

# No Arbitrary Power: An Originalist Theory of the Due Process of Law

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## NO ARBITRARY POWER: AN ORIGINALIST THEORY OF THE DUE PROCESS OF LAW

RANDY E. BARNETT\* & EVAN D. BERNICK\*\*

### ABSTRACT

*“Due process of law” is arguably the most controversial and frequently litigated phrase in the Constitution of the United States. Although the dominant originalist view has long been that the Fifth and Fourteenth Amendment’s Due Process of Law Clauses are solely “process” guarantees that do not constrain the content or “substance” of legislation at all, originalist scholars have in recent years made fresh inquiries into the historical evidence and concluded that there is a weighty case for some form of substantive due process. In this Article, we review and critique those findings, employing our theory of good-faith originalist interpretation and construction.*

*We begin by investigating the “letter” of the Due Process of Law Clauses—that is, their original meaning. Next, to develop doctrine by*

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*which this meaning can be implemented, we identify the clauses' original function—their spirit—of barring arbitrary exercises of power over people that rest upon mere will rather than constitutionally proper reasons. We contend that the original letter and spirit of the “due process of law” require legislators to exercise their discretionary powers in good faith by enacting legislation that is actually calculated to achieve constitutionally proper ends and impose a duty upon both state and federal judges to make a good-faith determination of whether legislation is calculated to achieve constitutionally proper ends. Finally, we confront hard questions concerning the scope of the states' reserved powers, acknowledging the flaws in the “police-power” jurisprudence of the so-called “Lochner era,” and we delineate an approach that will better safeguard all people against arbitrary power.*

*By so doing, we assist legislators by providing clarity concerning the constitutionally proper ends that they can pursue, aid state and federal judges by equipping them to review legislators' pursuit of those ends, and help members of the public by enabling them to monitor the performance of their legislative and judicial agents.*

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*A man ... cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this.*

—John Locke<sup>1</sup>

## INTRODUCTION

The Due Process of Law Clauses of the Fifth and Fourteenth Amendments are among the most frequently litigated and controversial provisions in the American Constitution. As Frederick Mark Gedicks has observed, “[i]t is difficult to imagine a more maligned constitutional doctrine than ‘substantive due process,’” understood as the proposition that the Due Process of Law Clauses impose limits on the substance or *content* of federal and state statutes rather than merely guaranteeing a particular legal *process* prior to the deprivation of life, liberty, or property.<sup>2</sup>

The dominant originalist view has long been that due process of law is solely a procedural guarantee that does not constrain the content of legislation.<sup>3</sup> “Substantive due process” has been long

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1. JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* 67 (J. W. Gough ed., Basil Blackwell 1948) (1690).

2. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 588 (2009).

3. See, e.g., 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1102-08 (1953); LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 248 (1999); ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 461 (1935); HUGH EVANDER WILLIS, *CONSTITUTIONAL LAW OF THE UNITED STATES* 705-06 (1936); Raoul Berger, “*Law of the Land*” *Reconsidered*, 74 NW. U. L. REV. 1, 27-29 (1979); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 369-70, 372-73 (1911); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96, 99; Walton H. Hamilton, *The Path of Due Process of Law*, in *THE CONSTITUTION RECONSIDERED* 167, 168, 176 (Conyers Read ed., 1938); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 502, 517 (1997); Charles M. Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218, 221-23 (1919); Andrew T. Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 2 (2005); Keith Jurov, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 *passim* (1975); Robert P. Reeder, *The Due Process Clauses and “The Substance of Individual Rights,”*

denounced as incoherent babble on par with “green pastel redness.”<sup>4</sup> In recent years, however, scholars have made fresh inquiries into the historical evidence and concluded that the case for some form of judicial review of the content of legislation under the Due Process of Law Clauses is weightier than initially supposed.

Among the most notable examples are Gedicks’s own work undertaking to demonstrate that the original meaning of the Fifth Amendment’s Due Process of Law Clause protects natural and customary rights against legislative deprivations;<sup>5</sup> Ryan Williams’s investigation of the Fifth and Fourteenth Amendments, which concludes that the latter but not the former constrains the content of legislation in certain ways;<sup>6</sup> and Timothy Sandefur’s argument that *both* clauses forbid legislation that has “no connection to a larger purpose or goal.”<sup>7</sup>

Even scholars who continue to defend something resembling the once-dominant originalist interpretation of substantive due process have made important modifications of that view. For example, Nathan Chapman and Michael McConnell have argued that due process of law requires judges to determine whether a legislative enactment *is in fact legislation* or is instead an attempt to exercise judicial power.<sup>8</sup> On this “separation of powers” account,

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58 U. PA. L. REV. 191, 204, 207, 210 (1910); Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 431, 440-42 (1926); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses Part 2*, 14 CREIGHTON L. REV. 735 *passim* (1981); Stephen F. Williams, “Liberty” in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers’ Intentions, 53 U. COLO. L. REV. 117, 118, 121, 126 (1981); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213, 217, 219 (Eugene W. Hickok, Jr. ed., 1991). See generally Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations of Legislatures* (pts. 1-3), 2 TEX. L. REV. 257 (1924), 2 TEX. L. REV. 387 (1924), 3 TEX. L. REV. 1 (1924).

4. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980). We hasten to add that Ely was *not* himself an originalist.

5. Gedicks, *supra* note 2, at 595-96.

6. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 505-06 (2010).

7. Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 292 (2012). Sandefur does not identify as an originalist, but uses originalist materials to make the case for substantive due process. See *id. passim*.

8. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677-79 (2012). For a similar view, see Matthew J. Franck, *What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over*

the due process of law guarantees a measure of judicial review of the content of legislation—if only to ensure that an enactment is general and prospective and does not abrogate common law procedural rights.<sup>9</sup>

In this Article, we revisit the original meaning of the text—the “letter”—of the Due Process of Law Clauses. We then apply our model of good-faith construction based on the clauses’ original functions—their “spirit”—of barring arbitrary exercises of power over individuals.<sup>10</sup> We contend that the original letter and spirit of “due process of law” in both the Fifth and Fourteenth Amendments require *legislatures* to exercise their powers over the life, liberty, and property of individuals in good faith by enacting legislation that is actually calculated to achieve constitutionally proper ends. Further, the original letter and spirit of “due process of law” impose a duty upon both state and federal *judges* to make good-faith determinations of whether legislation is calculated to achieve constitutionally proper ends.

In this way, the “process” required by “due process of law” requires a judicial inquiry into the “substance” of a statute to assess whether an act of a legislature is a *law*. An act that deprives any person of “life, liberty, or property”<sup>11</sup> is only a law if it is within what Alexander Hamilton referred to as the “just and constitutional powers” of a legislature to enact.<sup>12</sup> At the federal level, legislation must be within one of the enumerated powers of Congress (including the incidental powers to which the Necessary and Proper Clause expressly refers);<sup>13</sup> at the state level, legislation must be within the so-called “police powers” of a state, which are not specified in the text of the federal Constitution.<sup>14</sup> In this way, our approach provides

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“Substance” versus “Process,” 4 AM. POL. THOUGHT 120, 129 (2015).

9. Other notable defenses of substantive due process include BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941.

10. See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 32-36 (2018).

11. U.S. CONST. amend. V., XIV § 1.

12. THE FEDERALIST NO. 80, at 400 (Alexander Hamilton) (Ian Shapiro ed., 2009).

13. Barnett & Bernick, *supra* note 10, at 43-44.

14. *Id.* at 41. The same is true for regulations issued by state administrative agencies



guidance to state court judges enforcing their own state constitutions as well as to federal judges.

In Part I, we consider the original meaning of the “letter” of “due process of law.” In Part II, we consider its “spirit” or function. Part III identifies the just and constitutional powers of Congress, as well as those of state legislatures. A conclusion follows.

## I. THE LETTER: THE ORIGINAL MEANING OF “DUE PROCESS OF LAW”

### A. *The English Origins of the Phrase “Due Process of Law”*

There is not much dispute about the origin of the phrase “due process of law.” Scholars with profound disagreements about the meaning of the phrase in our Constitution trace the phrase to Magna Carta, a series of concessions extracted at sword point from King John at Runnymede in 1215.<sup>15</sup> The crucial language is found in Chapter 39, which provides: “No free man shall be arrested or imprisoned, or diseised or outlawed or exiled or in any way victimised ... except by the lawful judgment of his peers or *by the law of the land.*”<sup>16</sup> This language was directed against King John’s notorious efforts to impose his will by avoiding the regular processes of the common law courts, and attempting to rely instead upon prerogative courts that lacked independent, presumptively impartial judges, and traditional procedures designed to protect individual rights.<sup>17</sup>

In the fourteenth century, when King Edward III disregarded the promises made by King John, summarily punishing subjects outside the common law courts, Parliament codified a series of statutes that

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operating under statutory grants of authority as well as ordinances and by-laws issues by municipal corporations that are acting as agents of the state. In our view, all police powers, whether exercised directly by state legislative bodies or delegated by legislatures to other entities, were understood in 1868 to be inherently limited.

15. See, e.g., Berger, *supra* note 3, at 1; Ely, Jr., *supra* note 9, at 320.

16. MAGNA CARTA, Ch. 39 (1215), reprinted in RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES app. at 231 (2003) (emphasis added).

17. See J. C. HOLT, MAGNA CARTA 276 (George Garnett & John Hudson eds., 3d ed. 2015) (concluding that Article 39 was “aimed” primarily against “arbitrary disseisin at the will of the king,” against “summary process,” and against “arrest and imprisonment on an administrative order”).

more particularly described what Chapter 39 entailed.<sup>18</sup> A 1354 statute linked “due process of law” to access to common law courts with judges and traditional proceedings: “No man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by *due Process* of the Law.”<sup>19</sup> In 1368, when Edward III failed to adhere to this prohibition, Parliament enacted yet another statute that specifically indicted the King for bringing subjects before his council and provided that “no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old *law of the land*.”<sup>20</sup>

Thanks in significant part to Lord Edward Coke’s commentaries, the phrases “law of the land” and “due process of law” became synonymous. Coke invoked the Magna Carta’s constraints on royal power to combat the absolutist claims of King James I, the first Stuart King.<sup>21</sup> His discussion of the due process of law and the law of the land in his *Institutes of the Laws of England* reveals an understanding of these two phrases that is concerned both with the personnel and procedures that are required before people may be deprived of what is rightfully theirs *and* with the legal authority that supported those deprivations.

Coke interpreted Chapter 29 of King Henry III’s now-definitive 1225 confirmation of Magna Carta (corresponding to Chapter 39 in the original), which provided:

No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the

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18. *Id.* at 39-40.

19. Liberty of Subject Act 1354, 28 Edw. 3 c. 3 (emphasis added); *see also* HOLT, *supra* note 17, at 40 (emphasis added) (“[d]ue process ... was construed ... to exclude procedure before the Council or by special commissions and to limit intrusions into the sphere of action of the common-law courts”).

20. TURNER, *supra* note 16, at 123-24 (emphasis added) (quoting 42 Edw. 3 c. 3).

21. *See* Paul Raffield, *Contract, Classicism, and the Common-Weal: Coke’s Reports and the Foundations of the Modern English Constitution*, 17 L. & LITERATURE 69, 77 (2005).

Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.<sup>22</sup>

In interpreting this language, Coke drew upon a 1363 statute which stated “that no man be taken, imprisoned, or put out of his free-hold without process of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law.”<sup>23</sup>

It is clear that by “process” Coke meant a particular set of procedural rights and personnel that had long since come to be associated with the common law courts.<sup>24</sup> Yet there is more to Coke’s exposition of “process of law” than “process”—there is also “*law*.” The passage in which Coke identifies “law of the land” with “due process of law” reads thus:

*Nisi per Legem terrae.* But by the law of the land. For the true sense and exposition of these words, see the Statute of 37 E. 3. cap. 8. where the words, by the law of the land, are rendred without due proces of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall, of the common law. Without being brought in to answer but by *due proces* of the common law. No man be put to answer without presentment before justices, or thing of record, or by *due proces*, or by writ originall, according to the old *law* of the land.<sup>25</sup>

Earlier in his commentary on Chapter 29, Coke had translated *per legem terrae* as “by the common law, statute law, or custome of England.”<sup>26</sup>

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22. Magna Carta 1225, 9 Hen. 3 c. 29, *reprinted in* 25 Edw. c. 29.

23. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (The Lawbook Exchange, Ltd. 2002) (1642).

24. Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 340-41 (1987) (“[P]rocess by writ was designed to secure the personal appearance of a party before a court so that party could answer in person the charges against him.”).

25. COKE, *supra* note 23, at 50 (emphasis added).

26. *Id.* at 45.

“Writ” was a term for the written authority for a civil lawsuit for damages or a criminal prosecution<sup>27</sup>—according to Coke, such authority had to be grounded in the “common law, statute law, or custome of England”<sup>28</sup>—that is, grounded in what is called the English constitution. Under this system, writs described the substance of a good cause of action.<sup>29</sup> For example, what we today think of as the law of contracts was defined by the writs of debt, detinue, and covenant.<sup>30</sup> To practice law was to know the common law writs.<sup>31</sup> Without conduct satisfying the substance of some writ, there could be no liability.<sup>32</sup> In effect, then, no one could be “taken, imprisoned, or put out of his free-hold” through a civil suit or a criminal prosecution” contrary to the English constitution.

James I sought to formalize accretions of royal power under his Tudor predecessors by maintaining that law consisted solely in his royal will. In particular, he claimed the authority to adjudicate cases outside of the courts of law, explaining that “[t]he King being the author of the Lawe is the interpreter of the Lawe.”<sup>33</sup> These assertions prompted a series of dramatic confrontations between James I and Coke, who was then Chief Justice of the Court of Common Pleas.

Coke affirmed that Magna Carta recognized the existence of a law that was higher than the actions of the King, and denied that “[t]he King in his own person [could] adjudge any case.”<sup>34</sup> For such resistance, James I eventually dismissed Coke—but James I could not refute Coke.<sup>35</sup> English judges held acts of the King unlawful and refused to defer to mere executive will, instead exercising independent judgment in accordance with the law of the land, even if it meant holding royal acts void.<sup>36</sup>

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27. See RANDY E. BARNETT, OXFORD INTRODUCTION TO U.S. LAW: CONTRACTS 1-4 (2010) (describing the common law writ system and the particular writs governing contracts).

28. COKE, *supra* note 23, at 45.

29. BARNETT, *supra* note 27, at 1.

30. *Id.* at 2-4.

31. See *id.* at 1-2.

32. *Id.*

33. 5 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 428 n.5 (1924).

34. Prohibitions Del Roy (1607) 77 Eng. Rep. 1342, 1342; 12 Co. Rep. 64, 64.

35. 5 HOLDSWORTH, *supra* note 33, at 440.

36. See PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 179-217 (2008) (describing how this came to be understood as “an ordinary part of their duty”).

By the eighteenth century, the proposition that the law of the land bound the King had become entrenched in England.<sup>37</sup> The more complicated question concerned Parliament. Philip Hamburger has detailed how the content of the unwritten English constitution and the status of Parliament as the highest court in the land created impediments to any judicial invalidation of acts of Parliament on the grounds that those acts were inconsistent with the law of the land.<sup>38</sup> Because England's constitution was developed in part through custom, and Parliament was the court in which customs were declared or altered, Parliament's "enactments amounted to decisions upholding their constitutionality."<sup>39</sup> That is to say, "the common law itself stood in the way of decisions holding acts of Parliament unlawful."<sup>40</sup>

Coke's report of *Dr. Bonham's Case*<sup>41</sup> has been interpreted by some as a declaration that judges may hold acts of Parliament void because contrary to even higher law, perhaps natural law.<sup>42</sup> The case itself concerned one Dr. Thomas Bonham, who had been sentenced to pay a fine and to be incarcerated for practicing medicine in London without permission from the Royal College of Physicians.<sup>43</sup> Bonham brought an action for wrongful imprisonment.<sup>44</sup> A majority of the Court of Common Pleas held that the College had no authority to imprison Bonham.<sup>45</sup> In his report of the case, Coke explained the judges' reasoning thus:

The censors cannot be [] judges, ministers, and parties.... And it appears in our books, that in many cases, the common law will [] controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be

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37. *Id.* at 194.

38. *Id.* at 237-39.

39. *Id.* at 239.

40. *Id.* at 238.

41. *Dr. Bonham's Case* (1610) 77 Eng. Rep. 646; 8 Co. Rep. 113 b.

42. See Chapman & McConnell, *supra* note 8, at 1689-92 (summarizing the debate over the meaning of Coke's words).

43. *Dr. Bonham's Case*, 77 Eng. Rep. at 646.

44. *Id.*

45. *Id.*

performed, the common law will controul it, and adjudge such Act to be void.<sup>46</sup>

As Hamburger explains, Coke’s words must be considered in the context of a long-standing common law tradition of equitable interpretation—interpretation that, where the letter of the law was unclear, avoided a conclusion that was contrary to natural right and thus void in *conscience*.<sup>47</sup> It is highly probable that Coke meant only that judges ought to avoid concluding that Parliament had made someone a judge in his own cause, unless the letter of the Act clearly compelled that conclusion. Such equitable interpretation was *itself* a component of the common law.<sup>48</sup> Thus, Hamburger argues that Coke was laying a “moral foundation for [an] equitable interpretation,” not claiming the power to invalidate parliamentary statutes.<sup>49</sup>

And yet, Hamburger finds that the notion that some kind of higher law bound even Parliament was expressed in the early eighteenth century, in the wake of the imprisonment of five petitioners from Kent by a Tory-dominated House of Commons in 1701.<sup>50</sup> Daniel Defoe and the Whigs drew upon increasingly influential natural rights theory to criticize not only the imprisonments but the idea of parliamentary supremacy.<sup>51</sup>

Perhaps the most sophisticated judicial effort to grapple with the tension between parliamentary supremacy and natural rights theory was Chief Justice John Holt’s opinion in the 1701 case of *City of London v. Wood*.<sup>52</sup> Therein, Holt declared both that Parliament was bound by natural right and that no judicial remedy was available for a Parliamentary act that contradicted natural right—specifically, by making a person a judge in his own cause.<sup>53</sup> Holt affirmed that the result of such an act would be to return individuals to the “state of

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46. *Id.* at 652.

47. See HAMBURGER, *supra* note 36, at 54.

48. See *id.* at 54.

49. *Id.* at 274.

50. An account of the imprisonment of the Kentish petitioners and the ensuing dispute appears in Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2097-111 (1994).

51. *Id.* at 2100.

52. *City of London v. Wood* (1701) 88 Eng. Rep. 1592; 12 Mod. 669.

53. *Id.* at 1602.

nature”<sup>54</sup>—a condition in which rights were, as Locke put it, “very unsafe, very insecure,” and the defects of which legitimate governments were designed to cure.<sup>55</sup> Such an act would be “a void Act of Parliament”<sup>56</sup>—that is, void in conscience—and if it could not be construed otherwise, “government would be dissolved.”<sup>57</sup> *Judges* would be bound to give effect to it—but *the people* might “appeal to heaven”—that is, exercise their natural right of revolution.<sup>58</sup> Fortunately, Holt found that the Act at issue could be construed to avoid that unhappy outcome.<sup>59</sup>

### *B. The “Due Process of Law” in 1791 America*

#### *1. The Law of the Land*

In the wake of Americans’ own successful “appeal to heaven,” American judges did not face the impediments that constrained Coke and Holt from holding acts of Parliament unlawful. American corporations and colonies had written constitutions that could not be altered by ordinary legislation, as did most states after independence.<sup>60</sup> Ten of the newly independent state constitutions included law-of-the-land provisions that tracked the language of Chapter 39.<sup>61</sup> Scrutiny of Founding Era interpretations of these provisions yields persuasive evidence that “law of the land” and “due process of law” were understood during the time period in which the Fifth Amendment was ratified to guarantee both judicial process in courts of law *and* the application of law that conformed in respect to its content to written constitutions.

The landmark 1787 case of *Bayard v. Singleton*<sup>62</sup> is an instructive example. *Bayard* arose from North Carolina’s confiscation of Tory property.<sup>63</sup> The Bayards, who were victims of this confiscation, sued

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54. *Id.*

55. LOCKE, *supra* note 1, at 62.

56. *City of London*, 88 Eng. Rep. at 1602.

