

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

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ABSTRACT

One widely shared understanding of the Due Process Clause in the late eighteenth century encompassed judicial recognition of unenumerated substantive rights as limits on congressional power. This concept of “substantive” due process originated in Sir Edward Coke’s notion of a “higher law” constitutionalism, which understood natural and customary rights as limits on crown prerogatives and parliamentary lawmaking. The American colonies adopted higher-law constitutionalism in their revolutionary struggle and carried it with them through independence and constitutional ratification. Natural and customary rights limited the exercise of legislative power in the late eighteenth century through the normative definition of “law” inherited from the classical natural law tradition, which maintained that an unjust law was not really a “law.” American judges and attorneys did not consider legislative acts that violated natural or customary rights to be real “laws,” regardless of their compliance with a positivist rule of recognition. Accordingly, deprivations of life, liberty, or property effected on the authority of such acts did not comply with the “law” of the land or the due process of “law” because regardless of the process such acts

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

afforded, the deprivations they imposed were not accomplished by a true “law.” The classical understanding of “law” and the substantive understanding of due process that it underwrote are evident in legal dictionaries and in judicial decisions and arguments of counsel during the years immediately before and after ratification of the Bill of Rights in 1791.

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INTRODUCTION

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

This criticism has had particular resonance since the 1980s, when the Reagan Administration endorsed “originalism” as the only legitimate approach to constitutional interpretation.³ The most widely defended version of this interpretive theory holds that the contemporary meaning of a constitutional provision is the meaning that was understood by the people who lived at the time that the provision was proposed by Congress and ratified by the states.⁴ Sometimes called public-meaning originalism, this version is concerned with uncovering a purportedly objective public meaning, and is distinct from “intentional meaning” originalism, which focuses on the subjective understanding of a constitutional text by those who framed or ratified it.⁵ A

¹ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (“And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”).

² See, e.g., *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting) (“I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . .”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (“[U]nder no construction of [due process of law] that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.”); ROBERT BORK, *THE TEMPTING OF AMERICA* 114 (1990) (scornfully referring to *Roe v. Wade*’s substantive due process protection of abortion rights as a “judicial fiat”); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 942 (1973) (suggesting that *Roe* is a more dangerous precedent than *Lochner*).

³ See, e.g., Edwin Meese III, Speech Before the American Bar Association (July 9, 1985), in *MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDWIN MEESE III, 1985–1988*, at 7 (1989).

⁴ See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004); BORK, *supra* note 2, at 144; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (1997); KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 35 (1999).

⁵ E.g., BARNETT, *supra* note 4, at 92; BORK, *supra* note 2, at 144; Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 *MICH. L. REV.* 1081,

public-meaning originalist would interpret the 1787 constitutional text and the 1791 Bill of Rights in accordance with the common usage and public understanding of the words of those texts in the 1780s and 1790s; the Reconstruction Amendments of 1865, 1868, and 1870 in accordance with such usage and understanding in the 1860s and 1870s; and so forth. Proponents of originalism argue that adherence to original meaning in constitutional interpretation prevents federal judges (and especially Supreme Court Justices) from giving their personal value preferences the force of constitutional law.⁶

The doctrine of substantive due process has been a particular source of interpretive controversy. By their terms, the Due Process Clauses of the Fifth and Fourteenth Amendments appear to protect only rights to legal process.⁷

1081 (2005); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 5–6 (2007).

For critiques of intended-meaning originalism, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). For defenses of intended-meaning originalism, see Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239 (2007).

Throughout this Article, I use “originalism” to mean public-meaning originalism unless otherwise indicated.

⁶ See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 371 (2d ed. 1997) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*]; BORK, *supra* note 2, at 146; Kay, *supra* note 5, at 287; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 863–64 (1989); see also Ronald Reagan, Address to the Nation on the Supreme Court Nomination of Robert H. Bork, 2 PUB. PAPERS 1177, 1178 (Oct. 14, 1987), available at <http://www.reagan.utexas.edu/archives/speeches/1987/101487b.htm> (“The principal errors in recent years have had nothing to do with the intent of the framers They’ve had to do with those who have looked upon the courts as their own special province to impose by judicial fiat what they could not accomplish at the polls.”); Franklin D. Roosevelt, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary, 1 PUB. PAPERS 122, 126 (Mar. 9, 1937), available at <http://www.hpol.org/fdr/chat/> (criticizing the economic due process holdings of the pre-New Deal Court as the Justices’ insertion of their own “personal economic predilections” into the Constitution (quoting *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587, 633 (1936) (Stone, J., dissenting))).

Recognizing that judicial policy making is unavoidable when one interprets open-ended texts like the Due Process Clauses, some recent originalist scholarship has proposed to limit such policy making through bounded strategies of constitutional “construction.” See, e.g., BARNETT, *supra* note 4, ch. 5 (arguing that judges should construe open-ended constitutional texts in the manner that best protects individual rights); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* ch. 1 (1999) (arguing that because constitutional construction is largely a political activity, judges should defer to constructions adopted by the political branches).

⁷ See U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty or property, without due process of law”); U.S. CONST. amend. XIV, §1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”). But see Walter Dellinger, *Remarks on Jeffrey Rosen’s Paper*, 66 GEO. WASH. L. REV. 1293, 1293 (1998) (arguing that the text of the Due Process Clauses has an “irreducibly ‘substantive’ content” rooted in the fact that an absence of substantive restrictions on government renders procedural restrictions “worthless”).

