitutional law, and, like its ancestor, the Due Process Clause at a minimum has bound the government to act according to law.

Yet, there was one important distinction between the “the rule of law” as known to the British and as understood by the Colonists at the time of the American Revolution. In the sixteenth century, the English understood the common law as the unwritten embodiment of the historic customs and folkways, a form of fundamental or constitutional law that both empowered and restricted the authority of the Crown and guaranteed certain liberties to all Englishmen. The English treated certain written charters or laws such as Magna Carta as Parliament’s written guarantees of England’s fundamental law, not as examples of Parliament’s sovereign lawmakership. The events that occurred in English political history between 1640 and 1688 fundamentally altered the English understanding of the concept of “sovereignty.” Parliament now considered itself the sovereign power in England. Even the Crown accepted that political reality, to the point that, in their coronation oaths, William and Mary agreed to govern according to the laws of Parliament, a concession that, given the events preceding it, immediately established

pus, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown.”); HOWARD, THE ROAD FROM RUNNYMEDE, supra note 174, at 14-15, 23, 300 & n.6 (collecting state court cases to that effect); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 547 (4th ed. 1873). The members of Congress who voted in favor of sending the Bill of Rights to the states for ratification did not discuss the Due Process Clause. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 272 n.268 (1985).

261 See REID, supra note 97, at 93 (“Rule-of-law belonged to the seventeenth and eighteenth centuries. It was the cornerstone of the jurisprudence of liberty when liberty was struggling to survive.”). The Supreme Court has cited Magna Carta in more than eighty opinions over the last fifty years, Hon. Sandra Day O’Connor, Magna Carta and the Rule of Law, in in HOLLAND, supra note 116, at 9, a practice that shows no sign of slowing down, see e.g., Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2426 (2015); Kerry v. Din, 135 S. Ct. 2128, 2133 (June 15, 2015) (plurality opinion).

262 See John Harrison, Substantive Due Process and the Constitutional Text, 83 VA. L. REV. 493, 497 (1997) (“In their procedural aspect, the Due Process Clauses are under-stood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process.”) (footnote omitted); McIlwain, supra note 182, at 30.

263 See, e.g., GREENE, supra note 220, at 141; CHARLES HOWARD MCIWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 2-3, 9-11, 16-17 (1923) (hereafter MCIWAIN, AMERICAN REVOLUTION).

264 See Grey, Origins, supra note 10, at 856-57 (“The ideas of fundamental law, so dominant in 17th-century England, were subtly undermined in that country by the course of political history. The events of the Cromwellian period, the Restoration and the Revolution of 1688, and finally the evolution of the system of ministerial government under the Hanoverian Kings, all tended to create a practical legal supremacy in Parliament. Whig theory and practice made royal authority subordinate to Parliament, and Godden v. Hales [89 Eng. Rep. 1050 (K.B. 1686)] in 1686 represented the court’s last imposition of a constitutional limit on parliamentary authority in the name of the royal prerogative. The constitution came to be seen less as a body of principles limiting governmental power, and more as a set of institutions headed by a Parliament that possessed ultimate authority to change customary arrangements by legislation.”) (footnotes omitted). There were dissenters to that view, including William Pitt, the greatest English statesman of the age, but they were in the minority. See id. at 857-59.

265 See MCIWAIN, AMERICAN REVOLUTION, supra note 252, at 3, 43.
Parliamentary supremacy over the Crown. Over time, however, the events from the English Civil War through the Interregnum to the Glorious Revolution also gave rise to a far broader principle: Parliamentary sovereignty. Law was no longer the longstanding customs of the people; it was the dictate of the sovereign, which had clearly become Parliament. Law also was no longer a restriction on the power of Parliament; it was whatever legislation Parliament passed. The consequence was to fundamentally alter the longstanding British understanding of English constitutionalism. Now, Parliament could not only supplement the common law, but could also reject the common law and nevertheless define the supreme law of the land. Accordingly, the seventeenth century witnessed the success of Hobbes’ theory of sovereignty—viz., the proposition that in every state there must be a sovereign uncontrolled by law. As far as Parliament was concerned, Hobbes was correct—and in England that sovereign was Parliament.

By contrast, Americans still held the seventeenth century English understanding of the common law as the unwritten embodiment of the historic customs and folkways, a form of fundamental or constitutional law that both empowered and restricted the authority of the Crown and guaranteed certain liberties to all Englishmen. Even after the Glorious Revolution the Colonists continued to honor the seventeenth century belief that fundamental English law, including all of its protections of liberty, was sovereign, regardless of the allocation of power between the Crown and Parliament (and the Colonies, for that matter). One reason was that the change in custom and philosophy in England was not obvious in the Colonies. Another reason was that, before 1763, the Crown rarely interfered in the colonists’ business, leaving them with the belief that they were masters of their own fate.

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266 See GOODHART, supra note 160, at 50; MORGAN, supra note 235, at 8; 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 55 (1987) (hereafter REID, AUTHORITY OF LAW); REID, supra note 97, at 75.

267 See GOODHART, supra note 160, at 75-76 (“The Glorious Revolution had established the principle of parliamentary supremacy over the crown. Once Parliament began to transform ‘supremacy’ into ‘sovereignty’ and exercise supremacy over the law, as well as over the Crown, the English—or the Cokeian-American—theory of rule-of-law could not survive in the British constitutional world. The fact that the concept of rule-of-law, for so long a barrier constraining the power of the Crown on behalf of liberty, could not, in the same way, restrain Parliamentary power, not only explains much of the American Revolution’s constitutional controversy but sums up why the controversy had to be resolved by war. Legal theory in Britain was being forced apart from legal theory in the colonies, not only over the issue of constitutional restraint on legislative authority but over the immutability of rule-of-law.”). The members of Parliament also felt the need to maintain the supremacy of that institution even after 1688 in order to fend off advances by the Crown to regain the upper hand. See REID, supra note 97, at 100.

268 See GOODHART, supra note 160, at 60; HANNAN, supra note 132, at 201; Hazeltine, supra note 235, at 30-31.

269 See, e.g., GREENE, supra note 220, at 141; HANNAN, supra note 132, at 201; McILWAIN, CONSTITUTIONALISM, supra note 221, at 2-3, 9-11, 16-17.

270 See McLAUGHLIN, supra note 201, at viii.

271 See, e.g., Hazeltine, supra note 235, at 3 (“‘American institutions are still in some respects singularly like those of England at the death of Queen Anne, . . . Thereafter the changes in the British Constitution found no echo on the other side of the Atlantic, largely no doubt because taking the form of custom, not of statute, they were not readily observed.’”) (citation omitted).