57. Hamburger, *supra* note 50, at 2100.

58. LOCKE, *supra* note 1, at 84; see HAMBURGER, *supra* note 36, at 215.

59. See HAMBURGER, *supra* note 36, at 209-10.

60. *Id.* at 398.

61. Riggs, *supra* note 9, at 974-75.

62. 1 N.C. (Mart.) 42 (1787).

63. See HAMBURGER, *supra* note 36, at 449-50.

Singleton, the subsequent buyer of the property, seeking to recover it.<sup>64</sup> The legislature effectively acted as a judge in Singleton’s case, enacting a statute that required courts to dismiss suits against purchasers of forfeited Tory estates “upon the motion or affidavit of the defendant.”<sup>65</sup> Several dissenting legislators had raised constitutional objections to the act, claiming that it would violate the state’s law of the land clause by “deny[ing] ... the known and established rules of justice, which protect the property of all citizens equally,” and by “plac[ing] [citizens] under the adjudication of the General Assembly, whose desire to redress the grievance may be fluctuating, uncertain and ineffectual.”<sup>66</sup>

Although these arguments failed to win the day in the legislature, the Bayards’ claims would be vindicated in court.<sup>67</sup> Rejecting Singleton’s lawyers’ contention that “all acts of Assembly were laws, and their execution could not be prevented,”<sup>68</sup> the court held that “the [C]onstitution (which the judicial power was bound to take notice of as much as of any other law whatever,) st[ood] in full force as the fundamental law of the land” and that the legislature had deprived the Bayards of a right guaranteed by the law of the land—“a right to a decision of [their] property by a trial by jury.”<sup>69</sup> Indeed, the court declared that “no act [legislators] could pass[] could by any means repeal or alter the [C]onstitution, because if they could do this, they would at the same instant of time destroy their own existence as a Legislature and dissolve the government thereby established.”<sup>70</sup> Thus, a *judicial process* in which an *act* of a legislature is required to be in accordance with *the law* of the land set forth in a written constitution that constrained the legislature—and is

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64. *Bayard*, 1 N.C. (Mart.) at 42-43.

65. See HAMBURGER, *supra* note 36, at 451-52 (quoting Act of Dec. 29, 1785, reprinted in THE LAWS OF THE STATE OF NORTH-CAROLINA, PASSED AT NEWBERN, DECEMBER 1785, at 12-13 (Newbern, Arnett & Hodge 1786)).

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

67. See *Bayard*, 1 N.C. (Mart.) at 45.

68. HAMBURGER, *supra* note 36, at 453 (quoting Correspondence (New Bern, June 7), PA. PACKET, July 1, 1786).

69. *Bayard*, 1 N.C. (Mart.) at 45.

70. *Id.*



therefore a “law” that is binding on the parties<sup>71</sup>—eliminated the need for an appeal to heaven.

In 1784, Alexander Hamilton echoed the opposition of the dissenting legislators to the act that was ultimately held unlawful in *Bayard*. In the same year, Hamilton denounced a bill passed by the New York legislature that stripped Tories of their citizenship.<sup>72</sup> Hamilton argued that the bill was “contrary to the law of the land,” specifically, the thirteenth article of the New York Constitution,<sup>73</sup> which provided that “no member of this state shall be disenfranchised[] or deprived of any of the rights or privileges secured to the subjects of this state by the constitution, unless by the law of the land[] or the judgment of his peers.”<sup>74</sup>

Hamilton adopted Coke’s definition of the law of the land: “due process of law ... [means] by indictment or presentment of good and lawful men, and trial and conviction in consequence.”<sup>75</sup> Hamilton contended that “the legislature ... cannot, without tyranny, disfranchise or punish whole classes of citizens by general descriptions, without trial and conviction of offences known by laws previously established declaring the offence and prescribing the penalty.”<sup>76</sup> Such acts of “tyranny,” he contended, did not become part of the law of the land simply in virtue of their enactment.<sup>77</sup>

In 1787, Hamilton argued before the New York General Assembly that a proposed Senate amendment to an act regulating elections violated both the state’s law-of-the-land clause and a recently passed statutory provision guaranteeing due process of law. The act disqualified the owners of British privateers of vessels of war that had attacked the “vessels, property or persons” of the United States

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71. *Id.*

72. 3 THE PAPERS OF ALEXANDER HAMILTON 483 n.1 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (“[Hamilton’s] first *Letter from Phocion* was a public indictment of the majority in the state legislature and the inhabitants of New York City who in violation of the fifth and sixth articles of the treaty of peace not only refused to restore confiscated Loyalist property, but ignored the prohibition against further confiscation or prosecution.”).

73. Letter from Phocion to the Considerate Citizens of New-York, on the Politics of the Day (N.Y., Samuel Loudon 1784), reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 72, at 483, 484-85.

74. N.Y. CONST. art. XIII (Apr. 20, 1777), reprinted in 1 LAWS OF THE STATE OF NEW-YORK 1, 9 (New York, Thomas Greenleaf ed., 1792).

75. *Letter from Phocion*, *supra* note 72, at 485.

76. *Id.*

77. *Id.* at 485-86.

from holding any state office of trust.<sup>78</sup> Hamilton denied that “the law of the land” would “include *an act* of the legislature”—denied that is, that legislative acts *necessarily* became part of the law of the land.<sup>79</sup>

Again, Hamilton drew upon Coke, stating that Coke “interpret[ed] the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury.”<sup>80</sup> Hamilton found confirmation of his position in the terminology of “due process” adopted by the legislature, which connoted “the process and proceedings of the courts of justice”—process and proceedings which the legislature was institutionally incapable of providing.<sup>81</sup> As before, he rejected the idea that legislative enactments necessarily became part of the law of the land, without appropriate scrutiny by “the courts of justice.”<sup>82</sup>

Hamilton’s reliance on Coke in explaining the meaning of “due process of law” and “law of the land” was not unique. Prominent and widely cited American jurists relied upon Coke in interpreting both phrases.<sup>83</sup> These jurists affirmed the connection between the concept of due process of law and the proceedings of the courts.<sup>84</sup> St. George Tucker, a Virginia judge who taught constitutional law at William & Mary in the 1790s, wrote that “[d]ue process of law must then be had before a judicial court, or a judicial magistrate.”<sup>85</sup>

In his highly regarded *Commentaries on American Law*, one of the most influential legal minds of the Founding period, Chancellor James Kent of New York, defined due process of law as “law[] in its

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78. Alexander Hamilton, *Remarks on an Act for Regulating Elections*, DAILY ADVERTISER, Feb. 8, 1787, reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 34, 34 n.1, 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (quoting 1787 N.Y. Laws 383).

79. *Id.* at 35 (emphasis added and omitted). Hamilton’s statement has been interpreted to mean that the law-of-the-land clause did not *constrain* the legislature. See RAOUL BERGER, GOVERNMENT BY JUDICIARY 221-22 (Liberty Fund, Inc. 2d ed. 1997) (1977). Given that Hamilton was arguing that a proposed legislative amendment violated the law-of-the-land clause, this interpretation is implausible.

80. Hamilton, *supra* note 78, at 36.

81. *Id.* at 35-36 (emphasis omitted).

82. *Id.*

83. See *infra* text accompanying notes 85-87.

84. See *infra* text accompanying notes 85-87.

85. 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. at 203 (Phila., W.Y. Birch & A. Small 1803).

regular course of administration, through courts of justice.”<sup>86</sup> In his *Commentaries on the Constitution*, Supreme Court Justice Joseph Story stated that due process of law entailed “due presentment or indictment, and being brought in to answer thereto by due process of the common law,” and stated that it “affirms the right of trial according to the process and proceedings of the common law.”<sup>87</sup> For these jurists, due process of law required individualized deprivations of life, liberty, or property to take place through the courts with their judges and juries—thus forbidding legislatures from denying access to the courts.<sup>88</sup>

The history of the drafting and ratification of the Fifth Amendment is sparse. It is not clear why Madison chose to use “due process of law” rather than “law of the land,” despite his own state’s support for the latter phrase.<sup>89</sup> It is plausible that Madison sought to avoid conflation of the phrase with the reference to “the supreme law of the land” in the Supremacy Clause of Article VI.<sup>90</sup> Such conflation might have given rise to the belief that the Fifth Amendment did not incorporate any independent procedural requirements derived from the common law but unspecified in the Constitution’s text—the enactments identified as “the law of the land” identified in the Supremacy Clause are all examples of written, positive law.<sup>91</sup>

Yet, it is significant that the proposal that ultimately became the Fifth Amendment was, according to Madison’s original design, to be inserted into “article 1st, section 9, between clauses 3 and 4” alongside other limits on congressional power.<sup>92</sup> It would have followed the clause prohibiting Congress from enacting bills of

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86. 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 13 (N.Y., W. Kent 6th ed. 1848) (1826).

87. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1783 (Bos., Hilliard, Gray & Co. 1833).

88. See 2 KENT, *supra* note 86, at 13; 3 STORY, *supra* note 87, § 1783; 1 ST. GEORGE TUCKER, *supra* note 85, app. at 203.

89. See Act of May 6, 1776, ch. 1, § 8, 1776 Va. Laws, in *A COLLECTION OF ALL SUCH PUBLIC ACTS OF THE GENERAL ASSEMBLY AND ORDINANCES OF THE CONVENTIONS OF VIRGINIA* 33, 33 (Richmond, Thomas Nicolson & William Prentis 1785) (“[T]hat no man be deprived of his liberty except by the law of the land, or the judgement of his peers.”).

90. U.S. CONST. art. VI, cl. 2; see Chapman & McConnell, *supra* note 8, at 1724.

91. See Chapman & McConnell, *supra* note 8, at 1724.

92. 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834).

attainder and ex post facto laws<sup>93</sup>—strongly suggesting it too was designed to limit congressional action.<sup>94</sup>

As Chapman and McConnell have observed, moreover, Madison emphasized the need for a federal bill of rights by pointing to the fact that Britain’s declaration of rights had “gone no farther than to raise a barrier against the power of the Crown,” and that “the power of the Legislature is left altogether indefinite.”<sup>95</sup> “[T]he people of America are most alarmed,” Madison explained, that “the trial by jury, freedom of the press, or liberty of conscience” are unsecured by “Magna Charta” or “the British Constitution.”<sup>96</sup> While the first Congress would include the various provisions which we now call the Bill of Rights as separate amendments,<sup>97</sup> there is no reason to think that this decision rendered the Fifth Amendment inapplicable to Congress any more than it did the other subject-less guarantees of the first ten amendments, such as the guarantees against quartering troops or cruel and unusual punishments.<sup>98</sup>

At first blush, many of the early state cases interpreting “law of the land” and “due process of law” appear to be *solely* concerned with access to courts and the personnel and procedures associated with the courts at common law rather than the substance or content of the law being applied.<sup>99</sup> A number focus on legislative interference with the right to trial by jury and other procedural protections traceable to the common law.<sup>100</sup> Others focus on the statutory

93. U.S. CONST. art I, § 9, cl. 3.

94. Chapman and McConnell attribute similar significance to this initial placement. See Chapman & McConnell, *supra* note 8, at 1722.

95. 1 ANNALS OF CONG., *supra* note 92, at 436; Chapman & McConnell, *supra* note 8, at 1723.

96. 1 ANNALS OF CONG., *supra* note 92, at 436.

97. On the recency of the usage of the term “Bill of Rights” to refer to the first ten amendments, see generally GERARD N. MAGLIOCCA, THE HEART OF THE CONSTITUTION: HOW THE BILL OF RIGHTS BECAME THE BILL OF RIGHTS (2018).

98. Chapman & McConnell, *supra* note 8, at 1722-23; see also PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 255-56 (2014) (“[T]he Constitution recites its due process and other procedural rights at its conclusion rather than merely in Article III, and it states them in the passive voice ... mak[ing] clear that these rights limit all parts of government.”).

99. See *infra* notes 100-01 and accompanying text.

100. See, e.g., *Butler v. Craig*, 2 H. & McH. 214, 215, 226-27, 235-36 (Md. 1787); *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382, 387-88 (Ct. Com. Pl. 1794) (opinion of Burke, J.); JAMES M. VARNUM, THE CASE, TREVETT AGAINST WEEDEN, 1-36 (Providence, John Carter 1786), as reprinted in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417, 417-29 (Bernard Schwartz ed., 1971).

deprivation of “vested” property rights of specific persons who had acquired that property consistently with the positive law then in effect. Such deprivations were understood as adjudicative rather than legislative acts because they were neither generally applicable nor prospective in their operation.<sup>101</sup> As Chapman and McConnell show, Hamilton’s objection to the act invalidated in *Bayard* rested on the latter premise.<sup>102</sup>

This appearance is deceptive. In the first place, viewing certain common law rights that attached during judicial proceedings as *merely* procedural is anachronistic. We have already mentioned that the common law writ system was substantive in nature, with writs providing the substance of a good cause of action.<sup>103</sup> If the substance of a claim against a person did not fit within the *substance* of an accepted writ, there was not a good cause of action.

Consider also the right to trial by jury. During the Founding Era, juries could judge both law and fact. That is, juries could determine whether an act was constitutional before applying it in a given civil or criminal case to deprive someone of their life, liberty, or property.<sup>104</sup> The “procedural” right to trial by jury, then, was a means of ensuring review of the *substance* of governmental enactments.<sup>105</sup>

Second, determining whether statutory deprivations of vested rights were adjudicative rather than properly legislative acts required examination of the content or “substance” of legislative enactments to determine whether they were more like judicial decrees or sentences than general, prospective laws.<sup>106</sup> Finally, significant authority held that “due process of law” and “law of the land” required a legislative act to be consistent with applicable superior

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101. See, e.g., *Allen’s Adm’r v. Peden*, 4 N.C. (Car. L. Rep.) 442, 442 (1816); *Bayard v. Singleton*, 1 N.C. (Mart.) 42, 45, 47 (1787); *Merrill v. Sherburne*, 1 N.H. 199 *passim* (1818); *Dash v. Van Kleeck*, 7 Johns. 477, 480, 482-84 (N.Y. Sup. Ct. 1811) (opinion of Yates, J.); *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 306-07, 310-11 (C.C.D. Pa. 1795).

102. Chapman & McConnell, *supra* note 8, at 1716.

103. See *supra* note 29 and accompanying text.

104. See CLAY S. CONRAD, *JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE* 47-48 (2014).

105. See *id.*

106. See, e.g., *Allen’s Adm’r*, 4 N.C. (Car. L. Rep.) at 442; *Bayard*, 1 N.C. (Mart.) at 45, 47; *Merrill*, 1 N.H. 199 *passim*; *Dash*, 7 Johns. at 480, 482-84; *Vanhorne’s Lessee*, 2 U.S. (2 Dall.) at 306-07, 310-11.

law to qualify as law at all.<sup>107</sup> It is to this last distinction we now turn.

## 2. Distinguishing a “Law” from a Mere Legislative “Act”

Numerous Founding Era cases distinguish between a mere legislative “act” and a “law.”<sup>108</sup> To be a law, and therefore part of “the law” of the land or the due process “of law,” a legislative act had to be consistent with any higher laws, such as those found in the federal or state constitutions,<sup>109</sup> or in the nature of the “social compact.”<sup>110</sup>

The proposition that only such acts consistent with the federal Constitution became part of the law of the land can be found in diverse Founding Era sources, both republican and federalist. In the 1798 Kentucky Resolutions, republican Thomas Jefferson declared that the Alien and Sedition Acts were “*not law*, but ... altogether void, and of no force” because they violated the First, Fifth, and Tenth Amendments.<sup>111</sup> In his seminal opinion for the Court in the 1803 case of *Marbury v. Madison*, federalist Chief Justice John Marshall asked whether “an *act*[ ] repugnant to the [C]onstitution[ ] can become the law of the land,” and answered that “a legislative *act* contrary to the [C]onstitution is *not law*.”<sup>112</sup> In the 1819 case of *McCulloch v. Maryland*, Marshall stated that “the laws” of Congress “*when made in pursuance of the constitution*, form the supreme law of the land,”<sup>113</sup> the implication being that when “the laws” of Congress are *not* made in pursuance of the Constitution, they are mere acts that do *not* become part of the “law of the land.”<sup>114</sup>

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107. See *infra* Part I.B.2.

108. See *infra* text accompanying notes 112-14.

109. See *infra* text accompanying notes 111-16.

110. See *infra* text accompanying notes 117-24.

111. Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 566, 567-68 (Jonathan Elliot ed., 2d ed., D.C., Jonathan Elliot 1836) [hereinafter 4 ELLIOT’S DEBATES] (emphasis added).

112. 5 U.S. (1 Cranch) 137, 176-77 (1803) (emphasis added).

113. 17 U.S. (4 Wheat.) 316, 406 (1819) (emphasis added).

114. See *id.*

State courts, too, affirmed this understanding in measuring legislation against state constitutions. Judge Locke in a highly influential opinion in *Trustees of the University of North Carolina v. Foy* stated that North Carolina's law-of-the-land provision forbade "depriv[ations] of ... liberties or properties, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and *such acts of the Legislature as are consistent with the Constitution.*"<sup>115</sup> Another North Carolina case explicitly distinguished between a mere legislative "act" and "the law of the land": "[W]hat is the law of the land? Such *acts* of the Legislature *only* as violate none of the rules laid down in the constitution."<sup>116</sup>

Likewise, some judges did not consider a legislative act inconsistent with the nature of the social compact to be a "law." The most famous such opinion is probably Justice Samuel Chase's in *Calder v. Bull*, the 1798 case in which the Supreme Court considered the constitutionality of a resolution of the Connecticut General Court that granted a new trial in a probate proceeding.<sup>117</sup> Lawyers for Calder and his wife contended that the resolution violated the Ex Post Facto Clause of the federal Constitution, and that the legislature could not, consistent with the Connecticut constitution, "act as a court."<sup>118</sup> At the time, Connecticut had an unwritten, customary constitution.<sup>119</sup>

The Court ultimately determined that the legislature's actions did not violate the federal Ex Post Facto Clause because that clause solely forbade retroactive *criminal* punishments.<sup>120</sup> But Justice Chase also discussed the limits of legislative power under the Connecticut constitution.<sup>121</sup> Echoing the quote from John Locke that appears at the top of this Article, Chase wrote that because "[t]he purposes for which men enter into society ... determine the nature

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115. 5 N.C. (1 Mur.) 58, 88 (1805) (emphasis added).

116. *Ex'rs of Cruden v. Neale*, 2 N.C. (1 Hayw.) 338, 341 (1796) (per curiam) (emphasis added); *see also* *Tr. of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 130 (1817) (explaining that to be "law of the land," statutes must be "not repugnant to any other clauses in the constitution").

117. 3 U.S. (3 Dall.) 386, 386-87 (1798) (opinion of Chase, J.).

118. *Id.* at 398 (opinion of Iredell, J.).

119. *Id.* at 392-93 (opinion of Chase, J.).

120. *Id.* at 390-91, 395.

121. *Id.* at 392-93.

and terms of the social compact,” even without an express constitution, “[t]he nature, and ends of legislative power will limit the exercise of it.”<sup>122</sup>

Chase offered several examples of exercises of legislative power that were sufficiently contrary to those ends that “it [could not] be presumed” that people had authorized such power—such power had to be expressly given, in terms that did not admit of doubt.<sup>123</sup> Among them:

A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.<sup>124</sup>

In a now-equally famous opinion of his own in *Calder*, Justice James Iredell rejected the notion that legislative power was inherently limited.<sup>125</sup> He asserted that

[i]f ... a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.<sup>126</sup>

As authority for his position, Iredell cited Sir William Blackstone (who was describing the powers of Parliament).<sup>127</sup>

However true it now rings to some modern ears,<sup>128</sup> Iredell’s view of legislative power appeared to be an outlier at the time of the

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122. *Id.* at 388 (emphasis omitted).

123. *Id.*

124. *Id.* (emphasis omitted).

125. *See id.* at 398 (opinion of Iredell, J.).

126. *Id.*

127. *Id.* at 398-99.

128. *See* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 44-45 (1990) (“The better view of state legislative power is that, as Justice Iredell said ... it encompasses the power to make any enactment whatsoever that is not forbidden by a provision of a constitution.”).



Founding.<sup>129</sup> For example, in 1795, Justice William Patterson of the United States Supreme Court, then riding circuit, stated in *Vanhorne's Lessee v. Dorrance* that “[t]he legislature ... had no authority to make *an act* divesting one citizen of his freehold[] and vesting it in another, without a just compensation,” as such an act was “contrary to the principles of social alliance[,] in every free government,” as well as “contrary ... to the letter and spirit of the constitution.”<sup>130</sup> Similarly, in his opinion for the Court in *Fletcher v. Peck*, Marshall acknowledged that “[t]o the legislature all legislative power is granted” but questioned whether “*the act* of transferring the property of an individual to the public, be in the nature of the legislative power.”<sup>131</sup>

In the 1792 case of *Bowman v. Middleton*, the South Carolina Supreme Court evaluated an act that transferred a freehold from the heir-at-law to another person, and also from the eldest son of an intestate, and vested it in a second son.<sup>132</sup> Those challenging the act argued that while “there might be great and urgent occasions wherein it might be justifiable for the state to take private property from individuals, (upon a full indemnification) for the purposes of fortifications or public works,” the legislature could not simply take property from A and give it to B absent either compensation or a jury trial.<sup>133</sup> The court agreed, determining that the act was “*ipso facto*[] void” because it was contrary to natural law and “common right.”<sup>134</sup>

Textually, the Due Process of Law Clauses use four words, not two: the “due process *of law*” requires that no person could “be deprived of life, liberty, or property,” except by an act of a legislature that constitutes a “law.”<sup>135</sup> And the “*due process of law*” entitles every person to a judicial examination of, *inter alia*, the substance of a legislative act to ensure it was a “law.”<sup>136</sup> What exact quality a

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129. Gedicks, *supra* note 2, at 651-54 (documenting how Iredell’s view was “largely rejected by state constitutional decisions of the period”).

130. 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (emphasis added).

131. 10 U.S. (6 Cranch) 87, 136 (1810) (emphases added).

132. 1 S.C.L. (1 Bay) 252, 253-54 (Ct. Com. Pl. 1792).

133. *Id.* at 254.

134. *Id.* at 254-55.

135. *See, e.g.*, U.S. CONST. amend. V.

136. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 400, 406 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

legislative act must have to make it a binding law is less than perfectly clear. But it is demonstrable that Founding Era courts and commentators did insist upon some such distinction and were prepared to hold legislation void because it was not law.

### C. *The “Due Process of Law” in 1868 America*

The distinction between a legislative act or enactment and a law continued to develop in the nineteenth century. A frequently cited use of the distinction was Daniel Webster’s oral argument before the Supreme Court in *Trustees of Dartmouth College v. Woodward*:

By the law of the land is most clearly intended the general law; a law[] which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities[] under the protection of the general rules which govern society. Every thing which may pass under the form of an *enactment*[] is not, therefore, to be considered the law of the land. If this were so, *acts* of attainder, bills of pains and penalties, *acts* of confiscation, *acts* reversing judgments, and *acts* directly transferring one man’s estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land.<sup>137</sup>

As noted by Chapman and McConnell, Webster was likely only articulating a familiar distinction between legislation and adjudication.<sup>138</sup> But the idea that legislative power was inherently limited came to be understood as forbidding not only enactments that were not generally applicable or prospective but enactments that were not good-faith efforts to promote constitutionally proper governmental ends.<sup>139</sup>

In two Tennessee cases, Judge (and future Justice) John Catron interpreted the state’s law of the land clause to require “general

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137. 17 U.S. (4 Wheat.) 518, 581-82 (1819) (argument of Daniel Webster) (emphasis added).

138. Chapman & McConnell, *supra* note 8, at 1765-66; *see also* Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 412 (Md. 1838) (“An act which only affects and exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law.” (citation omitted)).

139. *See infra* text accompanying notes 140, 154, 157.

public law[s]” as distinct from “partial or private law[s]” that treated similarly situated individuals differently.<sup>140</sup> Judge Nathan Green of the Tennessee Supreme Court explained the perceived vice of the latter in a decision voiding an act that created a special court to handle all lawsuits brought against the Bank of the State of Tennessee: such partial legislation was “the same in principle as if a law had been passed *in favor of* some one [individual or corporate body].”<sup>141</sup> Obviously, if it were deemed constitutionally proper for the legislature to seek to advance the interests of “favor[ed]” individuals or groups, such enactments would have been considered unproblematic. Put another way, judges inferred from the differential treatment of similarly situated persons that legislation was designed to achieve constitutionally improper goals.

By 1868, “due process of law” was a sufficiently familiar phrase that Congressman John Bingham, the principal author of the Fourteenth Amendment, thought it unnecessary to elaborate in any great detail when questioned on the floor of the Thirty-Ninth Congress about its meaning.<sup>142</sup> “[T]he courts have settled that long ago,” said Bingham, “and the gentleman can go and read their decisions.”<sup>143</sup>

Which decisions? Although Bingham did not say, Congressman William Lawrence mentioned *Wilkinson v. Leland*,<sup>144</sup> *Terrett v.*

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140. See *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yerg.) 554, 555 (1831); *Vanzant v. Waddell*, 10 Tenn. (2 Yerg.) 260, 269-70 (1829) (opinion of Catron, J.).

141. See *Bank v. Cooper*, 10 Tenn. (2 Yerg.) 599, 607-08 (1831) (emphasis added); *Bagg's Appeal*, 43 Pa. St. 512, 414 (1862) (“Any form of direct government action on private rights, which, if unusual, is dictated by no imperious public necessity, or which makes a special law for a particular person, or gives directions for the regulation and control of a particular case after it has arisen, is always arbitrary and dangerous in principle, and almost always unconstitutional.”); see also *Sears v. Cottrell*, 5 Mich. 251, 254 (1858) (“By ‘the law of the land’ we understand laws that are general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws.”); *Jordan v. Overseers of Dayson*, 4 Ohio 294, 309-10 (1831) (denying that a state may “pass a law for the purpose of destroying a right created by the constitution” and affirming that judges have a “duty” to “hold [such laws] void”); *Dunn v. City Council of Charleston*, 16 S.C.L. (Harp.) 189, 200 (Const. Ct. 1824) (“Any act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the law of the land.”).

142. See CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

143. *Id.*

144. 27 U.S. (2 Pet.) 627 (1829).

*Taylor*,<sup>145</sup> *People v. Morris*,<sup>146</sup> and *Taylor v. Porter*<sup>147</sup> while on the floor.<sup>148</sup> To illuminate the meaning of due process of law, Lawrence quoted a passage from Justice Joseph Story's opinion in *Wilkinson*.<sup>149</sup> In *Wilkinson*, Justice Story concluded: "That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without restraint."<sup>150</sup>

Three of the opinions Lawrence invoked to expound the meaning of due process of law never used the phrase<sup>151</sup>—indicating that, by this time, the "due process of law" had become associated with a concept of inherently limited legislative power. In *Wilkinson*, Justice Story wrote that, whatever concept of government may have legitimized the "uncontrolled and arbitrary exercise" of such power "before the revolution," that "great event" amounted to a national rejection of that concept.<sup>152</sup> In *Terrett v. Taylor*, the Court held that a legislative land grant made to the Anglican Church by the British Crown could not be rescinded—that the title to the property had "indefeasibly vested."<sup>153</sup> Writing again for the Court, Story grounded this conclusion in "the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States."<sup>154</sup>

Finally, in *People v. Morris*, a case interpreting the New York state constitution (which at the time had no bill of rights) Judge Nelson wrote that "[the] vested rights of the citizen," including "that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation" and that the "obligation of contracts cannot be abrogated or essentially impaired," are to be held "sacred and inviolable, even against the plenitude of power of

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145. 18 U.S. (9 Cranch) 43 (1815).

146. 13 Wend. 325 (N.Y. Sup. Ct. 1835).

147. 4 Hill 140 (N.Y. 1843).

148. CONG. GLOBE, 39th Cong., 1st Sess. 1833 (1866).

149. *Id.*

150. *Wilkinson*, 27 U.S. (2 Pet.) 627, 657 (1829).

151. *See id.* at 627; *Terrett*, 18 U.S. (9 Cranch) at 43; *Morris*, 13 Wend. at 325.

152. 27 U.S. (2 Pet.) at 657.

153. 18 U.S. (9 Cranch) at 50.

154. *Id.* at 52.

the legislative department.”<sup>155</sup> In each of these three cases, judges invoked inherent limits on legislative means and ends.

In contrast, the fourth case, *Taylor v. Porter & Ford*, contains an extensive discussion of both “law of the land” and “due process of law,” both phrases having been incorporated into New York’s constitution by 1843.<sup>156</sup> Yet, before discussing these phrases, Judge Greene Bronson, echoing Locke, grounded one of the “ends” of state legislative power granted by the constitution in the “social compact,” namely, the protection of the individual rights of life, liberty, and property: “The security of life, liberty and property, lies at the foundation of the social compact,” wrote Bronson, “and to say that this grant of ‘legislative power’ includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established.”<sup>157</sup> Not only was legislative power subject to certain inherent limits—those limits constrained the purposes for which legislatures could act.

According to Bronson, then, even absent any express textual limits on legislative power—that is, any law-of-the-land clause—the legislature could not “take the property of A, either with or without compensation, and give it to B.”<sup>158</sup> But, Bronson expanded, “[t]he people have added negative words, which should put the matter at rest,” specifically, in providing that “[n]o member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers,”<sup>159</sup> and “[n]o person shall be deprived of life, liberty, or property, without due process of law.”<sup>160</sup>

Relying upon Coke, Bronson declared that the “law of the land” did not encompass “statute[s] passed for the purpose of working the wrong,” and that it “must be ascertained judicially that [someone] has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken

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155. 13 Wend. at 328.

156. 4 Hill 140, 145-47 (N.Y. Sup. Ct. 1843).

157. *Id.* at 145.

158. *Id.*

159. *Id.*

160. *Id.* at 147 (emphasis omitted).

from him.”<sup>161</sup> Similarly, he explained that “due process of law” connoted “a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property.”<sup>162</sup> “Mere legislation” could not serve as a basis for taking someone’s property without permission and giving it to someone else.<sup>163</sup>

To sum up, the decisions cited by Lawrence involve themes that were echoed in numerous decisions by state courts as well as in leading treatises on constitutional law during the Founding Era. A legislative act was deemed *not to be part of the law of the land* and was therefore considered insusceptible of being applied to individuals consistently with “due process of law” if (1) it deprived individuals of certain procedural rights traceable to the common law; (2) if it was either retrospective or insufficiently general, and thus usurped judicial power; or (3) more generally, if it violated a written constitution.

A *fourth* category of enactments that came to be understood as contrary to the law of the land developed towards the middle of the nineteenth century. As was earlier stressed by Justice Samuel Chase in *Calder*, implicit in the invalidation of legislative acts that were neither prospective nor general was a concept of legislative power which held such power to be inherently limited by the nature of the social compact.<sup>164</sup> And the nature of the social compact barred

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161. *Id.* at 145-46.

162. *Id.* at 147.

163. *Id.*

164. *See supra* notes 121-24 and accompanying text; *see also* Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 408 (Md. 1838) (“[T]here is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, ... the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority.”); White v. White 4 How. Pr. 102, 111 (N.Y. Sup. Ct. 1849) (“[T]he security of the citizen against ... arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon [textual] negatives. The exercise of such a power is incompatible with the nature and objects of all governments, and is destructive to the great end and aim for which government is instituted, and is subversive of the fundamental principles upon which all free governments are organized.”); Currie’s Adm’rs v. Mut. Assur. Soc’y, 14 Va. (4 Hen. & M.) 315, 438-39 (1809) (“[L]egislature[s] [are limited] ... by the principles and provisions of the constitution and bill of rights, and by those great rights and principles, for the preservation of which all just governments are founded.”).

any presumption that the people had consented to be governed by a legislature with arbitrary power.

All of this talk of the “social compact” may appear to be very abstract and therefore unhelpful to contemporary legislators and judges who must resolve hard questions about whether particular acts are constitutionally proper. But originalists must first go where evidence of original communicative content leads, and only then consider how best to implement that communicative content. As we will see, excluding the category of arbitrary legislation from the cognizance of legislators and judges would likely constrict the originally understood scope of the Fourteenth Amendment.

#### *D. The “Due Process of Law” Is a Substantive Procedure*

Our investigation of the original meaning of the Due Process of Law Clauses reveals the prevailing dichotomy of procedural and substantive due process to be unhelpful and potentially misleading. To be sure, the clauses constrain both *what* the government can do and *how* the government can do it. But their substantive and procedural components cannot be cleanly separated. Once it is acknowledged that the *procedure* or “process” that the Due Process of Law Clauses guarantee includes an opportunity to challenge the *content* or “substance” of a statute for its conformity with the Constitution and that a statute that does not conform with the Constitution is not a constitutionally proper law, the utility of the distinction vanishes.

Consider the First Amendment. We commonly speak of “First Amendment challenges” to the substance of legislation. Yet the right to a judicial determination of whether a legislative enactment prohibits “the free exercise of religion,” is part of the “due process of law.”<sup>165</sup> The due process of law guarantees a judicial forum in which people can contest whether the substance of a statute prohibits the free exercise of religion—and therefore is not a constitutionally proper law.<sup>166</sup> Further, a statute that *does* prohibit the free exercise of religion cannot be used to deprive someone of life, liberty, or

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165. *Cf. Taylor v. Porter & Ford*, 4 Hill 140, 145-47 (N.Y. Sup. Ct. 1843); Williams, *supra* note 6, at 464.

166. *Cf. Taylor*, 4 Hill at 145-47.

property, consistently with the due process of law, because it is not a constitutionally proper law.<sup>167</sup>

Despite the role they are playing in guaranteeing a judicial forum, the Due Process of Law Clauses are rarely noticed in such cases, and we speak only of the First Amendment.<sup>168</sup> This is analogous to how we now commonly speak of “First Amendment challenges” to state laws, when such challenges are, strictly speaking, Fourteenth Amendment challenges.<sup>169</sup> Indeed, according to the post-New Deal “incorporation doctrine,”<sup>170</sup> they are technically Due Process of Law Clause challenges!<sup>171</sup>

So too with a “Commerce Clause challenge,” which ineluctably connects the substance of the Commerce Clause with a judicial evaluation of the substance of an act of Congress.<sup>172</sup> Any challenge to a legislative act on the ground that the substance of the act exceeds the proper constitutional powers of Congress or a state legislature is, at the same time, a “Due Process of Law Clause challenge.”<sup>173</sup> It is the latter clause that guarantees a judicial process in which the act will be evaluated before a person is deprived of life, liberty, or property.<sup>174</sup> Further, if the act is beyond Congress’s constitutional powers, using the act to deprive an individual of life, liberty, or property would violate the Fifth Amendment’s Due Process of Law Clause as well as the Commerce Clause.<sup>175</sup>

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167. See generally *Marbury v. Madison*, 1 U.S. (1 Cranch) 137, 177 (1803); see also Gedicks, *supra* note 2, at 668.

168. See, e.g., *Locke v. Davey*, 540 U.S. 712, 715 (2004) (explaining that a state’s refusal to give aid to a postsecondary student who was pursuing a degree in theology did not violate the Free Exercise clause of the First Amendment without ever referencing the Due Process clause).

169. *Id.*

170. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

171. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 109-10 (2011) (observing that “enforcing the First Amendment right of freedom of speech against the states via the Due Process Clause is literally an exercise in protecting a substantive right through that clause,” as is the incorporation of any other enumerated right through the same means).

172. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243-44, 258 (1964) (stating that Congress did not violate the Commerce Clause, nor the Fifth Amendment, with the enactment of the Civil Rights Act of 1964).

173. See Gedicks, *supra* note 2, at 668.

174. See *Taylor v. Porter & Ford*, 4 Hill 140, 145-47 (N.Y. Sup. Ct. 1843).

175. See *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258.



The core question in every case involving a purported deprivation of life, liberty, or property without due process of law is whether that deprivation is consistent with the law of the land.<sup>176</sup> As we have seen, there are several types of defects that may cause legislation to fail to become the law of the land.<sup>177</sup> It is a mistake to reduce the due process of law to one of these defects or another. And nothing substantial is gained by dubbing one or more of those defects “procedural” or “substantive.”

Indeed, to separate procedure from substance is to risk failing to appreciate substantive aspects of what seem at first to be solely procedural guarantees—and vice versa. The right to trial by jury, in which historically the jury could pass upon the constitutionality of a statute, as we noted above, is only a particularly vivid example.<sup>178</sup> Better to think of due process of law as requiring a “substantive procedure”—that is, a judicial *procedure* designed to ensure that the *substance* of a statute conforms with the higher law of the land before any person can be deprived of his or her “life, liberty, or property.”

While the Fifth and Fourteenth Amendments’ Due Process of Law Clauses both guarantee a substantive procedure, there is an important distinction between the referents of “due process of law” in each amendment. Under the Fifth Amendment, before any person can justly be deprived of “life, liberty, or property” by operation of a congressional statute, the due process of law requires a judicial determination that the *substance* of such an “act” is consistent with the higher law of the land provided by the *substance* of the written federal Constitution. Specifically, a legislative act must be an exercise of, or calculated to carry into effect, an enumerated power.<sup>179</sup>

As John Marshall explained in *McCulloch v. Maryland*, this judicial process includes a means-ends analysis, in the form of an assessment of whether a legislative act was taken in good faith:

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176. See, e.g., *supra* notes 62-71 and accompanying text.

177. See *supra* Part I.B.2.

178. See *supra* notes 104-05 and accompanying text.

179. See Gedicks, *supra* note 2, at 668.

[S]hould Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful *duty* of this tribunal, should a case requiring such a decision come before it, to say that such an *act* was not *the law* of the land.<sup>180</sup>

By 1868, however, the concept of due process of law was understood to impose limits on the ends which *state* legislatures could pursue.<sup>181</sup> And courts constructed a doctrine—the police power doctrine—to implement that understanding.<sup>182</sup> Like the principle identified in *McCulloch*,<sup>183</sup> this doctrine required that exercises of state police powers be in good faith.<sup>184</sup>

As we will later discuss, the result of this distinction is that, although the Fifth and Fourteenth Amendments *both* place limitations on the ends which legislators may pursue, the substance of those limitations is different. The former are specified by the letter of the Constitution,<sup>185</sup> the latter are unspecified by the letter and therefore require constitutional construction.<sup>186</sup> This difference has implications for the implementation of the respective clauses.

Before getting to the implementation of the original meaning of “due process of law,” we need consider some alternative originalist interpretations of this text that have been offered by scholars.

### *E. Competing Originalist Interpretations*

We have shown that due process of law is, as originalists have long maintained, a procedural guarantee involving the judiciary. However, the judicial procedure it guarantees includes an opportunity for someone who stands to be deprived of life, liberty, or property to challenge the *substance* of legislation for its consistency with the law of the land. And such challenges in turn require judicial inquiry into whether enactments (a) abrogate common law

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180. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (emphases added).

181. See Williams, *supra* note 6, at 426, 462-63, 466-67.

182. See *infra* notes 219-22 and accompanying text.

183. See *McCulloch*, 17 U.S. (4 Wheat.) at 423.

184. See, e.g., *Austin v. Murray*, 33 Mass. (16 Pick.) 121, 126 (1834).

185. See U.S. CONST. amend. V.

186. See U.S. CONST. amend. XIV, § 1.

procedural protections; (b) are adjudicative rather than legislative because retrospective or insufficiently general; (c) violate express constitutional guarantees; or (d) deprive people of life, liberty, or property in the service of no constitutionally proper end, and are therefore arbitrary. The last of these categories of unlawful legislation—arbitrary legislation—is the most controversial and we now we respond to some criticisms of adding it to the list.

1. *Nathaniel Chapman and Michael McConnell*

While acknowledging its existence, Chapman and McConnell contend that judicial employment of a means-end analysis to evaluate whether legislation is arbitrary represents a late, controversial, and ultimately improper departure from a well-settled traditional understanding of due process of law.<sup>187</sup> They find “two principal instances of antebellum courts’ applying due process to invalidate a general and prospective law.”<sup>188</sup> The first is Chief Justice Roger B. Taney’s suggestion (in dicta) in *Dred Scott* that

an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.<sup>189</sup>

The second is *Wynehamer v. People*, an 1856 decision in which the New York Court of Appeals invalidated a statute prohibiting the sale of liquor.<sup>190</sup> The Court of Appeals reasoned that “[w]hen a law annihilates the value of property ... the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power.”<sup>191</sup>

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187. Chapman & McConnell, *supra* note 8, at 1722-73.