272 See GREENE, supra note 220, at 179-80; MORGAN, supra note 235, at 9 (“For Americans, the great thing about this empire, apart from the sheer pride of belonging to it, was that it let you alone. The average colonist might go through the year, might even go through a lifetime, without seeing an officer of the empire.”); Grey, Origins, supra note 10, at 867 (“In the colonies, actual governing power was divided; governors and colonial legislatures contested
From the formation of the Virginia Colony to 1763, neither the Crown nor Parliament had focused on the constitutional question of the division of authority between England and the colonies. At a macro level, Parliament regulated the colonies’ external affairs, such as the mercantile system of trade, and otherwise left the colonies discretion to govern themselves as they saw fit.273 At a micro level, there were no organized police forces in the Colonies, and no divisions of soldiers were garrisoned in the cities.274 The only local royal officials were governors, customs officers, and judges.275 Each group, however, suffered from a severe handicap. The governors relied on the state assemblies for the revenue necessary to perform any royal business, which left them more paper tigers than powerful stand-ins for the King.276 Royal customs officers held potentially muscular offices, but suffered from an equally disabling flaw, this one to their character—they were “a venal lot,” easily bribed, and did little to restrain the Colonists.277 In truth, though, the customs officers may have had no other choice. Had they tried to vigorously enforce the customs laws in a manner that the Colonists did not support, they faced not only organized local resistance, but also common law actions for damages before a jury that could decide the facts and the law, a power that rendered judges largely feeble.278 Even when a judge ruled against a local citizen, the sheriffs and constables responsible for enforcing the judgment were powerless to carry out that duty in the face of organized local opposition. To be sure, in theory, the King could direct the Crown’s business in America. But that theory and the reality were far apart. Before 1763, the multiple layers of bureaucracy between the Crown and the Colonists meant that the latter were free from any English interference in their lives.279

This longstanding practice gave rise to a widespread belief that America was largely an independent polity within the British Empire, foreshadowing the relationship that the states later sought to have with the federal government. America was subject to Parliamentary regulation of the Colonies’ external affairs, such as trade, but was free from Parliamentary interference in local colonial governance, such as taxation. The widespread nature of that understanding was significant given the weight afforded to settled customary norms under the English constitution. To the Colonists, the unwritten practice governing the relationship between England and America was

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273 See GREENE, supra note 220, at 63-66.
274 See id. at 140; MORGAN, supra note 235, at 9.
275 See GREENE, supra note 220, at 140; MORGAN, supra note 235, at 9.
276 See MORGAN, supra note 235, at 9.
277 Id.
278 See GREENE, supra note 220, at 142.
279 See GREENE, supra note 220, at 142.

“The government of Great Britain had not been designed to cover half the globe, and when Englishmen were not busy extending their possessions still farther, they were apt to regard the problem of turnpikes in Yorkshire as vastly more important than the enforcement of the Navigation Acts in New York. Administration of the colonies was left to the King, who turned it over to his Secretary of State for the Southern Department (whose principal business was England’s relations with southern Europe). The Secretary left it pretty much to the Board of Trade and Plantations, a sort of Chamber of Commerce with purely advisory power. The Board of Trade told the Secretary what to do; he told the royal governors; the royal governors told the colonists; and the colonists did what they pleased.” MORGAN, supra note 235, at 11. Matters started to change in 1763. See infra text accompanying notes 280-81.
entitled to the same legal authority as the unwritten customs of pre-Magna Carta common law in England. That tradition, along with the formal, informal, and sometimes-extralegal actions of the community—viz., the colonial version of the 1950s “massive disobedience” in many southern states—rendered English law subordinate to the law expressed in colonial assemblies and on American streets. The Colonists’ opposition to Parliament’s equally-strongly-held belief in its own sovereignty over the Colonies therefore was not grounded in a petulant desire for anarchy. Instead, it represented the Colonists’ practical application to their own circumstances of the principle of English political philosophy that a widespread, longstanding practice could become accepted as part of an evolving, unwritten constitution and the belief that the Colonists could establish their own governing traditions.

Parliament’s hands-off policy of colonial governance changed in 1763. With the successful close of what Americans call the French and Indian War and what in England was known as the Seven Years’ War, the English government’s debt had increased from £72 million in 1755 to £130 million in 1763. Plus, England acquired new territories in North America from France and was forced to garrison royal soldiers in the Colonies to protect them, and English taxpayers were paying fifty times as much as the Colonists for defense in America. Parliament, not unreasonably, concluded that the Colonies ought to pay a share of the cost of their own protection. To raise revenue to pay for that new expense, Parliament for the first time sought to tax the internal operation of the Colonies. The Stamp Act of 1675 was the first such effort.

The Colonists vehemently opposed Parliament’s tax. Pointing to the settled English political theory and longstanding practice that government could tax only those members of the public who were represented in the legislature, which the Colonists were not, the Colonists ar-

280 See GREENE, supra note 220, at 141-48.

281 See id. at 144-47 (describing the “public uprisings” and actions of “patriot committees” to frustrate the operation of English officials); Grey, Origins, supra note 10, at 876 (“The view that the Stamp Act was unconstitutional (in the full sense of ‘illegal’) provided the organizing principle for a new and vigorous movement of popular protest against the tax. Mobs forced stamp collectors from office and destroyed stamped paper, yet their actions were conceived as justified resistance to an illegal exercise of power, not as revolutionary attack on English rule. Thus, sober and law-abiding anti-stamp leaders like John Adams endorsed the mob violence in Boston on August 14, 1765, violence that forced the resignation of stamp collector Andrew Eliot.”).

282 See Grey, Origins, supra note 10, at 849-50 (“The constitutional ideas of the American Whigs of the revolutionary era arose primarily out of the traditional English conception of fundamental law. The original colonists were 17th-century Englishmen, and their political thought was formed by the institutions and beliefs characteristic of 17th-century England. Ideas of fundamental law superior to all organs of government—ideas that had dominated the century of civil war and revolution in their homeland—were to provide the moral and intellectual background for the colonists in the struggle that ultimately led to independence. While the traditional English conception of fundamental law lost institutional support in 18th-century English politics, this conception was renewed and fortified, particularly for Americans, by the political and legal theories of the Enlightenment. These theories, as developed by writers such as Pufendorf, Burlamaqui and Vattel, stressed limitations upon legislative power imposed both by general natural law and by the particular provisions of each nation’s constitution.”) (footnote omitted); Hazeltine, supra note 235, at 5 (“So far as [the English Common Law] protected them from the English government and from royal officials they looked upon it as their birth-right; so far as it interfered with their development it was to be disregarded.”) (bracketed material in original; footnote omitted).