188. *Id.* at 1722.

189. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857).

190. 2 Parker Cim. Rep. 421, 468, 488-89 (N.Y. 1856).

191. *Id.* at 461.

These “radical” decisions, Chapman and McConnell argue, are “faulty exceptions that prove the rule.”<sup>192</sup> Because *Dred Scott* was universally rejected by Republicans when they proposed and adopted the Fourteenth Amendment, Chapman and McConnell maintain that “it would be perverse to think that the public ... understood it to perpetuate Chief Justice Taney’s approach to due process.”<sup>193</sup> They say *Wynehamer* was “immediately controversial” and that there is “no evidence” that it had “any bearing on the meaning of the Fourteenth Amendment Due Process Clause.”<sup>194</sup> According to Chapman and McConnell, these two cases were outliers and both misinterpreted the due process of law.<sup>195</sup>

But as Ryan Williams points out, while *Dred Scott* was profoundly controversial among Republicans, “there is virtually no evidence to suggest that such controversy stemmed from Taney’s use of the Due Process Clause to protect vested property rights.”<sup>196</sup> Justice Benjamin Curtis’s dissent, lauded by Republicans, did not take issue with Taney’s suggestion that Congress could not generally obliterate vested property rights through legislation. Rather, Curtis focused on the unique character of slave property, stating that “[s]lavery, being contrary to natural right, is created only by municipal law.”<sup>197</sup> This principle is traceable to a famous decision by the King’s Bench in the 1772 case of *Somerset v. Stewart*, in which Lord Mansfield declared that slavery was “so odious, that nothing can be suffered to support it, but positive law.”<sup>198</sup>

As applied to the facts of *Dred Scott*, the *Somerset* principle compelled the conclusion that slave owners’ property in their slaves ceased to exist as soon as they voluntarily brought their slaves into federal territory where slavery was legally recognized “for the purpose of being absolutely prohibited, and declared incapable of existing.”<sup>199</sup> *Dred Scott*’s rejection by Republicans tells us nothing interesting about the meaning of “due process of law”; and Taney’s

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192. Chapman & McConnell, *supra* note 8, at 1772.

193. *Id.*

194. *Id.* at 1769-70.

195. *See id.* at 1772.

196. Williams, *supra* note 6, at 467.

197. *Scott v. Sandford*, 60 U.S. (19 How.) 393, 624 (1857) (Curtis, J., dissenting).

198. 98 Eng. Rep. 499, 510; Lofft 1, 19.

199. *Scott*, 60 U.S. (19 How.) at 593 (Curtis, J., dissenting).

use of this concept in dicta does not seem to have stirred any specific criticism or exerted any influence.<sup>200</sup> Indeed, it is reasonable to presume that Taney invoked the traditional and accepted conception of the due process of law because he thought it would bolster, rather than undermine, the persuasiveness of his argument.

Chapman and McConnell's discussion of *Wynehamer* is similarly deficient. *Wynehamer* was approvingly cited by multiple courts and treatise-writers around the time of the Fourteenth Amendment's enactment.<sup>201</sup> Those courts that did not follow *Wynehamer* determined that statutes prohibiting sales of alcohol fell within the scope of the police power; they did not hold that, to be consistent with the due process of law, statutes need only be general and prospective and not abrogate common law procedural rights.<sup>202</sup>

Indeed, none of the cases that Chapman and McConnell cite expressly held that the due process of law was limited in scope in the manner they propose; theirs is an argument from silence.<sup>203</sup> As we will see, there was more noise than they acknowledge; hesitance to invalidate is not the same as refusal to evaluate.

When McConnell and Chapman note that the Supreme Court in *Mugler v. Kansas* later upheld similar legislation,<sup>204</sup> they neglect the fact that the Court did so only after determining that the legislation was "enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens."<sup>205</sup> Writing for the Court, Justice John Marshall Harlan noted that the Court would not *uphold* legislation if it was "apparent that its *real object* is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property."<sup>206</sup> This is reminiscent of Marshall's "pretext" formulation in

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200. Williams, *supra* note 6, at 468-69.

201. See, e.g., *id.* at 469 n.281.

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

203. See Chapman & McConnell, *supra* note 8, at 1678 ("None of [the antebellum decisions] invalidated a general and prospective statute on the ground that it interfered with unenumerated but inalienable rights, was unreasonable, or exceeded the police power.").

204. *Id.* at 1769.

205. 123 U.S. 623, 666 (1887) (quoting *Patterson v. Kentucky*, 97 U.S. 501, 506 (1879)).

206. *Id.* at 669 (emphasis added).

*McCulloch*.<sup>207</sup> No Justice in *Mugler* disputed the proposition that purported exercises of the police power—whether they took the form of municipal by-laws or ordinances or statutes—needed to be evaluated for pretext. Skeptics of the legitimacy of means-ends analysis have yet to explain this consensus.

Thus, even if Chapman and McConnell are correct that none of the cases they discuss saw courts “applying due process to invalidate a general and prospective law,”<sup>208</sup> they have overstated the significance of this finding. The critical response to *Dred Scott* and *Wynehamer* does not indicate a rejection of these cases’ holdings that due process of law forbids general and prospective laws that deprive people of vested rights without furthering a constitutionally proper end. As Williams points out, the vested-rights interpretation implicit in both decisions was endorsed by state courts throughout the 1860s.<sup>209</sup>

## 2. Ryan Williams

Williams’s own study of the due process of law yields conclusions that are in certain respects closer to ours than are Chapman and McConnell’s but are in other respects farther apart. Like Williams, we find that the concept denoted by “due process of law” came to be understood by 1868 to have different referents than it did in 1791.<sup>210</sup> But we agree with Chapman and McConnell that Williams overstates the difference, and we think that Williams does not completely capture the meaning of either clause.<sup>211</sup>

Williams contends that the Fifth Amendment’s Due Process of Law Clause was not originally understood to apply to legislative acts.<sup>212</sup> To the contrary, as we have seen, the language of “due process of law,” like “law of the land,” was understood by key Framers, influential treatise-writers, and courts during the Founding Era to forbid legislatures from depriving people of

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207. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

208. Chapman & McConnell, *supra* note 8, at 1772.

209. Williams, *supra* note 6, at 462-63 (observing that by 1860 fourteen states had accepted the vested-rights interpretation).

210. *See id.* at 416.

211. *See* Chapman & McConnell, *supra* note 8, at 1677.

212. *See* Williams, *supra* note 6, at 511.

common law procedural rights, engaging in what was in substance adjudication rather than legislation, or otherwise violating a source of superior law, such as a written constitution.<sup>213</sup>

Concerning the Fourteenth Amendment, we share more common ground with Williams than with Chapman and McConnell. Williams finds that “due process of law” had by 1868 come to be understood to prohibit legislative interference with vested rights and to guarantee “general and impartial laws rather than ‘special’ or ‘class’ legislation that imposed particular burdens upon, or accorded special benefits to, particular persons or particular segments of society.”<sup>214</sup> He denies, however, that due process of law was understood to require that legislation be necessary to achieve constitutionally proper ends and thus to authorize judicial inquiry into “both the ends that the legislature sought to achieve and the means employed to achieve such ends.”<sup>215</sup> The latter understanding, he argues, did not develop until the 1890s—the so-called “*Lochner* era.”<sup>216</sup>

We agree that the police-power jurisprudence that developed in state courts—and later in the Supreme Court—in the wake of the ratification of the Fourteenth Amendment is distinguishable from antebellum police-power jurisprudence in certain respects. In particular, courts became more willing to look beyond the face of enactments to discern and evaluate the propriety of legislative ends. But there was continuity as well. Long before the *Lochner* era, antebellum courts repeatedly affirmed that legislative power was inherently limited by the ends for which legitimate governments are established,<sup>217</sup> and that legislatures could neither deprive people of vested property rights nor constrain them in their life, liberty, or property more generally, except—as Justice Harlan put it in *Mugler*—to “protect the community, or to promote the general well-being.”<sup>218</sup>

Prior to the ratification of the Fourteenth Amendment, state courts upheld a variety of enactments as valid exercises of the police

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213. See *supra* Part I.B.1.

214. Williams, *supra* note 6, at 425.

215. *Id.* at 426.

216. *Id.*

217. See *infra* notes 219-22 and accompanying text.

218. *Mugler v. Kansas*, 123 U.S. 623, 669 (1887).

power, from prohibitions of dirt-removal from privately owned beaches<sup>219</sup> to regulations specifying the hours during which cattle could be driven through the city streets<sup>220</sup> to statutes authorizing cities to make by-laws governing the interment of the dead.<sup>221</sup> But the scope of the police power was understood to be limited by its functions—the protection of health, safety, and morals of the public.<sup>222</sup>

For example, in the 1834 case of *Austin v. Murray*, the Massachusetts Supreme Judicial Court sustained a challenge to a by-law prohibiting the bringing of the dead into Charlestown for purposes of burial—a prohibition that solely affected Catholic parishioners.<sup>223</sup> It did so because it was “manifest” to the court that “the object and purpose” of a measure was not “made in good faith” and directed at the “public good.”<sup>224</sup> The court refused to uphold it simply because it was passed “under the guise of a police regulation.”<sup>225</sup>

It might be argued that *Austin* is of little significance to the originally understood scope of constitutional restrictions on state legislation because it involved a by-law issued by a municipal corporation. The trouble with any such argument is twofold. First, the proposition that legislatures were not understood to be obliged to pursue the public good whereas municipal legislations were obliged to do so lacks support.<sup>226</sup> Second, both by-laws and statutes were evaluated by antebellum courts in order to determine whether they were reasonably calculated to serve proper ends.<sup>227</sup>

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219. *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846).

220. *Cooper v. Schultz*, 32 How. Pr. 107 (N.Y. Sup. Ct. 1866).

221. *Coates v. City of New York*, 7 Cow. 585 (N.Y. Sup. Ct. 1827).

222. See Lowell J. Howe, *The Meaning of “Due Process of Law” Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583, 609 (1930).

223. *Austin v. Murray*, 33 Mass. (16 Pick.) 121, 126 (1834).

224. *Id.*

225. *Id.*

226. For contrary case law, see, for example, *Watertown v. Mayo*, 109 Mass. 315, 318 (1870) (drawing upon *Austin* and affirming that “[t]he law will not allow rights of property to be invaded under the disguise of a police regulation” without drawing a distinction between state statutes and municipal ordinances); *Thorpe v. Rutland*, 27 Vt. 140, 154 (1854) (“[A] statute requiring land owners to build all their fences of a given quality or height, would no doubt be invalid, as an unwarrantable interference with matters of exclusively private concern.”).

227. See, e.g., *Vanderbilt v. Adams*, 7 Cow. 349, 351 (N.Y. Sup. Ct. 1827) (upholding a statute authorizing harbor masters to regulate and station vessels in the East and North rivers only after determining that it was “calculated for the benefit of all,” and cautioning that it “would not be upheld, if exerted beyond what may be considered a necessary police



As Williams acknowledges, Thomas Cooley (whose views we examine at length below) was “[b]y far the most influential of the early post-Civil War commentators to address the meaning of due process and law-of-the-land provisions”; Cooley’s discussion of those provisions in his 1868 treatise focused on the “legitimacy of the legislature’s objectives and the means pursued to attain those objectives.”<sup>228</sup> Cooley took the view that “grave ... constitutional objection[s]” called the inquiry, not only into statutory text, but “those facts of general notoriety, which ... are part of the public history of the times.”<sup>229</sup>

We do not think that the letter of the Fourteenth Amendment compels judges to implement the precise police-power doctrine that was developed in either the early or late nineteenth century. But implementing the Fourteenth Amendment does require a conception of the legitimate ends of government that is consistent with the original function—the spirit—of the Due Process of Law Clause in the Fourteenth Amendment; and it requires a doctrinal approach to give the text legal effect today.

### 3. *John Harrison*

John Harrison has criticized the view that, because “due process of law” is synonymous with “law of the land” and “law of the land” was understood to entail the opportunity to challenge the necessity and propriety of government actions in judicial proceedings, so, too, does “due process of law.”<sup>230</sup> Harrison argues that the case against

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regulation”); *Bagg’s Appeal*, 43 Pa. 512, 515 (1862) (“Any form of direct governmental action on private rights, which, if unusual, is dictated by no imperious public necessity, or which makes a special law for a particular person, or gives directions for the regulation and control of a particular case after it has arisen, is always arbitrary and dangerous in principle, and almost always unconstitutional.”). Even some decisions in which courts upheld legislation saw judges expressing an understanding that legislative ends were constitutionally relevant. *See, e.g., Baltimore v. State*, 15 Md. 376 (1860) (upholding statute providing that “no Black Republican ... shall be appointed to any office” within a particular department but admitting that the act would be unconstitutional if office-holding were “proscribed on account of ... political or religious opinions”).

228. Williams, *supra* note 6, at 493-94.

229. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION* 391 n.1 (photo. reprint) 1972 (Boston, Little, Brown & Co. 1868).

230. *See Harrison, supra* note 3, at 542-44, 546-48, 551.

substantive review of government actions under the Fifth Amendment would be much *stronger* if “law of the land” had been used instead of “due process of law,” because “a substantive reading [of ‘law of the land’] would be textually absurd.”<sup>231</sup>

Specifically, Harrison claims that the Supremacy Clause provides that “[a]cts of Congress and treaties, the nonconstitutional sources of federal law, are not just the law of the land, but ‘the supreme Law of the Land.’”<sup>232</sup> Thus, a reference to “law of the land” in the Fifth Amendment would leave no room for substantive review of duly enacted federal statutes—and neither does “due process of law,” if indeed the terms are synonymous.<sup>233</sup>

Harrison’s critique rests upon a false premise. The Supremacy Clause does not provide that *all* congressional acts become “the supreme law of the land”—only those acts which are made *in pursuance of* the Constitution.<sup>234</sup> We have already seen in *Marbury* and *McCulloch* that John Marshall denied that an “act” of Congress that was not made in pursuance of the Constitution becomes part of the law of the land. Furthermore, Marshall maintained that determining whether a given act of Congress was made in pursuance of the Constitution requires inquiry into whether it was necessary to achieve constitutionally proper ends.<sup>235</sup>

Marshall’s understanding is consistent with Alexander Hamilton’s exposition of the Supremacy Clause in *Federalist 33*, in which Hamilton expressly denied that unconstitutional statutes became part of the law of the land.<sup>236</sup> Wrote Hamilton, “the clause which declares the supremacy of the laws of the Union ... *expressly* confines this supremacy to laws made *pursuant to the Constitution*.”<sup>237</sup> Thus, while a law authorized by the Constitution—for example, one “laying a tax for the use of the United States”—“would be supreme in its nature,” a law not authorized by the Constitution—for example, one “for abrogating or preventing the collection of a tax laid by the authority of the State, (unless upon imports and

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231. *Id.* at 546.

232. *Id.* at 546-47.

233. *Id.*

234. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

235. *Supra* notes 112-14 and accompanying text.

236. See THE FEDERALIST NO. 33, *supra* note 12, at 161 (Alexander Hamilton).

237. *Id.*

exports)”—“would not be the supreme law of the land, but an usurpation of power not granted by the Constitution.”<sup>238</sup>

If indeed the “due process of law” is synonymous with “law of the land,” there is nothing textually absurd about maintaining that due process of law entails substantive review of federal or state statutes if “the supreme *law* of the land” constrains the substance of legislation, not merely the procedures by which a statute is enacted. Harrison is wrong to assert that “[t]he law of the land is a variable the value of which is given by whatever tells us what the law is.”<sup>239</sup> Both the Supremacy Clause and the Due Process of Law Clauses establish criteria that legislation must meet in order to be considered law.

Harrison also argues that the Due Process of Law Clause would be redundant if it included limits on legislative power that were *already* imposed by other constitutional provisions.<sup>240</sup> But, as we have seen with respect to the First Amendment and Commerce Clause, acknowledging a *judicial process* by which statutes may be challenged as beyond the “proper” powers of Congress to enact before a person may be denied his or her life, liberty, or property was a distinct textual recognition of what was theretofore merely implicit.<sup>241</sup>

Be this as it may, as Chapman and McConnell observe, redundancy is a weak objection, here and elsewhere, for “[t]he Constitution and Bill of Rights are shot through with prohibitions that some Founders thought to be redundant with enumerated powers or prohibitions.”<sup>242</sup> Even on a procedural reading of the Fifth Amendment that does not incorporate substantive review, the due process of law would be redundant if it is understood—as it should be—to guarantee jury trials in civil and criminal cases, given that such trials are also guaranteed by other constitutional provisions.<sup>243</sup>

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238. *Id.*

239. Harrison, *supra* note 3, at 547.

240. *Id.* at 548.

241. See *supra* notes 165-75 and accompanying text.

242. See Chapman & McConnell, *supra* note 8, at 1721.

243. See *id.* at 1718.

#### 4. *Christopher Green*

Finally, Christopher Green has accumulated a body of evidence that “due process of law” in the Fourteenth Amendment and “duly convicted” in the Thirteenth Amendment are synonymous, and that neither phrase authorizes means-ends analysis.<sup>244</sup> Green argues that the term “duly convicted” was the product of “a tradition stemming from the Northwest Ordinance of 1787”—a tradition that “fully acknowledged the great evil of slavery ... and fugitive re-enslavement in particular, while conceding that a slave could be ‘lawfully’ claimed and reclaimed.”<sup>245</sup> According to Green, if “due process of law” and “duly convicted” mean the same—or nearly the same—thing, “due process of law” cannot possibly impose “substantive constraints on statutes’ propriety,” as a “substantive” understanding of due process of law would exclude the possibility of “lawfully” enslaving anyone, slavery being widely thought by Republicans to be contrary to natural right.<sup>246</sup> For this reason, Green concludes that “due process of law” serves only as a guarantee of access to regular judicial proceedings in which general, prospective statutes are applied prior to criminal punishment.<sup>247</sup>

Green makes a compelling case that “duly convicted” was not originally understood to forbid disproportionate criminal punishments or criminal laws that did not serve legitimate ends.<sup>248</sup> For example, the proliferation of statutes that imposed unreasonably harsh penalties for “frivolous offenses,” not in order to protect the equal rights of all but to subordinate a particular group of people, was understood by many Republicans to be an evil that would take another amendment to eradicate.<sup>249</sup>

But Green’s case against means-ends analysis ultimately depends upon his claim that “duly convicted” and “due process of law” are synonymous.<sup>250</sup> The evidence he marshals consists of several states’

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244. Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL’Y 73, 75-78, 90-92, 113 (2017).

245. *Id.* at 113.

246. *Id.*

247. *See id.* at 111.

248. *See id.* at 95.

249. *See id.* at 92-95.

250. *See id.* at 90.

prohibitions on slavery, a letter from Abraham Lincoln to Major General Frederick Steele concerning Arkansas's prohibition, and explanations of the Thirteenth Amendment's language by several commentators.<sup>251</sup>

Adopted on January 19, 1864, Arkansas's prohibition provided that "[n]either slavery nor involuntary servitude shall hereafter exist in this State, otherwise than for the punishment of crime, whereof the party shall [be] convicted *by due process of law*."<sup>252</sup> In his letter, Lincoln described the Arkansas slavery prohibition as "[t]here shall be neither slavery nor involuntary servitude, except in the punishment of crime whereof the party shall [be] duly convicted"<sup>253</sup>—thereby translating "due process of law" into "duly convicted."<sup>254</sup> Finally, commenting on the Thirteenth Amendment, John Burgess noted in 1893 that "[a]ccording to the terms of [the crime exception] it is only necessary that the person shall have been duly convicted; that is, shall have been convicted by due process of law."<sup>255</sup>

This evidence, while probative, is insufficient to establish synonymy. It is entirely consistent with the proposition that "due process of law" was understood to guarantee certain judicial proceedings prior to criminal punishment but was *also* understood to guarantee considerably more than that. If "duly convicted" is not synonymous with "due process of law" but instead captures a subset of what the latter requires, there is no tension between the authorization of judicial review of the content of legislation under the Fourteenth Amendment's Due Process of Law Clause and the Thirteenth Amendment.

Green could well be right that Charles Sumner's view that "injustice cannot be 'law'"<sup>256</sup> was not incorporated into the Thirteenth or Fourteenth Amendments.<sup>257</sup> But we do not claim that the

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251. *See id.* at 91-92.