283 See HANNAN, supra note 132, at 217; MORGAN, supra note 235, at 141-15.

gued that Parliament lacked the authority to tax the internal affairs of the Colonies. Americans also believed that Parliament sought to interfere in matters that the colonial charters and more than a century of tradition had left them to resolve in their own assemblies. The Colonists treated with the same contempt Parliament’s subsequent efforts to impose other taxes, such as the Tea Act of 1765 (the infamous tax on imported tea that lead to the Boston Tea Party), the Townsend Acts of 1767, and the Intolerable Acts of 1774. In each case Parliament sought to establish its plenary authority over the external and internal affairs of the Colonies, and each effort only fueled the Colonists’ ire. Ultimately, the Colonists came to believe that Parliament lacked the authority to legislate in any manner for the colonies, whether the law was a tax or some other form of regulation.

By the time of the American Revolution, the Colonists distrusted and feared the power of the English government, regardless of who exercised it. The Colonists shared the “common assumption” that “men and especially men in power are prone to corruption” and therefore believed that Parliament could be as arbitrary as the King. “The danger to liberty was what it had always been: departure from the rule of customary law” in favor of “a rule of arbitrary command.” “The difference,” as Professor John Phillip Reid argues, “was that now a House of Parliament, not just the Crown, had to be watched.” The Colonists distrusted Parliament no less than they distrusted King George III and believed that Parliament must be equally subject to the same “ancient constitution” that kept the Crown at bay.

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285 See McILWAIN, AMERICAN REVOLUTION, supra note 252, at 185.
286 Parliament believed that it was the sovereign and could enact whatever legislation it saw fit for the Colonies. Members of Parliament also came to believe in the theory of “virtual representation.” Not everyone in England had the franchise, but they benefitted from the virtual representation of others in Parliament. The Colonists were in the same position, the theory went. The Colonists disagreed and pointed to the established custom of self-government as a defense to what they deemed Parliament’s aggrandizement of power in America. See GREENE, supra note 220, at 69-70. In fact, the Colonists relied heavily on the value of custom as defining fundamental law. See Grey, Origins, supra note 10, at 871 (“The claim of constitutional protection for jury trial has particular theoretical interest, since it shows that the colonists viewed the unwritten fundamental law limiting Parliament’s power as including matters of custom independent of natural law. As McIlwain has said, “It would be difficult indeed ... to insist that so entirely English a thing as trial by jury was founded on the ‘immutable law of nature.’” Indeed, while in the literature of protest the basis for the principle of “no taxation without representation” was founded in the natural right of property, arguments for the right of jury trial were generally based upon its antiquity alone. As John Dickinson was later to put it: “It was not Reason that discovered or ever could have discovered the odd and in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries and experience has given a sanction to them.”) (footnotes omitted).
288 See REID, supra note 97, at 100; REID, AUTHORITY OF LAW, supra note 196, at 3-5, 69-72.
289 See MORGAN, supra note 235, at 7.
290 See REID, supra note 159, at 26, 85 (“American Whigs were not ambiguous about what they believed was the most general threat to liberty. It was arbitrary power.”).
291 See id. at 29.
292 “In the Old World the English had fought against the old world or arbitrary monarchy, attempting to secure their liberties through representative government. In the new World, Americans rejected the new world of arbitrary democracy, attempting to secure freedom by restricting the representatives of the people.” DIETZE, supra note 153, at 71; see GREENE, supra note 220, at 59-60.
To Americans, the rule of law—a tenet that was both ancillary to the equally favored principle of limited government and consistent with the Colonists’ religious understanding of this world and the next one—should govern Parliament no less than King George III. As Thomas Jefferson put it, referring to Virginia’s assembly, because “[o]ne hundred and seventy-three despots” can be “as oppressive as one,” an “elective despotism is not the government we fought for.” The Colonists also believed that the colonial assemblies held a political and legal status equal to Parliament’s as far as domestic legislation was concerned. “The fundamental principle of the American Revolution was that the colonists were coordinate members with each other and Great Britain of an empire united by a common sovereign,” James Madison stated, “and that legislative power was maintained to be as complete in each American parliament as in the British Parliament.” The American colonial governments were to be polities, as described by John Locke, voluntarily formed by a compact among free individuals to establish a government to protect the liberty of all.

Yet, the Colonists had not consented to be governed by Parliament, and, because Americans did not vote for members of Parliament, the Colonists did not see its members as their “virtual representatives.” But the Colonists believed that they had no opportunity to seek relief. An appeal to Parliament would have been futile. The Colonists also could not go to court to seek

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293 "To the Puritans, the law of nature, the law which Locke and other philosophers postulated as existing before government and social order were founded—this law which was all inclusive and permanent—inevitably assumed religious or theological significance. The law of nature was the law of God as well as the law of reason; and God himself was the embodiment of unchanging reason and inviolable law. I have already referred to the theological belief that God treated with man in a covenantal way. But man’s hope for salvation was based on the binding character of God’s covenant; and He who was the source of right and justice could not, because of His very nature, prove faithless to His own obligations. The universe under God was a constitutional universe; the monarch of the world was a constitutional monarch, ruling in accord with his own promises and in accord with unvarying justice. If then men longed for a government of law and not of men, they found the principle within their own theology and the basis of their belief was founded in their own faith. Puritanism, so far as it was embodied in the American constitutional structure and doctrine, would point to God in His Heaven, sovereign over the countless millions of men, bound by contract, bound by reason, and limited by immutable law.” McLaughlin, supra note 201, at 108 (footnote omitted).

294 “If there is any central principle in the American constitutional system it is that governments are not omnipotent; they are, or are supposed to be of only limited authority. This principle of limited authority is sometimes spoken of as the reign of law. Liberty has been defined as the right or privilege of not being under restraint or obligation to obey anything but the law. The struggle for freedom in English history was largely directed against arbitrary government, against a system or a ruler with power to act capriciously and with no responsibility to the governed. The long course of history during which men cherished the hope, often only a hope, of living under legally limited government is an impressive story. It is for us especially impressive, because the American people, a century and a half ago, succeeded in establishing that principle as an institutional fact[,]” McLaughlin, supra note 201, at 104-05 (footnote omitted); see also, e.g., Hurtado v. California, 110 U.S. 516, 531-32 (1884) (“In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into bills of rights, They were limitations upon all the powers of government, legislative as well as executive and judicial.”); Hazeltine, supra note 235, at 32-33.

295 II Thomas Jefferson, The Writings 162-63 (1903).

296 Hannon, supra note 132, at 223.

297 See McLaughlin, supra note 201, at 72-73, 107.

298 See, e.g., Hannon, supra note 132, at 225-26.
relief against Parliament because judicial review as we know it today was not yet an available option. With no peaceful opportunity to resolve the Colonists’ fundamental constitutional disagreement with Parliament over limitations on its sovereignty, armed conflict—albeit one that was more a rebellion than a war between dissimilar nations—became inevitable. In fact, it

299 Professor Edward Corwin summarized the case for judicial review of substantive legislation long ago. “‘Law of the Land’ and ‘Due Process of Law’ . . . derive their great contemporary importance not from their character as restrictions upon the power of the legislature in the enactment of procedure merely, but from their character as restrictions upon the power of legislation in general. Not everything that is passed in the form of law is ‘law of the land,’ say the courts, not only with reference to enactments which have nothing to do with the subject of procedure, but even with reference to enactments sanctioned by methods of enforcement admittedly unexceptionable, as, for example, the statute involved in the *Lochner* case. How has this come about? The essential fact is quite plain, namely, a feeling on the part of judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow.” Corwin, supra note 13, at 373-74 (footnote omitted).

300 There was no judicial mechanism for enforcing against Parliament the Colonists’ understanding of the unwritten English constitution or the liberty it guaranteed. See *Greene*, supra note 220, at 132-33, 183. The most analogous legal issue would have involved interpretation of a colonial charter, and the only enforcement options were forfeiture of the charter by act of Parliament, annulling of colonial legislation by the Crown, or judicial proceedings that resulted in an appeal to the Privy Council. Thayer, supra note 13, at 130-31. Magna Carta neither established a judicial enforcement mechanism nor referred to any specific common law writ. Instead, Article 61 of the Charter contemplated the enforcement would be done by a committee of twenty-five barons who could review the Crown’s conduct and obtain relief for any royal violation of the Charter by seizing the king’s castles and lands. Yet, after John’s death, when his son and successor Edward II ascended to the throne, Edward III reissued the Charter without Article 61. No subsequent reissuance of Magna Carta contained that provision. See *Bartlett*, supra note 182, at 66; *Brooke*, supra note 134, at 223; *Goodhart*, supra note 160, at 30-31; Wm. S. McKenzie, *Magna Carta* (1205-1915), in *Malden*, supra note 174, at 15-16; *McKechnie*, supra note 180, at 131, 160-61. Gradually, the writ of habeas corpus became the vehicle for enforcing the promise of Magna Carta Article 39. See 1 *Blackstone*, supra note 36, at *135; *Habeas Corpus Act of 1679*, 31 Cha. II, c. 2; see also DANIEL JOHN MEADOR: HABEAS CORPUS AND MAGNA Carter: DUALISM OF POWER AND LIBERTY (1966); 3 *Story*, supra note 329, § 1341, at 207 (noting that the writ ran “into all parts of the king's dominions; for it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained.”). Habeas corpus, however, was a remedy for unlawful imprisonment by the Crown; it was not yet a vehicle for challenging an act of Parliament. Atop that, at the time of the Revolution, it was uncertain under English law whether “the law of the land” guaranteed more than indictment or presentment by a grand jury in a criminal case or suit by a common law writ in civil actions. There also was no agreement whether English courts could invoke the British constitution to nullify acts of Parliament. See Corwin, supra note 13, at 368-70. Coke had once written that an act of Parliament would be void if it were unreasonable and inconsistent with the common law. In *Dr. Bonham's Case*, 8 Co. Rep. 114a, 77 Eng. Rep. 646, 647 (C.P. 1610) (“It appeareth in our books, that in many cases the common law will control Acts of Parliament and adjudge them to be utterly void; for where 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 it to be void.”). Coke’s dictum, however, was hardly a widely-accepted proposition. See Corwin, supra note 13, at 369-70. Although a Virginia county court held the Stamp Act unconstitutional, *McLaughlin*, supra note 201, at 121 & n.24, the principle that the courts could hold a legislative act unconstitutional did not become clear until *Marbury v. Madison*, 5 U.S. (1 Cranch) 177 (1803), resolved that question, but *Marbury* lay three decades in the future. The result was that the only recourse available to the Colonists to remedy arbitrary conduct by Parliament was public rebellion.

301 See HANNAN, supra note 132, at 210 (“Although the fighting [in the American Revolution] led one part of the Anglophere declaring itself independent from the other, it is anachronistic to think of it as a war between Americans and Britons. It was understood and described by contemporaries as a settlement by force of the Tory-Whig dispute, which by then had exhausted all attempts at peaceful resolution.”).

302 As Professor Andrew Cunningham McLaughlin once wrote, “the central principle of the American Revolution” was that “rebellion against an unlawful act was not rebellion but the maintenance of law. This philosophy gave character to the Revolution.” *McLaughlin*, supra note 201, at 119. See also, e.g., *Greene*, supra note 220, at 59-
could be argued that the American Revolution was fought over the principle that the Crown and Parliament were equally subject to the unwritten British Constitution as much as over the specific claims that the Declaration of Independence had lodged against King George III. “Thus a theory of law that had cost Charles I his head and James II his throne was about to cost Great Britain its American colonies.”

The period of the American Revolution teaches us the following. First, the Colonists were convinced that they possessed all of the rights enjoyed by the countrymen they left behind. Second, the Colonists believed that those rights included the liberties guaranteed by the common law and unwritten English constitution, of which Magna Carta was an important part, and adopted a written constitution in order to better protect those liberties. Third, unlike their countrymen, who had lived through the Civil Wars, the Interregnum, and the Glorious Revolution, which taught the English that Parliament could save them from the arbitrary actions of the Crown, the

66; MORISON, supra note 236, at 180 (“There was no American nationalism or separatist feeling in the colonies prior to 1775. . . . Americans were not only content but also proud to be part of the British imperium. But they did feel very strongly that they were entitled to all constitutional rights that Englishmen possessed in England.”), 182 (“[T]he Americans were a high-spirited people who claimed all the rights for which Englishmen had fought since Magna Carta, and would settle for nothing less. . . . Make no mistake; the American Revolution was not fought to obtain freedom, but to preserve the liberties that Americans already had as colonials. Independence was no conscious goal, secretly nurtured in cellar or jungle by bearded conspirators, but a reluctant last resort, to preserve ‘life, liberty, and the pursuit of happiness.’”) (emphasis in original); REID, supra note 159, at 75 (“If seen from the point of view of Bracton, Coke, Pym, Charles I, Sydney, and Hale, it is no exaggeration to say that the American Revolution was the greatest triumph for rule-of-law.”); see also id. at 26-29, 77-79; REID, AUTHORITY OF LAW, supra note 196, at 3-5; Corwin, supra note 13, at 370 (“The early state constitutions did not contemplate judicial review, but they were considered nonetheless as setting certain limitations upon legislative power, the transgression of which by the legislature would destroy, to use an oft-quoted phrase from Vattel, ‘the basis of the legislature’s own existence.’”).