252. *Id.* at 90 (quoting ARK. CONST. of 1864, art. V).

253. Letter from Abraham Lincoln to Frederick Steele (Jan. 20, 1864), in 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 141 (Roy P. Basler ed., 1953).

254. *See Green, supra* note 244, at 91.

255. 1 JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW: SOVEREIGNTY AND LIBERTY 185, 207 (Boston, Ginn & Co. 1893).

256. CONG. GLOBE, 38th Cong., 1st Sess. 1712 (1864).

257. *See Green, supra* note 244, at 85-86, 91 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1712 (1864)).

Due Process of Law Clauses guarantee a judicial evaluation of whether deprivations of life, liberty, or property conform with ideas of justice that are unmoored from the original meaning of the letter and the original spirit of the Constitution. We claim only that these clauses (1) guarantee proceedings in Article III courts in which legislative deprivations of life, liberty, and property may be challenged for their conformity with the Constitution; and (2) the Constitution limits the means and ends by which such deprivations can permissibly be justified.

## II. THE SPIRIT: IMPLEMENTING THE DUE PROCESS OF LAW CLAUSES

### A. *The Spirit of Due Process of Law: Barring Arbitrary Power*

Having identified the original meaning of the “due process of law” in both the Fifth and Fourteenth Amendments, we now turn to how it may be implemented in a way that is faithful both to its letter and to its original spirit. As we have explained elsewhere, the “spirit” of the text is its original functions, purposes, ends, or objects.<sup>258</sup> What was the original function (or functions) of the Due Process of Law Clauses?

In Part I, we chronicled how the concept of due process of law has been refined and even redefined over the course of centuries of Anglo-American jurisprudence. But throughout its development, the end or “spirit” of the concept remained the same: barring “arbitrary” power over life, liberty, and property. In England, the “due process of law” was designed to prevent innocent persons who had committed no breach of the law from being wrongfully deprived of their life, liberty, or property by the Crown.<sup>259</sup>

But, while the English conception of “the law of the land” was understood as a guarantee against arbitrary executive power,<sup>260</sup> in America the due process of law came to be understood as a guarantee against *all* arbitrary government action.<sup>261</sup> So the “due process

258. See Barnett & Bernick, *supra* note 10, at 26-27.

259. See *Prohibitions del Roy* (1607) 77 Eng. Rep. 1342, 1342-43; 12 Co. Rep. 64, 64-65.

260. See, e.g., HAMBURGER, *supra* note 36, at 194-95, 197-99, 202.

261. See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) (“As to the words from Magna Charta ... after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure

of law” not only protected people from arbitrary power by providing a judicial process by which a person could be accurately adjudicated as guilty or innocent, it also protected people from arbitrary power by denying that an arbitrary act of a legislature qualified as “a law.”<sup>262</sup> At all points, however, “the due process of law” was understood to denote a concept of rule by principles that are distinguishable from the mere will of the holders of power, and of impartial adjudication in neutral courts of law.<sup>263</sup> This is what “due process of law” denotes in our Constitution.

“Arbitrary” is a difficult term to define, let alone apply with precision. R. George Wright explains why context is critical in determining whether something is arbitrary—just as it is in determining whether something is “flat.”<sup>264</sup> An airport runway and a glass table might both be identified as “flat,” even though the regularity of their surfaces is quite different.<sup>265</sup> Why? As Wright points out, “different purposes and interests are at stake, themselves largely creating the crucial differences in context.”<sup>266</sup> Whether a decision is “arbitrary” similarly depends on what purposes and interests are at stake. Reasons that might count as reasonable grounds for one’s decision to see a particular film—one’s mood on a given day, and one’s desire to be entertained—would be rightly regarded as arbitrary if used to ground a decision about whether to throw someone in jail.<sup>267</sup>

The context with which we are concerned here is the exercise of legal power under “this Constitution”—what distinguishes a mere “act” of a legislature from “a law” that people have an obligation to follow.<sup>268</sup> We thus define arbitrariness with reference to *the ends* for

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the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”)

262. See CONRAD, *supra* note 104, at 19, 131; HARRISON, *supra* note 3, at 529.

263. See HARRISON, *supra* note 3, at 529.

264. R. George Wright, *Arbitrariness: Why the Most Important Idea in Administrative Law Can't Be Defined, and What This Means for the Law in General*, 44 U. RICH. L. REV. 839, 842 (2010).

265. *Id.* at 842-43.

266. *Id.* at 843.

267. See *id.* at 843, 849-50, 859.

268. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 11-12, 45-46, 48-49, 51-52 (2004) (describing and confronting the problem of constitutional legitimacy).

which legitimate governments are established among men—according to the political-philosophical premises on which this Constitution rests—legitimate governments are established among men—and *the means* which the Constitution authorizes to effectuate those ends. Legislation that is contrary to those ends or means is arbitrary—and therefore contrary to the original spirit of the Due Process of Law Clauses.<sup>269</sup>

As we have explained, the letter of the Due Process of Law Clauses requires a *judicial* proceeding—“due process”—of *some* kind prior to any deprivations of life, liberty, or property.<sup>270</sup> On this, *everyone* who has studied the original meaning of the Due Process of Law Clauses can agree. The disagreement concerns the *scope* of that judicial proceeding. The term “of law” clarifies this by connoting that a statute purporting to justify a deprivation of “life, liberty, or property,” be a valid “law,” meaning it was within the constitutional power of the respective legislature to enact.<sup>271</sup> An arbitrary

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269. We are aware, of course, of the body of public-choice-informed textualist literature on statutory interpretation that seems to cast doubt upon the very notion that one can meaningfully speak of legislative ends. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (stating that “it turns out to be difficult, sometimes impossible, to aggregate [legislators’ preferences] into a coherent collective choice,” and citing Duncan Black and Kenneth Arrow). While it is beyond the scope of this Article to engage with this literature in any depth, our view is that while groups of individuals do not have collective intentions in the sense of shared mental events, groups of individuals can decide to pursue shared goals through agreed-upon means that are specified in legal instruments. Those instruments may not expressly state the goals that their designers sought to achieve, but goals can nonetheless be inferred from their text and structure. Even the most ardent textualists do not deny this. *See, e.g.*, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) (finding “[e]vidence of pre-emptive purpose ... in the text and structure of the statute at issue” (alteration in original) (emphasis and internal quotation marks omitted) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))); *Nat’l Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) (“Knowing the purpose behind a rule may help a court decode an ambiguous text.”); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2010 (2009) (“Textualists understand that statutes are enacted to serve a purpose.”). For a nice distillation of this distinction in the constitutional context, see Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 828 & n.57 (1982) (arguing that although “[p]ublic choice principles suggest that the ‘drafters,’ as a group, may have no consistent intent.... [this] does not mean that the document they wrote lacks a structure,” and that “the Court must discover and carry out the design of any given [constitutional] provision”).

270. *See supra* Parts I.B.1-2.

271. *See supra* notes 135-36 and accompanying text.



statute is one that is not within what Hamilton referred to as the “just and constitutional” powers of the legislature to enact.<sup>272</sup>

At the federal level, this requires a judicial inquiry as to whether legislation falls within one of the delegated powers of Congress—which includes the incidental powers expressly recognized in the Necessary and Proper Clause—or is prohibited by the Constitution.<sup>273</sup> At the state level, identifying arbitrary legislation requires a judicial inquiry into whether (1) it is within the scope of power that is delegated to state legislatures by their own constitutions; and (2) whether it is prohibited by the federal Constitution’s limits on state power, including Section One of the Fourteenth Amendment.<sup>274</sup> For a state statute to be a law rather than a mere act of power, it is necessary, but not sufficient, that a state constitution authorize a particular exercise of power.<sup>275</sup> Such acts must also not deprive people of the due process of law or “abridge the privileges or immunities of citizens of the United States.”<sup>276</sup>

We will articulate a theory of the original letter and spirit of the Privileges of Immunities Clause in future work. For present purposes, it is enough to say that, on any of the competing originalist interpretations—other than the now-discredited one that the clause is an indecipherable “ink blot”<sup>277</sup>—any judicial enforcement of the clause clearly calls for *some* judicial evaluation of a state law that extends beyond the terms of a state’s own constitution.<sup>278</sup> In other words, the text of the Fourteenth Amendment requires *some*

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272. See THE FEDERALIST NO. 80, *supra* note 12, at 400 (Alexander Hamilton).

273. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-13 (1819). Note, however, that the Constitution also expressly recognizes “other[]” unenumerated “rights ... retained by the people.” U.S. CONST. amend. IX.

274. See *McCulloch*, 17 U.S. at 429-30, 436; *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 56, 63 (1805).

275. See *Jordan v. Overseers of Ohio*, 4 Ohio 294, 309-10 (1831).

276. U.S. CONST. amend. XIV, § 1.

277. BORK, *supra* note 128, at 166 (opining that “[n]o judge is entitled to interpret an ink blot,” and asserting, without citing authority, that “[the Privileges or Immunities] clause has been a mystery since its adoption”). *But see* MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS passim* (1986) (performing an exhaustive historical inquiry into the original meaning of the Privileges or Immunities Clause); Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419, 1430 (1990) (book review) (observing that Bork “does not mention, let alone grapple with, important books” that might have aided him in dissolving the ink blot).

278. See, e.g., Harrison, *supra* note 3, at 547.

construction of the outer boundaries of state legislative authority that judges can use to determine whether state law is abridging the privileges or immunities of U.S. citizens.

Having now identified the original spirit of the Due Process of Law Clauses—the prohibition of arbitrary power over life, liberty, and property—we can begin to specify an approach that equips legislators and judges to implement faithfully the original meaning of their text.

### *B. Identifying Good-Faith Exercises of Legislative Discretion*

Judges already routinely seek to determine whether legislative enactments sought to be applied to individuals are law rather than exercises of arbitrary power by a legislature, even if they do not use this precise language.<sup>279</sup> They do not, however, do so in *all* contexts in which life, liberty, or property is at stake. Rather, since the late 1930s, judges have followed the Supreme Court's lead in distinguishing between “fundamental” rights, burdens on which receive exacting judicial scrutiny, and mere “liberty” interests that receive more deferential scrutiny.<sup>280</sup> While the doctrines governing tiers of heightened scrutiny may be eroding, the lack of judicial protection of economic liberty in particular remains entrenched.<sup>281</sup>

The story of the emergence of the tiers of scrutiny—anticipated in a famous footnote in *United States v. Carolene Products*,<sup>282</sup> and later given an elaborate theoretical defense by John Hart Ely in his 1980 book, *Democracy and Distrust*<sup>283</sup>—has been told repeatedly. We will not recount it again here.

One of us has argued that both the original “Footnote Four” framework and its present incarnation contradict the express rule of construction provided by the Ninth Amendment by relegating

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279. See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016).

280. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

281. See *Whole Woman's Health*, 136 S. Ct. at 2300, 2309 (holding unconstitutional state restrictions on the unenumerated fundamental right to terminate a pregnancy after applying the undue burden test, and rebuking the lower court for “equat[ing] the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue”).

282. *Carolene Prods. Co.*, 304 U.S. at 152 n.4.

283. See generally ELY, *supra* note 4, at 75-77.

rights not textually “enumerated in the Constitution” to a less-demanding standard of judicial review *because* they are not enumerated.<sup>284</sup> But *some* form of tiered scrutiny might be defended, not on the prohibited ground that some rights are textually enumerated and others are not, but on the basis of concerns about institutional competence.

Specifically, given that the judiciary is institutionally incapable of thwarting all legislative opportunism, and will inevitably err in identifying instances of opportunism, perhaps it makes sense for judges to allocate scarce resources towards thwarting malign legislative behavior that the judiciary is just better equipped to identify and away from legislative behavior that it is more likely to err in identifying. So, if judges are more likely to err in identifying arbitrary burdens on economic liberty than they are in identifying arbitrary burdens on, for instance, political speech, it might make sense for judges to concentrate on the latter. As Neil Komesar has observed:

The resource costs of judicial review ... depend on the ease with which courts can distinguish valid from invalid governmental activity, and their ability to formulate and articulate a corresponding clear test. Clear tests mean fewer cases brought, litigated, and appealed, and therefore a smaller burden on the judiciary. Such clarity, however, involves a degree of arbitrariness or, more gently, generalization, which risks invalidating good legislation or accepting bad....

As the ... complexity of governmental regulation increased in the 1930s, the costs of court involvement also increased. Although many factors may have contributed to the retreat from economic due process which occurred, the sizable and increasing price tag for judicial involvement and the failure of judicial strategies to control these rising costs pushed relentlessly in that direction.<sup>285</sup>

We agree with Komesar that the emergence of tiered scrutiny can be understood in part as a response to a perceived need to economize

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284. See BARNETT, *supra* note 268, at 253, 255.

285. Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 691-93 (1988).

on scarce judicial resources in an increasingly complex policy environment.<sup>286</sup> We also agree that the courts need to be able to “distinguish valid from invalid governmental activity” with some degree of dispatch, given their heavy dockets and scarce judicial time and energy.<sup>287</sup> But Komesar’s analysis overlooks how the tiers of scrutiny assumed by *Carolene Products* in 1938 were quite different than today’s. Even if we assume *arguendo* that judicial error rates increase dramatically in the context of evaluating burdens on economic liberty,<sup>288</sup> and that the Court in *Carolene Products* was therefore right to distinguish between economic liberty and other rights (if not for the precise reasons that Justice Harlan Fiske Stone articulated), it does not follow that the current allocation of judicial resources is correct.

In particular, modern rational-basis review often scarcely resembles the inquiry into rationality that the judges conducted in the twenty-four years between 1931—when the Supreme Court decided *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*<sup>289</sup>—and 1955—when the Court in *Williamson v. Lee Optical* embraced what can be called “conceivable-basis review.”<sup>290</sup> It is not obvious that reducing the error costs associated with wrongly upholding pretended legislation by replacing “conceivable-basis review” with a standard

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286. *See id.* at 691.

287. *See id.*

288. The claim that the legislative process is less likely to generate arbitrary products in the context of economic regulation than it is in other contexts has been forcefully challenged. *See* William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 398-99 (1988) (drawing upon public choice theory to advance the argument that the majoritarian legislatures cannot be counted upon to respect citizens’ rights in *any* respect). But even if legislators are equally likely to enact arbitrary economic regulations as to enact arbitrary speech regulations, it does not follow that judges are equally likely to identify the first set of regulations correctly as they are the second set; they may well be better at identifying the second set. We stress that we are assuming institutional facts that might justify some form of tiered scrutiny in order to critique the current form of tiered scrutiny, not making a normative argument for a particular form of tiered scrutiny. We argue here only that the rationality review articulated in *Carolene Products* is well-calculated to implement the spirit of the due process of law.

289. *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931).

290. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

that closely resembles the rationality review described in *Carolene Products* itself would strain the judiciary to a breaking point. After all, the *Carolene Products* Court did not think it would.<sup>291</sup>

To explain how the rationality review described in *Carolene Products* would give legislatures the space that they need to exercise their constitutional powers for the benefit of the public while safeguarding the public against opportunism, we look to Justice Stone's opinion for the Court in *Carolene Products* and the lower court decision that was reversed in *Lee Optical*.

### 1. Rationality Review: Means-Ends Fit

Constitutional scholars all remember Justice Stone's affirmation that "regulatory legislation affecting ordinary commercial transactions" would henceforth be presumed constitutional.<sup>292</sup> Few, however, seem to have noticed the length to which he went to make plain that this presumption was rebuttable on the basis of facts presented to a court.<sup>293</sup> Justice Stone explained that "no pronouncement of a legislature can forestall attack upon the constitutionality of the prohibition which it enacts"; that "the constitutionality of a statute predicated upon the existence of a particular *state of facts* may be challenged by *showing to the court* that those facts have ceased to exist"; and that "the constitutionality of a statute, valid on its face, may be assailed by *proof of facts* tending to show that the statute as applied to a particular article is without support in reason."<sup>294</sup> He also assumed that "a statute would *deny due process* which precluded the *disproof ... of all facts* which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis."<sup>295</sup>

Stone's formulation of rationality review contemplates that litigants would be able to test legislation "by proof of facts" concerning

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291. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938) (clarifying that the judiciary may explore whether facts exist to support "a rational basis for legislation whose constitutionality is attacked").

292. *Id.* at 152.

293. See *id.* at 153.

294. *Id.* at 152-54 (emphasis added).

295. *Id.* at 152 (emphasis added).

its irrationality.<sup>296</sup> Thus, legislation is not to be pronounced unconstitutional “unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”<sup>297</sup> If “facts made known or generally assumed” precluded that assumption, legislation *would be* pronounced unconstitutional.<sup>298</sup> And in *Carolene Products* the Court did consider record evidence—however spurious<sup>299</sup>—about the alleged essential health benefits of milk fat that had been presented to Congress.

From 1910<sup>300</sup> to 1976,<sup>301</sup> only a three-judge panel consisting of two federal district court judges and one circuit court judge, selected by the chief judge of the district, could declare a state or federal statute unconstitutional.<sup>302</sup> As Michael Morley has detailed, “[t]hroughout much of the twentieth century, Congress prohibited individual federal judges from enjoining federal laws; only three judge panels were permitted to adjudicate claims for injunctive relief against allegedly unconstitutional federal statutes.”<sup>303</sup>

In 1954, a three-judge panel of the Western District of Oklahoma took the Court in *Carolene Products* at its word. The lower court dutifully stated that “all legislative enactments are accompanied by a presumption of constitutionality,” and that “[a] court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.”<sup>304</sup>

296. *Id.* at 153-54.

297. *Id.* at 152.

298. *Id.*

299. See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 417 (explaining that although “[t]he case against filled milk had the appearance of scientific rigor,” it was “utterly unproved”).

300. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557 (1910) (repealed 1976).

301. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1-2, 90 Stat. 1119, 1119 (1976).

302. See Comment, *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 205, 205 (1971) (describing the origins, benefits and procedural burdens of the three judge panel act).

303. Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 631 (2017); see also Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 113-18 (2008); Michael E. Solimine, *Ex parte Young: An Interbranch Perspective*, 40 U. TOL. L. REV. 999, 1002-03 (2009).

304. *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 132 (W.D. Okla. 1954).

That the challenge to the statute's constitutionality was heard by a panel consisting of a circuit court judge, the chief judge of the district, and a district court judge<sup>305</sup> is itself evidence that rationality review entailed a meaningful evaluation of the record evidence and argument presented to the court by the parties at trial.

True to its mandate, the panel engaged in such an evaluation. The Oklahoma statute in question, among other things, forbade anyone but a licensed optometrist or ophthalmologist to “[f]it, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person” or to replace any lenses without a written prescription from an Oklahoma licensed ophthalmologist or optometrist.<sup>306</sup>

Writing for the panel, District Judge Wallace noted that written prescriptions contain no instructions on how to fit glasses to the face, indicating that the fitting “can skillfully and accurately be performed” without specialized training.<sup>307</sup> He highlighted the fact that the device used to “measure[] the power of the existing lense and reduce[] it to prescriptive terms”—the “lensometer”—was “not operated by the physician but by a clerk in the office.”<sup>308</sup>

On the basis of these findings and other record evidence, the court concluded that “[t]he means chosen by the legislature does not bear ‘real and substantial relation’ to the end sought, that is, better vision.”<sup>309</sup> Those means served only “to place within the exclusive control of optometrists ... the power to choose just what individual opticians will be permitted to pursue their calling”—an end to which the legislature was not competent.<sup>310</sup> The court did not directly accuse the legislature of naked protectionism. It did, however, determine that the discrimination against opticians was not rationally justified as a health measure on the basis of the facts in the record, and was therefore unconstitutional.<sup>311</sup>

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305. *Id.* at 131.

306. OKLA. STAT. tit. 59, §§ 941-942 (1953).

307. *Lee Optical*, 120 F. Supp. at 135.

308. *Id.* at 136-37.

309. *Id.* at 138 (citing *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928)).

310. *Id.* at 137 n.20.

311. *Id.* at 143.