303 See, e.g., GREENE, supra note 220, at 132-33, 160-64; McILWAIN, AMERICAN REVOLUTION, supra note 252, at 5; MCLAUGHLIN, supra note 201, at 127 (“The colonists were demanding a constitutionally checked government; they claimed it was already theirs; and in course of time they proceeded not only to fight, but to create governments of exactly that character.”); Gedicks, supra note 12, at 614 (“The Revolution took place against this backdrop of constitutional polarity in Britain and the American colonies. The higher-law constitutionalism of Coke and seventeenth-century common lawyers was receding, while the constitutionalism of parliamentary supremacy and sovereign command was ascendant. 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. 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 understand the colonies’ relationship to the king and Parliament in terms of seventeenth-century higher-law constitutionalism. They accordingly reacted to parliamentary taxation and internal regulation of the colonies by invoking Magna Carta, due process, and fundamental common law rights. Ultimately, of course, this conflict was resolved by revolution and independence.”) (footnotes omitted); Hazeltine, supra note 235, at 22-23.

304 GOODHART, supra note 160, at 60. There is, of course, an eminently reasonable argument that due process should be read as a protection only against unauthorized executive action, which is how Justice Thomas Jackson read it. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (juxtaposing the Article II Take Care Clause with the Fifth Amendment Due Process Clause: “One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther.”); see also CURRIE, supra note 232, at 272 (noting that “considerable historical evidence supports the proposition that ‘due process’ of law was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law”); Corwin, supra note 13.
Colonists feared that Parliament could be as autocratic as King George III. Fourth, the Colonists saw no difference between the guarantee in Magna Carta of treatment according to “the law of the land” and the guarantee of “due process of law” found in a later act of Parliament and in the Fifth Amendment Due Process Clause. The question, then, is this: Does the English and American constitutional history leading up to 1791 help us interpret the concept of “due process of law”?

IV. RESCUING THE LOST DOCTRINES

The constitutional history of Magna Carta offers a home for the lost due process doctrines. Each doctrine is better explained as a guarantee of “the law of the land” than as a matter of “fundamental fairness” or similar approach. Shifting the relevant analysis to a limitation imposed by “the law of the land” also would not alter the outcome of those decisions. The result is that tying the Due Process Clause to its roots rationally explains the principle underlying each doctrine without requiring reconsideration of the Supreme Court’s precedents.

A. THE GEOGRAPHIC REACH OF LEGAL AUTHORITY

Start with the personal jurisdiction doctrine. The purpose of the doctrine is to limit the geographic reach of state power when exercised through its courts. As explained earlier, from 

Pennoyer v. Neff [305] through Daimler AG v. Bauman [306] the Supreme Court has distinguished between residents of a particular forum and foreigners or strangers to that jurisdiction. Using the Due Process Clause as the vehicle for limiting state power, the Court has held that a state court may enter judgment against a resident defendant, such as an individual who seeks relief through the state judicial system or a company that is incorporated within the state or, for all practical purposes, uses that forum as its principal place of business, for any claim, while also prohibiting the state courts’ from entering judgment against a nonresident defendant that lacks sufficient “minimum contacts” with the jurisdiction even for a tort or contract breach that occurs within the forum.

The rule finds its antecedent principles in the law governing the jurisdiction of courts at common law. Before Henry II centralized the judicial system, each baron would appoint judges to resolve disputes within his own barony. Once Henry II’s new judicial system displaced the barons’ courts, judges had the authority to resolve disputes throughout England or within any territory over which the Crown’s courts could exercise jurisdiction and enforce their judgments. The law that those judges applied— “the law of the land” or the common law—was the settled customs of England and nowhere else. Even William largely left the settled Danish customs in place when he conquered England in 1066. The consequences of that state of affairs were these: First, the common courts lacked jurisdiction over matters that occurred in any jurisdiction where the king’s writ did not run—which meant that no English court had authority over any dispute that occurred in any other kingdom. [307] Second, because it was the settled customs of England

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[305] 95 U.S. 714 (1878).
[307] See, e.g., MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 4–5, 29–33 (2003). Practical considerations entered into that matter too. Judges sat at Westminster or “rode circuit” to hear cases across England, but crimes were tried in the district where they were alleged to have occurred. “Jurors” were also drawn from that district whether served as witnesses or factfinders. Together, those facts made it impossible, practically speaking, for any crime committed beyond England’s shores to be tried in England. See id.
that became the law applied by the king’s courts, the “land” whose “law” governed was also England—which explains why the common law did not apply beyond England’s shores.\(^{308}\)

The contemporary personal jurisdiction doctrine is fully explicable in terms of a construction of the Due Process Clause limiting the reach of each state’s legal authority to disputes or injuries occurring within its borders.\(^{309}\) The framers established a central government responsible for managing the affairs of the nation or refereeing disputes among the states, but left to the states the power to regulate whatever people, business, or events that occur within their borders. New York courts have no more authority to resolve disputes or remedy injuries that relate entirely to California than California has with respect to the same type of issues for New York. In every such case, state courts cannot enter a judgment that seeks to affect the life, liberty, or property interests that fall within another state’s jurisdiction and also cannot attempt to impose a forum’s law on a different state. Our federalist system entitles each state to govern its own people, businesses, and affairs as long as they do not affect their counterparts in a different state. In any case where one state seeks to do just that, the relevant question is not whether it is fundamentally fair to allow one state to supervise the internal affairs of another—an issue that can be answered only by making a subjective comparison of the rules that would be applied in each jurisdiction, an inquiry that not only lacks a clear answer, but also impugns the sovereignty of each state—but by properly and objectively determining which one may claim that it is the only “land” that may lay claim to jurisdiction over the dispute. Of course, there is no guarantee that different states courts will agree on the same answer to that inquiry. Different state courts could well prefer their own forum and laws to those of other states, those preferences could well affect their analyses of personal jurisdiction issues, and even Supreme Court justices can disagree over the resolution of a particular jurisdictional dispute. Nonetheless, a “law of the land” approach to this matter, accordingly, better explains how personal jurisdiction issues should be resolved than a test requiring a court to decide whether it is fundamentally fair to subject a defendant to suit in one state or another because it focuses on the location of the specific event giving rise to the controversy.\(^{310}\)

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\(^{308}\) *Lex terrae*, in 1215, means what Matthew Paris called ‘the pious and just laws of King Edward.’ It is the ancient custom of the realm, ‘the law of the land’ in a real sense.” McIlwain, supra note 122, at 49 (footnote omitted); see McIlwain, supra note 122, at 50–51; see also Regina v. Paty, (1704) 92 Eng. Rep. 232, 234 (QB) (the *lex terrae* “takes in all the other laws, which are in force in this realm”); TWYSDEN, supra note 212, at 82 (“The subject of England is a people hath bee ne ever jealous of their freedome, and their lott is to live under a law of mercy that favours liberty. In our historians we find it mentioned under several names: Henry the First calls them the auntient liberties of the subject; elsewhere they are termed “antiquas libertates regni,” “rectum judicium terrae,” “lex terrae,” “jus regni,” etc. In the Acts and Rolles of Parliament they are called “la franchise de la terre,” “le droit du royalm,” “the law of the land,” etc. by all which various appellations are meant nothing else but those immunities either to his person or his goods; and the ground that hee doth so is, that they are allowed him by the law of the land, which the king alone can not at his owne will alter, and therefore can not take them from him, they being as auntient as the kingdome itselfe, which the king is to protect.”).

\(^{309}\) That was also the rationale the Supreme Court adopted in *Pennoyer*, the Court’s first personal jurisdiction case. See Pennoyer v. Neff, 95 U.S. 714, 722–23 (1878) (“[I]t is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. ‘Any exertion of authority of this sort beyond this limit,’ says Story, ‘is a mere nullity, and incapable of binding such persons or property in any other tribunals.’”).

\(^{310}\) That conclusion is consistent with a long line of Supreme Court decisions making the point that a state cannot exercise sovereign power extraterritorially. See Huntington v. Attrill, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only
B. THE SUBSTANTIVE EXERCISE OF LEGAL AUTHORITY

A “law of the land” approach makes perhaps even greater sense when the issue involves the next Lost Due Process Doctrine. The origins of the Due Process Clauses readily explain why the Rule of Legality, the Void-for-Vagueness Doctrine, the Unforeseeable Judicial Expansion of Criminal Liability Doctrine, and the Proof-of-Guilt Requirement are essential guarantees of “the law of the land.”

Before Parliament came to monopolize the lawmaking process and to use written statutes to define prohibited conduct, English law had a far more informal nature. The law existed in the form of unwritten English customs, royal decrees such as the Dooms of Ethelred, and the common law decisions of the courts at Westminster or on the “circuit.” Those forms of law did not have in common the requirement that a rule must be written for it to be deemed a “law,” a requirement that would have made little sense in an era when few were literate. But they did share one simple feature: They had to exist. The original laws, such as the ones forbidding homicide, rape, theft, and burglary, grew out of then-contemporary mores, including religious doctrine, and they were known throughout England. That principle, today known as the Rule of Legality, gave birth to the next two. The Void-for-Vagueness Doctrine stands for the proposition that when a statute is so vague that the average person cannot readily understand its meaning, the legislation is void because it is tantamount to having no law at all. The Unforeseeable Judicial Expansion of Criminal Liability Doctrine extends that principle from legislative rules to judicial decisions. It forbids the courts from expanding the scope of a criminal law to reach conduct that no reasonable person could have foreseen being a crime. Otherwise, legislatures could direct the courts to expand the criminal law in ways that no one could anticipate.

Finally, the requirement that a person be proven to have committed a crime, like the other three doctrines, is readily explained by English constitutional history. Article 39 of Magna Carta sought to prevent King John from arbitrarily punishing his subjects except in accordance with “the law of the land.” Throwing someone in jail who had committed no crime but had earned the Crown’s disfavor would be an archetypical example of precisely what Article 39 sought to outlaw. The requirement that the government, today’s successor to the Crown, prove a violation of by the comity of other States.”); Bonaparte v. Tax Court, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”). The Court continues to treat that principle as “good law.” See Bigelow v. Virginia, 421 U.S. 809, 822–23 (1975) (“The Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State.”). Generally, jurisdiction exists when every element of the crime occurs within the boundaries of the state. In rare cases a state can prosecute someone for out-of-state conduct with an in-state effect, but that would only occur where, for instance, a person in one state defrauds or shoots someone in another state or conspires elsewhere to commit a crime in that other state. See Ford v. United States, 273 U.S. 593, 620–24 (1927); Strassheim v. Daily, 221 U.S. 280, 284–85 (1911); WAYNE R. LAFAVE, CRIMINAL LAW § 4.4, at 223–24 (5th ed. 2010).

311 Initially, English law did not distinguish between criminal and tort liability. In part, that was because the two concepts were virtually identical. See, e.g., LAFAVE, supra note 304, § 1.2(f); PLUCKNETT, supra note 151, at 442-54 (discussing the origins of common law felonies); JOHN SALMOND, JURISPRUDENCE 427 (8th ed. 1930) (“The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.”); Hall & Seligman, supra note 42, at 644. In part the explanation was that the remedy for a violation, damages, was the same in either case. In a time when no prisons existed to incarcerate convicted offenders and there was no central government with a monopoly over capital punishment, payment of damages served as the only alternative to inter-clan warfare. See supra text accompanying note 140.
law is an essential safeguard against arbitrary punishment. After all, it makes little sense to have the first three requirements—that is, to require that a law exist, that it be readily understandable by the average person, and that the courts not retroactively expand its reach—if the government may punish someone whether or not he broke the law. Accordingly, each of those Lost Due Process Doctrines is better explained as an element of “the law of the land” than as fitting into a substantive or procedural niche for the Due Process Clause.

C. THE DELEGATION OF LAWSMAKING AUTHORITY TO PRIVATE PARTIES

The third Lost Due Process Doctrine—the principle that the government may not delegate governmental power to private parties who are neither legally nor politically accountable to the public for its exercise—also can be explain by viewing the matter through the prism of “the law of the land.” If we treat Article 39 of Magna Carta as a protection against arbitrary governmental conduct—whether executive or legislative in nature—the Private Delegation Doctrine then becomes a means of protecting against sham delegations.

The barons forced Article 39 on King John to prevent him from taking away their lives, liberty, and property except as permitted by English law. Their concern was to protect their interests by preventing the crown from acting capriciously. The only mechanism available to them was the common law. Parliament did not yet exist, and the king appointed the men who sat on the bench. The barons could have agreed to replace King John with a ruler of their choosing, but that protection might last only for the lifetime of the new king, since one of the new king’s heirs could turn out to be as vicious, cruel, and arbitrary as John. The barons could have entered into a covenant to oppose any such new tyrant, but they would have known (long before the term “free rider” was coined) that each one would have been glad to let the others do the fighting and also that no one could be certain what his own heirs might be like. Forcing King John to comply with the common law did not offer the barons a new and independent party to serve as England’s leader, but it did give them a known and independent intermediary between the crown and them, as well as a standard—“the law of the land”—by which King John and all his successors could be measured.