The Supreme Court, of course, reversed,<sup>312</sup> applying a standard of review that is difficult to imagine any legislation failing to satisfy. Writing for the Court, Justice William O. Douglas made plain that, henceforth, legislation reviewed under the Court's constitutional default standard of review would be upheld if the Court could *conceive* of any hypothetical reason why the legislature *might* have enacted that legislation—even if that reason found no support in the record.<sup>313</sup>

In the instant case, despite acknowledging that it “appears that in many cases the optician can easily supply the new frames or new lenses without reference to the old written prescription,” Douglas hypothesized that the “legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation of the fitting of eyeglasses.”<sup>314</sup> That there was no evidence in the record that the legislature had so concluded was immaterial to Douglas's analysis.<sup>315</sup> The move from a realistic evidence-based inquiry into whether legislatures were actually trying to achieve proper ends to a formalist hypothetical inquiry into whether the legislature might have had proper ends in sight, was significant.

The new standard would be carefully and precisely articulated by Justice Clarence Thomas in an otherwise-obscure case: *FCC v. Beach Communications*.<sup>316</sup> Writing for the Court, Justice Thomas stated that judges applying rational-basis review must uphold legislation “if there is any reasonably conceivable state of facts that could provide a rational basis for [it]”; that those challenging legislation must “negative every conceivable basis which might support it”; and that the government need not justify legislation with “evidence or empirical data.”<sup>317</sup> As Justice John Paul Stevens ruefully observed in concurrence, “conceivable[-basis review]” is “tantamount to no review at all.”<sup>318</sup>

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312. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

313. *Id.* at 487-88.

314. *Id.* at 487.

315. *Id.* at 487-88.

316. 508 U.S. 307, 313-16 (1993).

317. *Id.*

318. *Id.* at 323 n.3 (Stevens, J., concurring).



The *Carolene Products* Court was on solid ground in assuming that it would deny due process to allow the government to forestall constitutional challenges by simply asserting the legitimacy of its ends or to deny litigants the ability to demonstrate that legislation was arbitrary.<sup>319</sup> Yet, that is effectively what the “conceivable-basis” standard of review that Justice Douglas articulated enables.<sup>320</sup>

2. *Good-Faith Exercises of Legislative Discretion:  
Smoking out Pretext*

We have seen how, in *McCulloch*, Chief Justice Marshall imposed a judicially administrable limiting principle on the discretion of Congress to enact laws that are necessary and proper for carrying into execution its discretionary powers.<sup>321</sup> His principle is worth repeating:

[S]hould Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful *duty* of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.<sup>322</sup>

In other words, courts are *required* to determine whether the discretion afforded Congress to enact laws that are “necessary and proper”<sup>323</sup> have been exercised in good faith. Or, as Hamilton explained in his defense of the constitutionality of a national bank, Congress “has only a right to pass such laws as are necessary and proper to accomplish the objects intrusted [sic] to it,” and that “[t]he relation between the measure and the end ... must be the criterion of constitutionality.”<sup>324</sup>

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319. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-54 (1938).

320. See *Lee Optical*, 348 U.S. at 487-88.

321. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819).

322. *Id.* (emphases added).

323. See U.S. CONST. art. I, § 8, cl. 18.

324. Alexander Hamilton, *Opinion of Alexander Hamilton on the Constitutionality of a National Bank* (Feb. 23, 1791), in LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 98 (photo. reprint 1967) (M. St. Clair Clarke & D. A. Hall eds., 1832).

The rationality review employed by the lower court in *Lee Optical* to evaluate the “relation between the measure and the end” can be understood as an effort to determine whether the statute in question was a good-faith exercise of the legislative power. In contrast, conceivable basis review is a formalist shell—it preserves only the appearance of a requirement to show that a law is necessary and proper to accomplish an end entrusted to state governments.<sup>325</sup>

The due process of law to which a person is entitled before being deprived of his or her life, liberty, or property requires a realistic evaluation of a contested statute, not a formalistic one. We propose that such an inquiry ought to operate as follows: Once a party has made a threshold showing that he or she stands to be deprived of his or her life, liberty, or property, the government should be made to offer a reason for its actions and to bear the burden of producing evidence in support of its actions. Judges should then determine whether the government has demonstrated that its actions are calculated to achieve a constitutionally proper end or ends—whether the end sought is one to which the legislature is competent.

We have elsewhere described a theory of group agency that makes the concept of a legislative end epistemologically coherent, notwithstanding the reality that different legislators may have different motivations and expectations, and we will not reiterate it here.<sup>326</sup> We stress, however, that such ends can be inferred from the text, structure, and likely effects of legislation, and thus need not entail direct inquiry into the motivations or expectations of any particular individuals.<sup>327</sup>

Requiring the government to offer a reason for its actions, and to bear the burden of producing evidence that its actions are calculated to achieve a constitutionally legitimate end, comports with the spirit of the Due Process of Law Clauses. Government officials are in control of the evidence concerning the ends that legislation is designed to achieve.<sup>328</sup> Placing the burden of producing evidence on

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325. See *supra* note 318 and accompanying text.

326. Barnett & Bernick, *supra* note 10, at 50-51.

327. *Id.* at 51.

328. See *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362 (11th Cir. 2002) (explaining that “[a] presumption is generally employed to benefit a party who does not have control of the evidence on an issue,” and that it would therefore be “unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that

the government is likely to yield more evidence than would otherwise be available.<sup>329</sup> The government, after all, is the least-cost producer of evidence related to the connection between its policies and any proper end that those policies are said to be designed to accomplish. Placing the burden of production on the government in turn allows judges to better determine whether an action is necessary to achieve a constitutionally proper end.

We have elsewhere argued that, because all judges, legislators, and executive-branch officials receive their powers over resources belonging to others after each having made a voluntary promise to abide by the terms of “this Constitution,” such officials are properly understood to be fiduciaries.<sup>330</sup> Accordingly, they ought to exercise their delegated powers in good faith, consistently with the ends that they have been empowered to pursue, rather than in pursuit of other ends.

Fiduciary law recognizes that excessive policing of fiduciaries by generalist judges will do beneficiaries more harm than good.<sup>331</sup> Besides discouraging competent would-be fiduciaries from entering into fiduciary relationships in the first place, such monitoring may defeat the purposes for which beneficiaries grant their fiduciaries discretion by preventing those beneficiaries from receiving the benefits of knowledge and judgment that both beneficiaries and judges lack.<sup>332</sup>

Yet, the risk of opportunistic behavior is too great, and the costs that it imposes on beneficiaries too high for judicial review to be toothless, whether the fiduciary be private or public.<sup>333</sup> Similar costs and benefits attach to policing legislation to protect the rights, privileges, and immunities of the People, who may not divest themselves of the burdens of legislation the way shareholders may divest themselves of stock.<sup>334</sup>

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element of the claim”).

329. *See id.* (explaining that when a party has a burden of production, they “must present evidence ‘to rebut or meet the presumption.’” (quoting FED. R. EVID. 301)).

330. *See* Barnett & Bernick, *supra* note 10, at 23-26.

331. *See* Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 603-04 (2013) (providing rationale for Delaware courts’ use of the business judgement rule, which gives fiduciaries significant room for error).

332. *Id.*

333. *See* Barnett & Bernick, *supra* note 10, at 29-32.

334. *Id.*

### III. THE PROPER ENDS OF LEGISLATIVE POWER

To constitute a law, a legislative act must be “necessary and proper” to achieve a constitutionally proper end.<sup>335</sup> In considering the scope of the Due Process of Law Clauses, we need not present a theory of the full scope of federal or state legislative power. Instead, we need only consider the propriety of that subset of enactments that deprive a person of his or her life, liberty, or property. We have shown that such laws must be consistent with constitutionally proper ends.<sup>336</sup> In this Part, we identify these proper ends.

#### A. *The Ends of Congressional Power: Few and Defined*

That the Constitution limits the ends—or what were referred to as “objects”<sup>337</sup>—of the *federal* government is readily apparent; and those ends are easy to identify. Article I vests “[a]ll legislative Powers *herein granted*” in “a Congress ... which shall consist of a Senate and a House of Representatives.”<sup>338</sup> Article I, Section 8, and Article IV, Sections 1 and 3 list the permissible ends of federal statutes.<sup>339</sup> To this list other ends have been added in a number of Amendments.<sup>340</sup> The Tenth Amendment then reaffirms that all powers that have not been so “delegated to the United States by the Constitution ... are reserved to the States ... or to the people.”<sup>341</sup>

Among the powers delegated to Congress is the incidental power to pass legislation that is “necessary and proper for carrying into Execution” the ends that are provided in Article I and elsewhere in the Constitution.<sup>342</sup> The Necessary and Proper Clause is not a grant of additional power—it is an acknowledgement of a power that would exist absent its textual expression.<sup>343</sup> (The inclusion of the

335. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411-12 (1819) (emphasis omitted).

336. See *supra* notes 260-69 and accompanying text.

337. THE FEDERALIST NO. 45, *supra* note 12, at 206 (James Madison).

338. U.S. CONST. art. I, § 1 (emphasis added).

339. See *id.* art. I, § 8; *id.* art. IV §§ 1, 3.

340. See, e.g., *id.* amends. XIII, § 2, XIV, § 5, XV, § 2, XVI, XVIII, XIX, XXIV, § 2, XXVI, § 2.

341. *Id.* amend. X.

342. *Id.* art. I, § 8, cl. 18.

343. See GARY LAWSON ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE, 111-14 (2010).

word “expressly” in the Tenth Amendment—as it had been in the Articles of Confederation—would have negated this implicature.)<sup>344</sup>

The claim that there was any broad agreement concerning the scope of Congress’s powers during the Founding Era might be questioned in light of the constitutional debates that immediately broke out after ratification. When then-Secretary of the Treasury Alexander Hamilton proposed the incorporation of a national bank to a Federalist-dominated first Congress in 1791, a flurry of opinions on the subject were issued by Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Hamilton himself.<sup>345</sup> James Madison, then serving as a member of the first Congress, delivered a lengthy speech concerning the constitutionality of the bank bill, applying a list of principles that he believed ought to guide consideration of whether assertions of government power were authorized by the Constitution.<sup>346</sup> Madison contended that it was “not possible to discover in [the Constitution] the power to incorporate a Bank.”<sup>347</sup>

Rather than focus on the disagreements—much of which, we submit, concerns the particulars of a national bank—we wish to stress the commonality between the opinions of Madison and Hamilton with respect to incidental powers. Madison concluded that the Necessary and Proper Clause must be “limited to means necessary to the end, and incident to the nature of the specified powers,”<sup>348</sup> and he rejected any interpretation that would “give an unlimited discretion to Congress” and thus “destroy [ ]” the “essential characteristic of the Government, as composed of limited and enumerated powers.”<sup>349</sup> But Madison did not deny that the national government

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344. *Id.*

345. See Letter to George Washington from Edmund Randolph (Feb. 12, 1791), NAT’L ARCHIVES: FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-07-02-0200-0001> [https://perma.cc/3PAT-KL9T]; Letter to George Washington from Thomas Jefferson (Feb. 15, 1791), NAT’L ARCHIVES: FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-07-02-0207> [https://perma.cc/K9LN-UBC8]; Letter to George Washington from Alexander Hamilton (Dec. 13, 1790), NAT’L ARCHIVES: FOUNDERS ONLINE, <http://founders.archives.gov/documents/Washington/05-07-02-0035> [https://perma.cc/G7WV-7NPS].

346. 1 ANNALS OF CONG. 1944 (1791) (Joseph Gales ed., 1834).

347. *Id.* at 1896.

348. *Id.* at 1898.

349. *Id.*

had unenumerated, incidental powers to carry enumerated powers into execution.<sup>350</sup> Indeed, he acknowledged that “some discretionary power, and reasonable latitude must be left to the judgment of the legislature” in pursuing the “great ends of government” set forth in the Constitution.<sup>351</sup>

Likewise, in defending the constitutionality of his bank proposal, Hamilton did not argue that Congress enjoyed unlimited discretion. To the contrary, he affirmed that government power was *inherently* limited, writing that “no government has a right to do merely what it pleases”<sup>352</sup>—which is a succinct definition of an arbitrary power. As we noted above, like Madison, Hamilton maintained that the national government created by the Constitution “has only a right to pass such laws as are necessary and proper *to accomplish the objects intrusted to it,*” and stated that “*the relation between the measure and the end ... must be the criterion of constitutionality.*”<sup>353</sup>

Nearly thirty years later, Chief Justice John Marshall would reach the same conclusion as Hamilton. In *McCulloch*, Marshall set forth his own now canonical construction of the Necessary and Proper Clause: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”<sup>354</sup> Apart from some loose talk about “convenien[ce],”<sup>355</sup> the actual construction adopted by Marshall in *McCulloch* was largely consistent with both Madison and Hamilton’s insistence that some means-end scrutiny—“the relation between the measure and the end”—was required to set the boundaries of incidental powers.<sup>356</sup>

In addition, as we have noted, Marshall advocated a judicial inquiry into whether legislative claims to be pursuing an enumerated object or end are asserted in good faith or are instead pretextual.<sup>357</sup> Marshall stressed that the Court would be bound to invalidate

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350. See *supra* note 176 and accompanying text.

351. 4 ELLIOT’S DEBATES, *supra* note 111, at 423 (statement of James Madison).

352. Hamilton, *supra* note 324, at 98 (emphasis omitted).

353. *Id.* (emphases added).

354. 17 U.S. (4 Wheat.) 316, 421 (1819).

355. *Id.* at 422.

356. See *supra* notes 348-53 and accompanying text.

357. See *supra* note 176 and accompanying text.

legislative acts that, although cast as measures calculated to achieve legitimate ends, were in fact efforts to usurp powers not delegated to Congress.<sup>358</sup>

Identifying such pretextual legislation in particular cases and controversies could necessarily entail pursuing the government's true ends by measuring the fit between the government's purported ends and its choice of means, as both Hamilton and Madison had favored. Otherwise, Congress could in practice do what it pleased, so long as it pointed to a proper power and claimed that it was seeking to accomplish an object "intrusted to [the government]."<sup>359</sup>

In short, Marshall favored judicial scrutiny of the good faith of congressional assertions of powers—the basic approach we are proposing here. On Marshall's account, Congress may not act to accomplish ends that it is not constitutionally empowered to pursue on the pretext of pursuing proper ends act honestly—rather than pretextually. And judges are bound to keep Congress honest.<sup>360</sup>

Our claim can therefore be summarized thus: (1) Congress has a constitutional duty to act in ways that are necessary to carry into effect proper enumerated or incidental powers; (2) legislative enactments that are not necessary or proper are not made "pursuant to" the Constitution and, therefore, do not become part of the supreme law of the land; (3) the Fifth Amendment's Due Process of

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358. *McCulloch*, 17 U.S. (4 Wheat.) at 423 ("[S]hould Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." (emphasis added)).

359. Hamilton, *supra* note 324, at 98. As we explain in Barnett & Bernick, *supra* note 10, the Supreme Court's decision in *U.S. v. Darby*, 312 U.S. 100 (1941), rejected *sub silentio* this limitation of congressional power identified by Marshall. Barnett & Bernick, *supra* note 10, at 43-44.

360. Marshall would subsequently draw upon fiduciary principles in defending his opinion in *McCulloch*, as well as rely on the limiting principle of the "pretext" passage to avoid the charge that the opinion of the Court was too latitudinarian. See John Marshall, *A Friend of the Constitution I*, ALEXANDRIA GAZETTE, July 15, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 207, 211 (Gerald Gunther ed., 1969) ("[T]he whole political system is founded on the idea, that the departments of government are the agents of the nation."); John Marshall, *A Friend of the Constitution III*, ALEXANDRIA GAZETTE, July 2, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, 173 ("Congress certainly may not, under the pretext of collecting taxes, or of guaranteeing to each state a republican form of government, alter the laws of descents; ... the means [must] have a plain relation to the end.").

Law Clause forbids the federal government from depriving individuals of life, liberty, or property without a judicial process to ensure that such a deprivation is pursuant to the law of the land; (4) thus, this judicial process includes ascertaining whether the government's actions are necessary and proper means of carrying into execution a power delegated to Congress, rather than delegated to another branch of government, or not delegated at all.

We do not claim that particular substantive limitations on congressional power are contained in the text of the Fifth Amendment. Rather, we are claiming that the Fifth Amendment expressly recognizes the fundamental right to a *judicial process* to ensure that someone's life, liberty, or property is not being deprived, except by a constitutionally valid exercise of legislative power. The exact scope of these legislative powers is specified elsewhere.<sup>361</sup> In the case of the federal government, it is to be found in the limited objects or powers identified in the text of the Constitution.<sup>362</sup> In the case of states, it is to be found both in the texts of state constitutions and in the inherent limits on all legislative power, whether or not such limits are expressly acknowledged in a state constitution.<sup>363</sup> We now turn to these limits.

### *B. The Ends of State Legislative Power: General but Not Unlimited*

Because the powers of state governments are not enumerated in the federal Constitution,<sup>364</sup> determining whether state legislators are constitutionally bound to pursue any particular set of ends is more complicated than determining whether federal officials are so bound. After all, Madison described the powers of state governments as “numerous and indefinite,”<sup>365</sup> and the Tenth Amendment refers to “powers ... reserved to the States respectively, or to the people,” without specifying *which* remaining powers are reserved to states and which are reserved to the people.<sup>366</sup>

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361. *See, e.g.*, U.S. CONST. art. I, § 8.

362. *See, e.g., id.*

363. *See, e.g., id.*; VA. CONST. art IV, § 14.

364. *See* U.S. CONST. amend. X.

365. THE FEDERALIST NO. 45, *supra* note 12, at 208 (James Madison).

366. U.S. CONST. amend. X.



Nevertheless, in the wake of the ratification of the Fourteenth Amendment, state courts and, later, the Supreme Court needed to develop a construction of the scope of state power to give effect to the text of both the Fourteenth Amendment's Due Process of Law Clause and its Privileges or Immunities Clause. Once the latter had effectively been redacted by the Court in *The Slaughter-House Cases*<sup>367</sup> and *United States v. Cruikshank*,<sup>368</sup> the Due Process of Law Clause was made to do most of the work protecting individual rights against state legislation.<sup>369</sup>

As we have seen, the concepts of the "law of the land" and "due process of law" had come to be understood to forbid not only interference with purely procedural rights but also deprivations of vested rights and arbitrary distinctions between persons and groups, as well as other deprivations of life, liberty, or property that served no proper governmental end.<sup>370</sup>

While the text of the Constitution specifies the ends or objects of congressional power by which the constitutionality of federal legislation can be assessed,<sup>371</sup> the substantive protection from arbitrary power provided by the Fourteenth Amendment's Due Process of Law Clause<sup>372</sup> would be empty without an implementing construction of the appropriate ends of state power, against which an act of the legislature can be evaluated.<sup>373</sup> After 1868, courts adopted and refined the police power doctrine that state courts had

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367. 83 U.S. 36, 78-80 (1873).

368. 92 U.S. 542, 565-66 (1876).

369. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). It should be clear by this point that we are not defending review of the content of legislation under the Fourteenth Amendment's Due Process of Law Clauses as a mere second-best compensating adjustment for the redaction of the Privileges or Immunities Clause. In a world with a reliably enforced Privileges or Immunities Clause, judges and legislators would still be required by the original meaning of the Due Process of Law Clause to evaluate the substance of legislation when the Privileges or Immunities Clause did not apply. People who are not U.S. citizens, for instance, are not covered by the Privileges or Immunities Clause, but would be able to challenge arbitrary deprivations of life, liberty, or property under the Due Process of Law Clause. But the just powers of Congress over noncitizens may differ from its powers over citizens of the United States, who may enjoy additional privileges or immunities.

370. *See* discussion *supra* Part I.D.

371. *See* U.S. CONST. art. I, §§ 1, 8-10.

372. *See* U.S. CONST. amend. XIV, § 1.

373. *See* discussion *supra* Part I.D.

begun to develop during the antebellum period.<sup>374</sup> It is to this judicial construction we now turn.