If so, it makes utterly no sense to believe that the barons would have allowed King John or a successor to delegate royal power to an advisor of the king’s choosing as a means of avoiding the Article 39 requirement of governance according to law. A rule prohibiting sham transactions—such as a sham delegation of government power designed to avoid a limitation expressly placed on a superior officer by law—certainly would be a feature of every mature legal system,

312 McIlwain, supra note 122, at 41. McIlwain explains that, given all of the parties’ relevant statements leading up to Magna Carta—such as King John’s oath, the barons’ demands, John’s counteroffer, and the like—“[i]t is clear that all these expressions refer not to abuses of judicial process, but to the King’s practice of attacking his barons by armed force without any process whatsoever.” Id. 43; see also MCKECHNIE, supra note 180, at 381 (“Whatever may have been the exact grievances that bulked most largely in the barons’ minds in 1215, their main contention was obvious: the deliberate judgment of a competent court of law must precede any punitive measures to be taken by the King against freemen of his realm.”).

313 “The law of the land’ is one of the great watchwords of Magna Carta, standing in opposition to the king’s mere will. Yet, in a paradox that is perhaps only superficial, the rebels of 1215 did not want less royal justice but more. While the clauses dealing with the king’s feudal rights seek to place clear limits on their exercise, the provisions regarding royal justice do not seek to limit it but to make it more regular, equitable, and accessible. The legal changes that had taken place under Henry II . . . were irreversible. Royal justice was now the favored first resort. All that was required was that it should obey its own rules.” BARTLETT, supra note 182, at 65.
and there is no reason to assume that the barons were less sophisticated that we are today in this respect. They were aware of King John’s wiles and stratagems, as well as his direct abuses of power. It is impossible to believe that they would have readily acquiesced in a royal scheme to nullify Article 39 either by placing a puppet on the throne or by vesting an apparatchik with the crown’s authority, someone who would unhesitatingly carry out John’s orders regardless of their compliance with the common law. Article 39 sought to eliminate the royal abuse of power, not simply to transfer it to someone else chosen by the king who could be as equally capricious and would be free from the safeguards of that chapter.

The same principle is applicable when the government seeks to transfer governmental power to private parties. The Framers sought to limit the powers of the new central government, and Articles I, II, and III accomplishes that goal in several ways: They create a limited number of federal elected or appointed offices; they restrict how private parties may come to hold and exercise the powers of those offices; and they provided express and implied remedies for cases in which officeholders abuse their delegated authority. The Due Process Clause protects the pub-

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314 Article I establishes a Congress of the United States. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). The election and term limit provisions imposed by Articles I and II, along with the Twelfth and Seventeenth Amendments, create procedures for the periodic election to the offices of Representatives, Senators, and Presidents. See U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); id. art. I, § 3, cl. 1 (Senators hold office for six years); id. art. II, § 1, cl. 1 (the President holds office for four years); id. amend. XXII, § 1 (limiting the number of years that a person may hold office as President). Under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, Congress may preempt state laws governing the time, place, and manner of holding federal elections, but not the qualifications for voting in them. See Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2258 (2013); The Federalist No. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961); id. No. 52, at 323, 326 (James Madison). The Bicameralism and Presentment requirements of Article I, Section 7, regulate how those officeholders may make “Law.” See U.S. CONST. art. I, § 7, cl. 2 & 3; INS v. Chadha, 462 U.S. 919 (1983); cf. Clinton v. City of New York, 524 U.S. 417 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law); see also U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”). The legislative powers granted to Congress in the next section, Article I, Section 8, identify the particular subjects that those laws may govern. See U.S. CONST. art. I, § 8 (listing the “power[s]” that Congress may use law to regulate). Article I also expressly contemplates that Congress may select certain officers. See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); id. § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); id. § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.”). The Necessary and Proper Clause implicitly empowers Congress to hire staff. See id. § 8, cl. 18 (“The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

Article II creates the office of the President of the United States. See U.S. CONST. art. II, § 1. The Article II Take Care Clause directs the President to ensure that the “Law” is faithfully executed. See U.S. CONST. art. II, § 3. The companion Article II Appointments Clause contemplates that Congress and the President can create additional offices to fill executive positions in the government. The Clause ensures that only parties properly appointed to their posts may enforce the law. See U.S. CONST. art. II, § 2.

Article III creates the Supreme Court of the United States and grants Congress the power to establish additional, lower courts. See U.S. CONST. art. III, § 1. The Article III Judicial Power Clause grants the Supreme Court and lower federal courts the power “to say what the law is.” See U.S. CONST. art. III, cl. 1; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
lic against the federal government’s attempt to shed those rules by delegating power to private parties, whether individuals or corporations.\textsuperscript{315} Reading the Due Process Clause as a requirement that government officers exercise their lawmaking authority only pursuant to “the law of the land” accomplishes that result by forbidding the government from authorizing private parties, who are unencumbered by constitutional and statutory restrictions on their exercise of government power, to fill in as erstwhile federal officials. Permitting federal officials to delegate power in that manner leaves the recipient able to act without being subject to the safeguards that protect the public against government abuse. It makes little sense to read the Constitution as permitting its restrictions to be so easily evaded. To be sure, Congress may grant private parties the opportunity to challenge the action of government officials.\textsuperscript{316} But “Congress may not displace the legal and political protections that a government organized and operated under the rule of law guarantees the public by handing over the so-called ‘levers of government’ to private individuals.”\textsuperscript{317} “Vesting in private parties governmental authority over a matter otherwise designated as a subject fit only for governmental responsibility eliminates the protections that the rule of law offers everyone as part of the political and social compact that the Framers offered to the nation in 1787.”\textsuperscript{318}

\section*{D. The Incorporation Doctrine}

Now we come to a lost doctrine that could remain lost. A “law of the land” approach may not readily explain the Incorporation Doctrine. Part of the reason is textual. The Bill of Rights identifies various guarantees in addition to the ones provided by the Due Process Clause,

\begin{itemize}
  \item Read together Articles I, II, and III define the “Republican Form of Government” that the Framers created for the nation and that Article IV guarantees each state. See U.S. CONST. art. IV, § 4 (the Guarantee Clause) (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).
  \item A corporation can be a “person” under American law. See Santa Clara Cnty. v. So. Pac. R. Co., 118 U.S. 394 (1886) (ruling that a “corporation” is a “person” for purposes of the Fourteenth Amendment).
  \item See, e.g., the Administrative Procedure Act, 5 U.S.C. § 701 (2012). The First Amendment Petition Clause grants private parties the right to ask government officials to benefit them by acting within their authority in a favorable manner.
  \item Paul J. Larkin, Jr., The Dynamic Incorporation of Foreign Law and Constitutional Regulation of Federal Lawmaking, 38 HARV. J.L. & PUB. POL’Y 337, 418 (2015); see also id. at 419-20 (“Granting a private party power that the Constitution vests only in parties who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind. If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive and prosper. At a micro level, it would be to leave to the King’s delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The ‘plan of the Convention’ was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the public against the government’s choice of either option. Using private parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers’ signal accomplishment of establishing a government under law.”).
  \item Id. at 418.
\end{itemize}
which would make it difficult to construe the latter as a guarantee of all of the former. Of course, there is no flat rule against redundancy even in the Constitution—after all, Article III guarantees the same type of jury trial in criminal cases that the Sixth Amendment Jury Trial Clause—so it might be that a court could stretch “the law of the land” to include the other guarantees. But that would be a stretch.

There is a better argument. The Fourteenth Amendment Privileges or Immunities Clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]” In its first decision construing the Fourteenth Amendment, the Supreme Court gave the clause an extremely narrow interpretation. In the Slaughterhouse Cases, the Court ruled that the Clause applies only to the rights of national citizenship, such as the right to travel interstate, despite the fact that the Bill of Rights contained numerous provisions that had been guarantees of national citizenship since it was adopted in 1791. To date the Court has been unwilling to reconsider the Slaughterhouse Cases’ interpretation of the Privileges or Immunities Clause. Numerous scholars, however, have persuasively argued that the Clause was designed to incorporate the Bill of Rights guarantees against the states. If the Supreme Court ultimately were willing to reconsider Slaughterhouse Cases and

\[\text{\textit{Compare} U.S. Const. art. III, \S} \ (“\text{Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”) with \text{id. amend. VI} (“\text{In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law[.]”)}\]

\[\text{\textit{See} U.S. Const. amend. XIV, \S} 1 (“\text{No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]”)}\]

\[83\text{ U.S. (16 Wall.) 36 (1873).}\]

\[83\text{ Since the Slaughterhouse decision, the Supreme Court has relied on the Privileges or Immunities Clause to hold a statute unconstitutional only once, in Saenz v. Roe, 526 U.S. 489 (1999), which held invalid a California state law limiting the welfare payments a recipient could receive during the first year of residency. Saenz did not reconsider Slaughterhouse’s narrow interpretation of the Privileges or Immunities Clause, but the Court later declined to rule out such reconsideration in an appropriate case. See McDonald v. Chicago, 561 U.S. 742, 758 (2010). Justice Thomas has expressed his willingness to reconsider and overrule the Slaughterhouse decision. For example, he would have squarely relied on the Privileges or Immunities Clause to hold unconstitutional a Chicago ordinance prohibiting the private possession of firearms. See \textit{id.} at 806-58 (Thomas, J., concurring).}\]

endorse the academy’s view of the Privileges or Immunities Clause, the Due Process Clause would drop out of the incorporation debate.

E. A BACKSTOP GUARANTEE OF FUNDAMENTAL FAIRNESS

Resolving the Incorporation Doctrine debate by reconsidering the Slaughterhouse Cases would also go a long way toward answering the issue whether due process as “the law of the land” can serve as an all-purpose backstop for measuring the fairness of federal and state trial procedures. The Sixth Amendment guarantees a criminal defendant the right to a “trial” before an “impartial” decisionmaker, so it is not a big step to read that provision as requiring that any trial be “fair” and that the specific guarantees the Court has created be seen as different aspects of what is necessary for a trial to have that feature. The result again would be that a “law of the land” approach would not require the Supreme Court to overturn its criminal procedure precedents. Were the Court to decide that the Privileges or Immunities Clause incorporates the Bill of Rights, this entire line of cases would find a home in the Sixth Amendment. The Due Process Clause would still be relevant, but only as a guarantee that every person must receive the benefit of whatever law and procedure a state may adopt. That guarantee, of course, would be far more limited than the role that due process currently plays as a guarantee of fundamental fairness. But it would be far more faithful to the role that the Framers intended the Due Process Clause to play in our system.  

CONCLUSION

Americans today live under the freedoms purchased by the blood of patriots, the sweat of working men and women, and the treasures of a nation blessed with fertile soil, lakes and rivers with an abundant supply of potable water, and a free market economy that has generated a high

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324 In any event, the Court has begun to walk away from its due-process-as-backstop line of precedents. The Court first put the brakes on this approach is Graham v. Connor, 490 U.S. 386 (1989), a case involving a claim of police brutality during an arrest. Reasoning that the Fourth Amendment Reasonableness Clause directly applies to arrests as “seizures,” the Court declined to provide an additional layer of review under the Due Process Clause. Id. at 395 (“[W]e hold that all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.”) (emphasis in original). Since then, the Court has consistently ruled that the Due Process Clause does not serve as an all-purpose backstop that can be invoked when another constitutional provisions that specifically addresses the government’s conduct does not reach as far as a private party would like. See, e.g., County of Sacramento, v. Lewis, 523 U.S. 833, 843 (1998) (noting that due process analysis is inappropriate if a party’s claim is “covered by” a more specific constitutional provision); United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) (same); Albright v. Oliver, 510 U.S. 266, 273 (1994) (plurality opinion) (“Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims’”; e.g., id. at 273-74 (declining to interpret the Due Process Clause to impose a requirement on the states similar to what the Fifth Amendment Indictment Clause would demand). Whenever a specific constitutional provision addresses a certain type of police or judicial conduct, that provision should serve as the prism through which the courts view a constitutional challenge.
standard of living. Magna Carta identified many of those liberties eight centuries ago and forced the king to concede that they were a living part of England’s unwritten constitution. By forcing King John to agree that sovereignty exists by virtue of and under law, Magna Carta gave us “the rule of law” that allows those liberties to flourish. It also supplies a home for several different due process doctrines that are vibrant today, but do not fit into one cubbyhole of the strict “substance vs. procedure” divide that the Supreme Court has adopted. Rather than try to fit one of those square pegs into either of those round holes, the court should step back from the Due Process Clause and consider the history of its direct lineal ancestor, Magna Carta. That history demonstrates how those doctrines should be classified today and also gives us yet another reason to revere the place of Magna Carta in Anglo-American legal history.

325 Daniel Hannan, a member of the European Parliament and the representative from Runnymede, England, identified many of the liberties Americans hold dear in what others have labeled “The Patriot’s Creed”: “Lawmakers should be directly accountable through the ballot box; the executive should be controlled by the legislature; taxes should not be levied, nor laws passed, without popular consent; the individual should be free from arbitrary punishment or confiscation; decisions should be taken as close as possible to the people they affect; power should be dispersed; no one, not even the head of state, should be above the law; property rights should be secure; disputes should be arbitrated by independent magistrates; freedom of speech, religion, and assembly should be guaranteed.” HANAN, supra note 132, at 16.