### 1. *The Origins of the “Police Power” Before 1868*

At the time of the framing, the phrase “internal police” or “police” was used to refer generally to the reserved powers of the states.<sup>375</sup> For example, writing for the Court in *Gibbons v. Ogden*, Chief Justice Marshall distinguished between “regulations of [interstate] commerce” and police power regulations.<sup>376</sup> The latter encompassed “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.”<sup>377</sup>

The police power was not a new concept—it could be traced back centuries.<sup>378</sup> As Markus Dubber has explained, the historical police power authorized a powerful few to rule over their supposed inferiors.<sup>379</sup> It was rooted in a conception of state government as household governance—the householder’s absolute power to arrange the household for the common good of the whole family served as a model for absolute continental monarchies.<sup>380</sup>

Such an unlimited concept, however, was in pronounced tension with the republican form of government authorized by the Constitution. In addition, it would ill-serve the needs of courts to find a judicially administrable line against which exercises of state power challenged as arbitrary could be measured. So, in nineteenth-century America, the police power was given a more limited

374. See *infra* Part III.B.2.

375. See BARNETT, *supra* note 268, at 324-25, 328 (surveying usage). For instance, Pennsylvania incorporated a provision into its constitution that stated that “the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same.” *Constitution of Pennsylvania—September 28, 1776*, AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/pa08.asp](http://avalon.law.yale.edu/18th_century/pa08.asp) [<https://perma.cc/F492-TFGD>].

376. 22 U.S. (9 Wheat.) 1, 203 (1824).

377. *Id.*

378. For a comprehensive history of the police power across continents and centuries, see generally MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* (2005). For an overview of the police power as both a source of and limitation upon state police power in America, see generally Daniel B. Rodriguez, *The Inscrutable (Yet Irrepressible) State Police Power*, 9 N.Y.U. J.L. & LIBERTY 662 (2015).

379. See DUBBER, *supra* note 378, at 3.

380. See *id.* at 48-50.

meaning.<sup>381</sup> While space constraints prevent us from examining the origins and doctrinal development of the police power in detail, we can sketch its general contours.

Judges and legal commentators evaluating exercises of state power under state constitutions frequently noted the difficulty of defining the contours of the police power.<sup>382</sup> Judges nonetheless made efforts to confine the police power to certain objects and to determine whether government officials were *actually* pursuing those objects when they invoked the police power.<sup>383</sup> The police power was sometimes conceptualized as a means of enforcing a common law maxim governing the law of nuisance—*sic utere tuo, ut alienum non laedas*—use your own property in such a way that you do not injure other people's.<sup>384</sup> An influential 1843 opinion, written by Judge Lemuel Shaw,<sup>385</sup> distilled it thus:

We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.<sup>386</sup>

In the early nineteenth century, judicial scrutiny of legislative ends was not particularly rigorous. Caleb Nelson observes that judges limited themselves almost exclusively to the face of statutes in evaluating them.<sup>387</sup> Consider the 1833 case of *Hoke v. Henderson*, which saw the North Carolina Supreme Court maintaining that a

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381. See discussion *infra* Part III.B.2.

382. DUBBER, *supra* note 378, at 120 (“Virtually every definition of the police power was accompanied by the remark that it cannot be, and has not been, defined ... [it] ‘has remained without authoritative or generally accepted definition.’” (quoting ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS* iii (1904))).

383. See DUBBER, *supra* note 378, at 120-21.

384. See, e.g., *State v. Buzzard*, 4 Ark. 18, 41 (1842); *State v. Glen*, 52 N.C. 321, 327 (1859); *Shaw v. Kennedy*, 1 N.C. (Taylor) 158, 160, 163 (1817); *Thorpe v. Rutland*, 27 Vt. 140, 149 (1855).

385. See *Commonwealth v. Alger*, 61 Mass. 53, 64 (1843).

386. *Id.* at 84-85.

387. See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790 (2008).

legislature could not validly use its admitted power over other aspects of the clerks' offices *for the purpose of* expelling clerks from office.<sup>388</sup> Judge Ruffin's opinion noted that "if the law [were] couched in general terms, so that the Court, which cannot inquire into motives not avowed, could not see that the act had its origin in any other consideration but public expediency," the court would "be obliged to execute it as a law."<sup>389</sup>

Crucially, Ruffin added, such a general enactment, if designed to accomplish an end *not* grounded in public expediency but simply to expel the clerks, would be given effect by judges "not because it was constitutional, but because the Court could not see its real character, and therefore could not see that it was unconstitutional."<sup>390</sup> The implication was that such an enactment would indeed *be* unconstitutional but that judges could not invalidate it. In declining to inquire into legislative ends, judges sometimes advanced arguments based on the separation of powers, emphasizing the respect owed to members of a coordinate branch and that branch's unique province and duty to legislate.<sup>391</sup>

We stress that this judicial hesitancy or restraint is wholly separate from identifying the substantive scope of a state's police power. It is downstream from a vision of the judicial role—a vision that is itself a constitutional construction, not part of the original meaning of the text of the Fourteenth Amendment.

If judges are textually bound by the original meaning of the Due Process of Law Clauses of the Fifth and Fourteenth Amendments to evaluate whether legislative enactments depriving persons of their lives, liberty, or property are arbitrary—as we maintain they are—there is no textual bar against judges realistically evaluating "the relation between the measure and the end"<sup>392</sup> when those ends are

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388. See 15 N.C. 1, 29-30 (1833); see also *Jordan v. Overseers of Dayton*, 4 Ohio 294, 309-10 (1831) ("If the state should pass a law for the purpose of destroying a right created by the constitution, this court will do its duty [and hold it void]; but an attempt by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we can not but regard as a legitimate exercise of power.").

389. See *Hoke*, 15 N.C. at 26.

390. *Id.* at 27.

391. See, e.g., *Sunbury & Erie R.R. v. Cooper*, 33 Pa. 278, 286 (1859) ("[T]he judicial authority of the state is instituted to judge of the fulfilment of the duties of private relations, and not to decide whether legislators have faithfully fulfilled theirs.").

392. Hamilton, *supra* note 324, at 98 (emphasis omitted).

cleverly disguised. After the Fourteenth Amendment was enacted, this is just what happened.

*2. Police Power Doctrine After 1868: Securing the Rights  
Retained by the People*

Nineteenth-century judges and commentators never quite confronted—let alone resolved—the tension between the unlimited historical police power and the Constitution’s premise of limited government. But, after the Fourteenth Amendment imposed new federal constraints on state power, judges made efforts to render the police power safe for a constitutional republic<sup>393</sup> in a manner that echoed the Declaration of Independence.

After affirming that “all men are created equal,” and “that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness,” the Declaration offered the following concise summary of the purpose of all legitimate government: “That *to secure these rights*, Governments are instituted among Men, deriving their *just powers* from the consent of the governed.”<sup>394</sup> According to this vision, “just powers” are those which are delegated by “the governed” in order to secure the individual rights of “Life, Liberty and the pursuit of Happiness.”<sup>395</sup>

Thomas M. Cooley, the Chief Justice of the Michigan Supreme Court and a professor at the University of Michigan, as well as its Dean,<sup>396</sup> formulated the question confronting judges in any case involving a purported exercise of the police power thus: “[W]hether the State exceeds its *just powers* in dealing with the property and

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393. See Howe, *supra* note 222, at 589 (examining police power cases and concluding that they are unified by the Lockean premise that “government cannot take from any person life, liberty or property except when such a taking is necessary to secure life, liberty and property to the individuals generally who compose society”). For an argument that the attribution of the police power to American governments was a negative development, despite such efforts to “limit the damage,” see HAMBURGER, *supra* note 98, at 466 n.a (contending that it has “undermined the specialized and enumerated powers established by American constitutions”).

394. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

395. *Id.*

396. See Thomas M. Cooley, MICH. L. (2009), [https://www.law.umich.edu/historyandtraditions/faculty/Faculty\\_Lists/Alpha\\_Faculty/Pages/Cooley\\_ThomasM.aspx](https://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Pages/Cooley_ThomasM.aspx) [https://perma.cc/PH7Q-GQ6R].

restraining the actions of individuals.”<sup>397</sup> What were those “just powers?” Cooley articulated a construction of the police power that is consistent with the premises of the Declaration:

The police of a State ... embraces its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of the rights by others.<sup>398</sup>

Cooley made no effort to create a comprehensive list of proper state powers, believing that one could not enumerate all of “the various cases in which the exercise by one individual of his rights may conflict with a similar exercise by others.”<sup>399</sup> Instead, he focused on whether the state’s actions were calculated to safeguard the rights of individuals.

In an impressive survey of late nineteenth-century police power decisions, Howard Gillman argued that their dominant theme was hostility to class legislation—legislation that singled out particular groups for burdens and benefits, on the pretext of a public-oriented goal.<sup>400</sup> Cooley’s focus on natural and civil rights—as well as that of courts that cited him as an authority—revealed Gillman’s analysis to be incomplete.<sup>401</sup>

While judges in the late nineteenth century were certainly opposed to class legislation, numerous opinions link concerns about the singling out of particular groups with concerns about violations

397. See COOLEY, *supra* note 229, at 572 (emphasis added).

398. *Id.*

399. See *Id.* at 746.

400. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 102-04 (1993); see also V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 *DUKE L.J.* 955, 964 (2009) (describing how state courts struck down laws that were not “general and public,” and which operated unequally during the antebellum period).

401. For an extensive critique, see generally David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 *GEO. L.J.* 1 (2003). For a defense of Gillman’s emphasis on class legislation, see generally Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 *B.U. L. REV.* 881 (2005).

of individual rights.<sup>402</sup> Still other police power cases did not deploy *any* class legislation analysis, and focused solely on whether challenged measures were calculated to promote a proper end.<sup>403</sup>

For example, in the 1885 case of *In re Jacobs*, the New York Court of Appeals invalidated a ban on tenement cigar making after determining that it was “not a health law” and “ha[d] no relation whatever to the public health.”<sup>404</sup> That the court regarded the ban as pretextual legislation can be gleaned from its declaration that “[u]nder the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded,” and from its citation to Chief Justice Marshall’s language concerning pretext in *McCulloch*.<sup>405</sup>

Yet the court also lavished attention upon the fundamentality of the right implicated by the ban: “the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation.”<sup>406</sup> It was because that right was sacred and inalienable that the court considered itself to be duty-bound to determine whether the ban had “at least in fact some relation to the public health, that the public health [was] the end actually aimed at, and that it [was] appropriate and adapted to that end.”<sup>407</sup> Because the court was “not ... able to see” any of those things, it pronounced the act “unconstitutional and void.”<sup>408</sup>

Once the “due process of law” had come to be understood to require an inquiry into whether a legislative act either deprived

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402. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 279-80 (1932) (invalidating legislation on grounds of interference with economic liberty *and* favoritism); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 556 (1923); *Lochner v. New York*, 198 U.S. 45, 64 (1905).

403. *See, e.g.*, *Weaver v. Palmer Bros.*, 270 U.S. 402, 408, 414 (1926) (invalidating as “arbitrary” and “unreasonable” a Pennsylvania statute prohibiting the use of “shoddy” in the manufacture of bedding); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 516-17 (1924) (invalidating as “essentially unreasonable and arbitrary” a Nebraska statute permitting variations from standard bread weights of only two ounces per pound within twenty-four hours after baking); *S. Covington & Cin. St. Ry. v. City of Covington*, 235 U.S. 537, 548-49 (1915) (invalidating as unreasonable a requirement that the temperature of street cars never be permitted to fall below fifty degrees Fahrenheit).

404. 98 N.Y. 98, 114 (1885).

405. *Id.* at 110, 112.

406. *Id.* at 106.

407. *Id.* at 115.

408. *Id.*

individuals of vested rights or was directed at benefitting or burdening particular groups or individuals without furthering any legitimate legislative end, such legislative acts came to be understood as mere “pretended legislation.”<sup>409</sup> But, distinguishing a valid law from pretended legislation would be impossible without some means of distinguishing proper from improper legislative ends.<sup>410</sup>

Giving effect to the letter of the Fourteenth Amendment’s Due Process of Law Clause (and the Privileges or Immunities Clause) thus requires a conception of what the limits of legislative power are—that is, what distinguishes a genuine law from what the Supreme Court would describe as “mere will exerted as an act of power.”<sup>411</sup> What *could* legislatures do, consistent with nineteenth-century police power doctrine?

Legitimate exercises of the police power could be grouped under two headings: regulations and prohibitions. Legislatures were understood to have the just power to make *rightful* activities—activities that do not inherently injure other people—*regular*, that is, specify the modes in which they could be conducted so as to prevent rights violations *ex ante* (rather than relying solely on *ex post* lawsuits for damages).<sup>412</sup> Thus, both the specification of what is required to make contracts legally binding and the specification of speed limits reduce the risk of accidental injury. Legislatures were also understood to have the just power to *prohibit* wrongful activities that inherently injure others, such as theft, murder, or fraud.<sup>413</sup> By securing the individual rights retained by the people in either of these ways, legislatures promoted the public good.<sup>414</sup>

Yet, if perhaps police power jurisprudence was not in fact as incoherent as it was later made out to be by its “realist” critics,<sup>415</sup>

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409. CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856) (statement of Rep. John Bingham) (attacking “pretended legislation” recently passed by Kansas pro-slavery legislature, which he believed to be unconstitutional); *see also* THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776) (charging George III with “combin[ing] with others to subject us to a Jurisdiction foreign to our [C]onstitution, and unacknowledged by our [L]aws; giving his Assent to their [A]cts of pretended Legislation”).

410. *Cf.* BARNETT, *supra* note 268, at 331.

411. *Hurtado v. California*, 110 U.S. 516, 535 (1884).

412. *Cf. id.* at 535-37.

413. *See* BARNETT, *supra* note 268, at 337.

414. *See id.* at 331-33.

415. *See, e.g.,* Morris R. Cohen, *Legal Theories and Social Science*, 25 INT’L J. ETHICS 469,



neither was it ever as entirely coherent as this conceptual grouping might suggest. And it became less coherent over time.<sup>416</sup> In the wake of an evangelical movement to simply obliterate certain categories of property (namely, liquor and lottery tickets) deemed harmful to the welfare of the community—not because their possession or sale violated anyone’s rights but simply because they were deemed immoral—the malleability of the “public morals” prong of police power doctrine became apparent.<sup>417</sup>

Although some scholars have described morals regulation as a context in which American jurists frequently upheld restraints on personal liberty and property rights,<sup>418</sup> John Compton details in *The Evangelical Origins of the Living Constitution* how this description “greatly overstates the nineteenth-century judiciary’s affinity for morals regulation.”<sup>419</sup> Compton shows that while “nineteenth-century judges rarely questioned the legitimacy of traditional forms of morals regulation,” those regulations were justified in terms of “the maintenance of *public* order,” rather than “the eradication of [*private*] vice.”<sup>420</sup> Further, judges at first resisted *novel* morals regulations advanced by evangelical reformers that they deemed incompatible with traditional limits on government power.<sup>421</sup> While upholding traditional liquor licensing laws, judges struck down key components of temperance legislation that banned the manufacture and sale of intoxicating liquors altogether.<sup>422</sup>

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480 (1915); Edward S. Corwin, *Social Insurance and Constitutional Limitations*, 26 YALE L.J. 431, 431-32 (1917); Robert L. Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523, 529 (1927).

416. See Corwin, *supra* note 415, at 431-32.

417. See *infra* notes 418-26 and accompanying text; cf. Corwin, *supra* note 415, at 431-32 (explaining how courts elastically construed the “police power” to allow the state to promote the “general welfare” by legislation “reasonably adapted” to that end).

418. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 314 (1973) (concluding that vested rights “in liquor, lottery tickets, gambling, and sex never appealed much to [nineteenth]-century judges”); WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 149 (1996) (explaining that morals regulation was the “easy case” in which private rights were trumped by public power); Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1427, 1446-47 (1997) (explaining the duality between “economic individualism” and “moral collectivism” traceable to the colonial period).

419. JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* 8 (2014).

420. *Id.* (emphasis added).

421. See *id.*

422. See *id.* at 110-11.

But this resistance did not last. Compton describes how judges sympathetic to the reformers' cause, or simply unwilling to buck popular opinion, upheld liquor and lottery prohibitions by sweeping them within the malleable "morals" prong of the police power.<sup>423</sup> The Supreme Court in *Mugler v. Kansas* would eventually uphold these laws as well, sanctioning the constitutionality of a state prohibition on manufacturing liquor against a due process of law challenge in which the plaintiffs alleged that the law did not fall within the scope of the police powers.<sup>424</sup>

Writing for the Court, Justice John Marshall Harlan insisted that the Court had a solemn duty to invalidate purported police measures with "no real or substantial relation" to the ends of "protect[ing] the public health, the public morals, or the public safety."<sup>425</sup> But, he wrote, "we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks."<sup>426</sup>

As J. I. Clark Hare observed in an 1889 treatise, *American Constitutional Law*, the *Mugler* majority treated liquor as an inherently noxious category of property comparable to poisons or infected merchandise, without any concerted effort to demonstrate that liquor was "hurtful ... when used in moderation."<sup>427</sup> It thereby allowed the police power to escape its traditional bounds without establishing an objective standard for evaluating future claims that a given measure was within the scope of the police power.<sup>428</sup> This lapse would prove costly.

Realists would later point to the Court's acquiescence in such legislation as evidence that police power doctrine did not rest upon any coherent principles but merely upon judicial preferences. Justice Oliver Wendell Holmes, Jr.'s pithy and highly influential *Lochner* dissent provides a famous example. To illustrate that "[t]he liberty of the citizen to do as he likes so long as he does not interfere

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423. *See id.* at 89-90.

424. 123 U.S. 623, 653, 657 (1887).

425. *Id.* at 661.

426. *Id.* at 662.

427. J. I. Clark Hare, Lecture XXXIV, in 2 AMERICAN CONSTITUTIONAL LAW 746, 772 (Boston, Little, Brown & Co. 1889).

428. *See id.* at 772-73.

with the liberty of others to do the same”<sup>429</sup>—paraphrasing Herbert Spencer’s Law of Equal Freedom, defended in his book *Social Statics*—was a mere “shibboleth.”<sup>430</sup> Holmes alluded to the Court’s lottery decisions.<sup>431</sup>

Further, judicial scrutiny of statutes to identify pretended legislation often left much to be desired when the stakes were highest. Though typically not recognized as such, perhaps the most appalling failure of the old police power jurisprudence is *Plessy v. Ferguson*, in which the Court upheld Louisiana legislation forbidding private street-car operators to provide service to both Blacks and Whites.<sup>432</sup> Writing for the Court, Justice Henry Brown spent all of a single paragraph analyzing “whether the statute of Louisiana is a reasonable regulation.”<sup>433</sup> Brown emphasized that “there must necessarily be a large discretion on the part of the legislature,” and that legislatures are “at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.”<sup>434</sup>

The *Plessy* Court’s deference to “established usages, customs and traditions,” and its failure to require any proof of a threat to “the public peace and good order,” posed by integrated trollies, nor inquire into the true ends of the challenged legislation (as it had in *Yick Wo v. Hopkins*<sup>435</sup>) was symptomatic of a jurisprudence that all too often took the government’s representations concerning its ends at face value.<sup>436</sup> Indeed, *Plessy* was decided just three years after

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429. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

430. *Id.*

431. *See id.*; see also Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 468 n.70 (1909) (highlighting how the judiciary had once maintained that “simple legislative declaration[s]” could not destroy the right to sell or possess liquor but now permitted liquor to be transformed into a “nuisance per se” (emphasis omitted) (quoting *Wynhamer v. People*, 13 N.Y. 378, 454 (1856))).

432. 163 U.S. 537, 552 (1896).

433. *Id.* at 550.

434. *Id.*

435. 118 U.S. 356, 374 (1886) (holding unconstitutional a facially neutral San Francisco ordinance that required everyone who operated a wooden laundry to secure a permit after determining that it was designed to discriminate against the Chinese).

436. *Plessy*, 163 U.S. at 550.

James Bradly Thayer published his paean to judicial restraint in the *Harvard Law Review*.<sup>437</sup>

As Justice Harlan pointed out in his now-canonical dissent, “[e]very one knows that the statute ... had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons”<sup>438</sup>—not to promote “public peace”<sup>439</sup> but to stamp Blacks with a “badge of servitude.”<sup>440</sup> Accepting the majority’s premise that “[i]f the power exists to enact a statute, that ends the matter so far as the courts are concerned,” Harlan denied that the government was constitutionally empowered to pursue the end of establishing a “superior, dominant, ruling class of citizens.”<sup>441</sup> The end being sought was not one “to which the legislature was competent.”<sup>442</sup> In short, under the pretext of exercising legitimate power, the legislature had exercised arbitrary power.<sup>443</sup>

Harlan’s *Plessy* dissent could serve as a blueprint for consistent and effective review of the state’s exercise of their police powers.<sup>444</sup> But as the majority’s analysis makes plain, no such blueprint was consistently followed.<sup>445</sup> For every decision in which the Court did smoke out pretext after context-sensitive analysis of the government’s means and ends during the late nineteenth-century, one can point to another in which they fell short.<sup>446</sup> We need an approach to adjudication that can better effectuate both the letter and the original spirit of the Fourteenth Amendment.

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437. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Thayer argued that legislation should “not ... be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.” *Id.* at 140 (quoting *Commonwealth v. Smith*, 4 Binn. 117 (1811)).

438. *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting).

439. *Id.* at 550 (majority opinion).

440. *Id.* at 562 (Harlan, J., dissenting).

441. *Id.* at 559.

442. *Id.*

443. *See id.*

444. *See id.* at 552-64.

445. *See id.* at 545 (majority opinion).

446. *Compare* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), *with* *Barbier v. Connolly*, 113 U.S. 27 (1885) (refusing to inquire into ends of facially neutral ordinance prohibiting night work only in laundries, despite allegation that the purpose was to force Chinese-owned laundries out of business).

### 3. *Protecting the Health, Safety, and Morals of the Public*

We have generalized that the police power allows for the *prohibition* of acts that necessarily violate the rights of others—such as laws prohibiting murder, rape, robbery, theft and the like. There is universal consensus that state legislative power can be used to punish rights violations after they have occurred.<sup>447</sup> We have also maintained that the police power allows for the *regulation* of behavior that *risks* violating the rights of others to prevent the violations from occurring. This type of regulation falls under the traditional rubric of regulations to protect the health and safety of the public.<sup>448</sup> Again, there is universal consensus on the propriety of this state legislative power—even as some may contest whether particular health and safety restrictions accomplish the end they purport to seek.<sup>449</sup>

As we have noted, some authorities also included a third object or end of legislation: the protection of the public morals.<sup>450</sup> A subset of such laws would clearly be warranted under the rights-protective conception of the police power: laws that regulate conduct in the “public sphere” by which is meant areas under the control of government to which the general public has access. These areas include streets, sidewalks, alleyways, and public parks.<sup>451</sup>

We also stress that, while the scope of the police power most certainly did not include the taking of property from one person, or “class,” to give to another solely on the grounds that the latter would benefit from the taking,<sup>452</sup> there was no constitutional barrier to legislatures using their general tax power to establish assistance programs for the poor, or otherwise providing goods that would go

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447. See, e.g., Rodriguez, *supra* note 378, at 664-65.

448. See *id.* at 676.

449. See *id.*

450. See Howe, *supra* note 222, at 609.

451. See BARNETT, *supra* note 268, at 331 (arguing that such laws fall within the “Lockean construction of the police power of the states”).

452. That is, it did not include what Cass Sunstein has termed “naked preferences.” Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (arguing that numerous constitutional provisions, including the Due Process of Law Clauses, forbid “the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”).

undersupplied by the market—absent government intervention.<sup>453</sup> Whereas the tax power could sometimes be used in a regulatory fashion, in which case it would be subject to the same limitations as other police power regulations,<sup>454</sup> the use of the tax power by a state to raise revenues to support public works—or otherwise promote public welfare—was a power distinct from the police power to regulate rightful exercises of liberty and prohibit wrongful acts.<sup>455</sup>

All of these exercises of the state police (and tax) powers were generally accepted in 1868 and remain so today.<sup>456</sup> To assess whether a deprivation of life, liberty, or property is arbitrary requires courts to assess whether there is a sufficient relationship between the means adopted and these undisputed ends to conclude that the measure was adopted in good faith—the measure need not be Kaldor-Hicks efficient.<sup>457</sup>

With all this consensus in mind, we are left with one last claim of a police power “end” that is in dispute: whether states may prohibit conduct performed in private and outside the view of the general public—conduct that has no external social costs associated with it that would justify categorizing it as a nuisance—on the *sole* ground that the legislature deems such conduct to be immoral.<sup>458</sup> Addressing this question at length in this space would take us too far afield.<sup>459</sup> But, to provide a sense of our answer, we offer three observations.

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453. See Rodriguez, *supra* note 378, at 677.

454. Whatever may be the precise scope of the tax power, it is beyond the scope of this Article.

455. See Rodriguez, *supra* note 378, at 677.

456. See Howe, *supra* note 222, at 609.

457. A policy is Kaldor-Hicks efficient if (a) those who reap net welfare gains because of the policy can compensate those who incur net welfare losses because of the policy and still remain better off than they were before the policy was made; and (b) the losers could not afford to offer the gainers enough to agree to forego their gains. For a discussion, see MATTHEW D. ADLER, *WELL-BEING AND FAIR DISTRIBUTION: BEYOND COST-BENEFIT ANALYSIS* 98-99 (2012). Although it has been criticized—costless redistribution from gainers to losers never really takes place—Kaldor-Hicks efficiency remains “indispensable to applied welfare economics.” ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 42 (6th ed. 2012). We agree with Justice Douglas that judges should not hold state laws unconstitutional, solely “because they may be unwise, improvident, or out of harmony with a particular school of thought.” *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955).

458. See Brief of the Institute for Justice as *Amicus Curiae* in Support of Petitioners, at 16-17, *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (No. 02-102).

459. See *id.* at 3 (arguing at length that states have no such power).

First, regardless of what view one takes on this issue, people of diverse constitutional views can agree that the *rest* of the above-discussed legislative ends—protecting public health and safety and regulating public conduct so as to minimize rights-conflicts—are proper.<sup>460</sup> So, nothing prevents courts from using these ends to engage in a means-ends analysis to prevent arbitrary legislative acts.<sup>461</sup> Second, a power to regulate or prohibit private conduct outside of spaces controlled by the government on behalf of the general public, *solely* on the basis that it is immoral, is not contained anywhere in the text of the Constitution—either expressly or by implication.<sup>462</sup> If such a power exists, it is because judges say it exists.

Consequently, third, because no private morals power is textually specified, whether or not there exists such a power is a matter of constitutional construction.<sup>463</sup> For us, that is no deal breaker. But whether such a power is the best construction of the letter of the text of the Constitution will depend on whether it can fairly be within its original spirit.<sup>464</sup> We have demonstrated that the Due Process of Law Clauses were designed to bar arbitrary exercises of legislative power.<sup>465</sup> We doubt that the regulation of purely private acts on the basis of morality can be nonarbitrary in actual operation.

How would a legislature justify such a measure? Would it engage in philosophical or religious analysis of morality? Would it hold hearings on these moral claims? How could a citizen contest it? Would she be permitted to introduce “expert” testimony of moral philosophers or religious authorities? How could a court evaluate such moral claims when advanced by parties to a constitutional challenge? Would a judge reach a “finding” on whose moral stance was more justified?

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460. That is to say, an “incompletely theorized agreement” can be reached about the constitutional propriety of protecting public health, safety, and public morals. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995); see CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 35-61 (1996) (defining and describing incompletely theorized agreements).

461. See Williams, *supra* note 6, at 494.

462. See Brief of the Institute for Justice, *supra* note 458, at 14.

463. See *id.* at 15.

464. See Barnett & Bernick, *supra* note 10, at 3.

465. See *id.* at 14.

In practice, such debates are typically waged, not in terms of morality, but in terms of risks of empirically ascertainable harms to the general public.<sup>466</sup> Bare moral disapproval is rarely considered sufficient to justify such measures in the absence of sometimes dubious empirical claims of harm to others that would fit within the health and safety rationales about which a consensus exists.<sup>467</sup>

Even in the early republic, one finds a stark contrast between strict adultery, antisodomy, obscenity laws (in those places where such measures existed), and lax enforcement.<sup>468</sup> We are not surprised that—as Lawrence Friedman has documented—“a surge of interest in victimless crime, in vice, in sexual behavior”<sup>469</sup> took place during the late nineteenth century, when moralistic Progressivism driven by a marriage of evangelical religious fervor and quack science became influential.<sup>470</sup>

The existence of the earlier laws has been offered as evidence that states do in fact have the constitutional power to prohibit purely immoral activities—regardless whether they pose any risk of injury to anyone.<sup>471</sup> We think the better view is that these laws *were* regarded as means of protecting members of the public from injury—but the connection between means and ends was very attenuated. For example, Thomas West has detailed the lengths to which Americans went in the early republic to promote marriage in the belief that it was “indispensably necessary for the securing of natural rights.”<sup>472</sup>

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466. See Dan M. Kahan, *The Cognitively Illiberal State*, 110 STAN. L. REV. 101, 103-4 (2006) (describing how and why “disputes over the morally sectarian visions to be expressed by the law” have been replaced in modern liberal societies by “contestation over the means to be employed to attain society’s secular ends”); Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1661, 1682 (2016) (tracing—and criticizing—the Court’s privileging of “consequentialist, utilitarian” ends over “[c]onstitutive [e]nds” related to the expression of the social meaning of behavior).

467. See *id.* at 1672.

468. See THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING* 230 (2017) (finding that this contrast “characterized all [the Founders] sex and marriage policies”).

469. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 138 (1993).

470. See generally COMPTON, *supra* note 419; THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2016).

471. See *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) (declining to recognize “a fundamental right to homosexuals to engage in acts of consensual sodomy” because “[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights,” and “when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws”).

472. See WEST, *supra* note 468, at 219.



He also showed how morals regulations—in particular, prohibitions on various kinds of sex outside of marriage—rested on that belief, rather than the belief that states enjoyed plenary power to shape and mold a virtuous citizenry.<sup>473</sup>

The communicative content of the constitutional text, however, does not require us to accept any particular set of morals laws as sufficiently connected to the end of rights-protection to be within the states' reserved powers. To repeat, we do not believe that the communicative content of the constitutional text is so thick.

We think the rationality review deployed by the three-judge panel in *Lee Optical* is well-tailored to implement the anti-arbitrariness spirit of the Due Process of Law Clauses.<sup>474</sup> Under such rationality review, some strict morals laws might have been found unconstitutional in the early republic as well as now.<sup>475</sup> Had they been widely enforced, the issue of their unconstitutionality would then have been joined in earnest.<sup>476</sup> But they were not enforced, so it was not joined in earnest.<sup>477</sup>

In our view, any purported governmental end, the scope of which cannot be objectively assessed by a citizen or independent judiciary, poses an intolerable risk of arbitrariness. In practice, how far legislators may go in the service of such an end will depend solely upon their own will. In the parlance of present day constitutional practice, the claim that legislatures may deprive a person of life, liberty, or property on the sole ground that the legislature deems her act to be immoral lacks a judicially administrable limiting principle.<sup>478</sup> And such a limiting principle is necessary to implement the original meaning of the Fourteenth Amendment's text.<sup>479</sup>

Having offered these preliminary remarks on the propriety of regulating activities conducted in private solely on the ground that they are immoral, we close by reiterating that very few laws purport

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473. *Id.* at 232 (“[T]he founders believed that discouraging sex outside of marriage (both heterosexual and homosexual) promotes the integrity of marriage, which they regarded as a fundamental condition of the social compact required by natural rights theory.”).

474. *See supra* notes 309-11.

475. *See WEST, supra* note 468, at 228.

476. *See* Brief of the Institute for Justice, *supra* note 458, at 16.

477. *See id.*

478. *See* Howe, *supra* note 222, at 598.

479. *See* Williams, *supra* note 6, at 505.

to be justified in this way.<sup>480</sup> Instead, most deprivations of an individual's life, liberty, and property purport to be justified as reasonable means to safeguard the health and safety of the general public, or to regulate conduct in the public sphere.<sup>481</sup> In short, the overwhelming preponderance of laws are claimed to serve ends that nearly everyone agrees are within the just powers of state governments.<sup>482</sup> If so, what matters is whether the means adopted have such an attenuated connection to these ends as to indicate that they were adopted to serve other forbidden ends outside the original scope of the legislative power.<sup>483</sup>

### *C. Beyond Securing the Rights Retained by the People?*

To assess whether a person is being deprived of life, liberty, or property without due process of law requires an inquiry into whether a legislature has acted pursuant to its just powers.<sup>484</sup> We have argued that scope of the powers of state governments be defined with reference to the original function of the police power in 1868, which was based on a natural rights-based theory of the nature and limits of government.<sup>485</sup> Some will object that this conception is too narrow—that the scope of government power in general, and state power in particular, was not understood to be so limited in either 1791 or 1868, and that the amended Constitution is the product of “many minds” and resists any unified theory.<sup>486</sup>

As Jack Balkin has summarized, prominent historians (among them, Bernard Bailyn, J.G.A. Pocock, and Gordon Wood) have documented the influence of a “civic republican” tradition upon Founding Era thought.<sup>487</sup> This tradition was characterized by opposition to monarchy, aristocracy, and oligarchy no less than to

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480. See Brief of the Institute for Justice, *supra* note 458, at 16.

481. See Rodriguez, *supra* note 378, at 677.

482. See *id.* at 679.

483. See Sunstein, *supra* note 452, at 1718.

484. See Howe, *supra* note 222, at 592 (quoting *Regents of Univ. of Md. v. Williams*, 9 G. & J. 365, 408 (Md. 1838)).

485. See *id.* at 590.

486. CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* 8 (2009).

487. See Jack M. Balkin, *Which Republican Constitution?*, 32 *CONST. COMMENT.* 31, 46-49 (2017).

direct popular rule; belief in the priority of the public good; commitment to civic equality; opposition to “domination” either in civil society or in politics; commitment to self-rule, understood as representative government; and opposition to corruption.<sup>488</sup> Bailyn, Pocock, Wood, and others have contended that Founding Era thought “owed as much to the ideas of James Harrington, Baron de Montesquieu and ‘Country Party’ ideology, as [it] did to the work of John Locke and the liberal tradition of natural rights.”<sup>489</sup>

We have no quarrel with the proposition that those who drafted and ratified the unamended Constitution, those who amended it in 1791, and those who amended it in 1868 were influenced by a variety of political-philosophical sources. But, we think the purported tension between civic republican and Lockean liberal traditions has been exaggerated and may stem, in part, from a failure to appreciate how the concept of the “public good” was understood within Lockean liberalism.<sup>490</sup> In an illuminating study of the concept of the public good within classical liberalism, generally, George H. Smith has shown that neither Locke nor his followers denied that government had an obligation to promote the public good or that the government might regulate—or even prohibit actions—that individuals would otherwise take in order to so promote it.<sup>491</sup> Rather, they were convinced that the public good was best promoted through the protection of natural rights, and such civil rights as had proven necessary to secure natural rights.<sup>492</sup>

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488. *Id.*

489. *Id.* at 44. For helpful overviews of this scholarship, see Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 17 (1992); Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49, 57-58 (1972); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 135 (1995).

490. GEORGE H. SMITH, *THE SYSTEM OF LIBERTY: THEMES IN THE HISTORY OF CLASSICAL LIBERALISM* 27 (2013).

491. *See id.* at 26-48.

492. *See id.* at 28. Smith notes that Madison recommended that a declaration be affixed to the Constitution that read, in part, “[t]hat government is instituted, and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.” *Id.* at 29 (quoting James Madison, Speech in Congress Proposing Constitutional Amendments, reprinted in JAMES MADISON: WRITINGS 441 (Jack N. Rakove ed., 1999)). This, Smith argues, is “the natural-rights paradigm of the ‘public good,’” and “illustrates the restrictive function of the public good in classical liberalism.” *Id.*

Determining whether this Lockean conviction stands up under scrutiny today is beyond the scope of this Article. We are concerned with whether that conviction was an essential part of the political-philosophical contexts in which the Fifth and Fourteenth Amendments were drafted and ratified. It is anachronistic to project into the context of eighteenth- and nineteenth-century constitutional communication a conflict that was not perceived until the late twentieth century.

We find that Founding Era affirmations—of which there are many—that natural rights could be constrained by legislatures to promote the public good rested upon the premise that such constraints were necessary “to secure and to enlarge ... the natural rights” of members of the public.<sup>493</sup> When people during the Founding Era spoke of the necessity of giving up or surrendering their natural liberty for the sake of the public good, they did not mean that the government could define the public good as the “felt necessities of the time”<sup>494</sup> seem to demand and invoke that public good to deprive people of their liberty. Rather, they meant that securing the rights of all required individuals to transfer powers to the government that they would otherwise be able to exercise personally in the state of nature—just not as effectually—and to submit to constraints upon the exercise of the natural freedom that they retained.<sup>495</sup>

Any relinquishment of freedom was understood to be a trade.<sup>496</sup> It was thought that all individuals would enjoy more freedom as a consequence, than they would otherwise.<sup>497</sup> For example, by surrendering the right to personally execute the law of nature and receiving in return the civil right to the protection of the laws by an *impartial* enforcer, one *gains* more overall security for one’s natural rights.<sup>498</sup>

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493. James Wilson, *Of the Natural Rights of Individuals*, in 2 THE COLLECTED WORKS OF JAMES WILSON 1053, 1061 (Kermit L. Hall & Mark David Hall eds., 2007).

494. O. W. HOLMES, JR., *THE COMMON LAW* 1 (Boston, Little, Brown, & Co. 1881).

495. See Shalhope, *supra* note 489, at 59.

496. See Daniel A. Farber & John E. Muench, *Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235, 241 (1994).

497. See *id.*

498. See *id.*

Because the Founders did not identify the public good with whatever values were presently held by the general public, the purported conflict between the public good and individual rights did not take the form that some historians have posited.<sup>499</sup> While the exercise of individual rights could, in certain contexts, be contrary to the public good and regulated accordingly—that is what the police power was for—the public good sought was the increased security and enlargement of the rights of all.<sup>500</sup> The core of the concept held throughout the Founding Era.<sup>501</sup>

The case for deploying natural rights theory to implement the Fourteenth Amendment's Due Process of Law Clause is strengthened by investigation of the publicly available context in which it was enacted.<sup>502</sup> The influence of natural rights-infused abolitionist constitutionalism on Republicans in the Thirty-ninth Congress has been well-documented, as have the premises on which that constitutionalism rested.<sup>503</sup> As Michael Kent Curtis has summarized in his pioneering study of the Fourteenth Amendment, “by 1866 leading Republicans in Congress and in the country at large shared a libertarian reading of the Constitution,”<sup>504</sup> according to which, “[g]overnment existed, as the Declaration of Independence asserted, to protect natural rights.”<sup>505</sup>

The men who shaped the Fourteenth Amendment repeatedly and publicly articulated a theory of government according to which, as John Bingham put it, government's “primal object must be to protect each human being within its jurisdiction in the free and full enjoyment of his natural rights.”<sup>506</sup> This is not to say that the Fourteenth Amendment enacts Locke's *Second Treatise*, much less

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499. See Rogers, *supra* note 489, at 25.

500. See Farber & Muench, *supra* note 496, at 241.

501. See *id.* at 242-43.

502. See *id.* at 246.

503. See, e.g., CURTIS, *supra* note 277, at 236; JACOBUS TENBROEK, EQUAL UNDER LAW 117-19 (1965); JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 115-18 (1951); WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 202-03 (1977); Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165 *passim* (2011); Farber & Muench, *supra* note 496, at 235-36; Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J. L. & LIBERTY 115, 135 (2010).

504. CURTIS, *supra* note 277, at 215.

505. *Id.* at 41.

506. CONG. GLOBE, 34th Cong., 3d Sess., app. 139 (1857).

Herbert Spencer's *Social Statics*.<sup>507</sup> It is to say that insofar as constitutional decision makers *must* construct a framework for implementing the Constitution's guarantees of due process of law, that framework *must* be informed by a theory of the nature and limits of government, period—not just the expressed limits on the federal government. And such a theory informed the original design of those guarantees, thereby infusing its spirit.<sup>508</sup>

### CONCLUSION

Our good-faith theory of the due process of law can guide legislators and judges by providing clarity concerning the nature of legitimate government ends, and by equipping legislators and judges with tools that enable them to pursue those ends. It enables those who draw discretionary power from the Constitution to discharge the duties that come with it—and to achieve the purposes for which they were entrusted with that power. It also helps the rest of us to monitor their performance of their duties.

Legislating is a decidedly complex activity. But it is not irreducibly complex, and we do not need to start from scratch in developing a theory of the nature or limits of government power. We have a written Constitution that was informed by a rich theory of the “just powers” of government, and carefully designed to implement that theory. Accurately identifying the original meaning of the letter of Due Process of Law Clauses, along with their original function or spirit, is the key to ensuring that we enjoy the substance of the Constitution's promises.

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507. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

508. See Sandefur, *supra* note 503, at 172.