Moreover, with respect to the Fifth Amendment Due Process Clause, an overwhelming scholarly consensus holds that it protects only procedural rights.⁸ Originalism has emerged as yet another weapon against the doctrine of substantive due process—that is, against judicial recognition and enforcement of individual rights that are not enumerated in the constitutional text,⁹ and in support of a more constrained judiciary that subordinates such rights to the actions of the elected branches of the federal and state governments.¹⁰

But originalism is more than a supplemental argument against unenumerated rights and judicial activism. In addition to possessing a powerful, intuitive appeal,¹¹ originalism rests on a plausible philosophical foundation, highlighted by the fact that writing is an intentional act. As

⁸ See, e.g., BERGER, GOVERNMENT BY JUDICIARY, *supra* note 6, at 221–44; 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1102–08 (1953); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 15 (1980); Walton Hamilton, *The Path of Due Process of Law*, in THE CONSTITUTION RECONSIDERED 168 (Conyers Read ed., 1968); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 248 (1999); ANDREW C. McLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 461 (1935); HERMINE HERTA MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 125 (1977); HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 705–06 (1936); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213 (Eugene W. Hickok, Jr. ed., 1991); Raoul Berger, “*Law of the Land*” *Reconsidered*, 74 NW. U. L. REV. 1 (1979) [hereinafter Berger, “*Law of the Land*”]; Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1910) [hereinafter Corwin, *Due Process*]; Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations of Legislatures* (pts. 1–3), 2 TEX. L. REV. 257 (1924), 2 TEX. L. REV. 387 (1924), 3 TEX. L. REV. 1 (1924); Charles M. Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218 (1919); Andrew T. Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 2 (2005); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975) [hereinafter Jurow, *Untimely Thoughts*]; Robert P. Reeder, *The Due Process Clauses and “The Substance of Individual Rights,”* 58 U. PA. L. REV. 191 (1910); Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (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* (pt. 2), 14 CREIGHTON L. REV. 735 (1981).

⁹ See JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 133–34 (2005); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 25 (1998).

¹⁰ See O’NEILL, *supra* note 9, at 231; Friedman & Smith, *supra* note 9, at 87.

¹¹ See, e.g., Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449, 514 (1989) (describing the nature of originalist imagery, which portrays judges as “keepers of the covenant” and provides a powerful link with the past); Jonathan R. Macey, *Originalism as an “Ism,”* 19 HARV. J.L. & PUB. POL’Y 301, 308 (1996) (suggesting that the widespread appeal to originalism in constitutional interpretation, even by non-originalists, constitutes strong evidence that the theory is intellectually legitimate); Earl Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773, 779 (arguing that, beyond its potential for justifying conservative policy outcomes, originalism has a deep and widespread appeal because of its apparent neutrality, especially in comparison with other theories of constitutional interpretation).

numerous commentators have pointed out, human beings are uninterested in interpreting signs that lack a sentient author—that is, in attributing meaning to randomly occurring marks that are unrelated to any human communicative intention.¹² According to this argument, signs or marks that lack a sentient author cannot be “writing” because the meaning of any writing is identical to the message that its author meant to communicate.¹³

If writing generally is an intentional act, then written law is especially so.¹⁴ Laws have “purposes”; once enacted, they are expected to have certain effects, to “do” something that the lawmakers intended to be done. Written law is “written” precisely to fix a particular (albeit collective) human intention in words.¹⁵ Written law is thus the paradigmatic example of writing as an intentional act.¹⁶

Originalism rhetorically grounds this relationship between intention and writing.¹⁷ An originalist would argue that the framers had certain purposes that they expected the Constitution to fulfill.¹⁸ As rational, intelligent, and well-educated individuals, the framers can be presumed to have written the Constitution in those words that best communicated these purposes to the people it would bind.¹⁹ What else could the words of the Constitution mean,

¹² The classic exposition of this view is Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723 (1982), reprinted in *AGAINST THEORY: LITERARY STUDIES AND THE NEW PRAGMATISM* 18 (W.J.T. Mitchell ed., 1985), which argues that the meaning of a text is simply and necessarily the meaning intended by its author, obviating the need for “theories” of interpretation. See generally E.D. HIRSCH, *VALIDITY IN INTERPRETATION* (1967); JOHN R. SEARLE, *MIND: A BRIEF INTRODUCTION* (2004). Numerous legal academics have adapted this intentionalist account to legal and (especially) constitutional interpretation. See, e.g., Paul Campos, *Against Constitutional Theory*, 4 YALE J.L. & HUMAN. 279, 284 (1992); Steven D. Smith, *Correspondence: Law Without Mind*, 88 MICH. L. REV. 104 (1989).

¹³ See Knapp & Michaels, *supra* note 12, at 19 (arguing that this identity “robs intention of any theoretical interest”).

¹⁴ See WHITTINGTON, *supra* note 4, at 59–60; Campos, *supra* note 12, at 302; Smith, *supra* note 12, at 112, 115.

¹⁵ See Kay, *supra* note 5, at 239; Smith, *supra* note 12, at 111.

¹⁶ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 633 (1999).

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

¹⁸ WHITTINGTON, *supra* note 4, at 60. Unlike intended-meaning originalism, public-meaning originalism does not give controlling authority to these subjective understandings and expectations. See *supra* note 5 and accompanying text.

¹⁹ See WHITTINGTON, *supra* note 4, at 60; see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) (“As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”).

then, if not what those words were publicly understood to mean at the time that the Constitution was drafted and ratified?²⁰

As recent Supreme Court nominations have made unmistakably clear,²¹ originalism now defines the terms of public debates about constitutional meaning.²² Given the political, intuitive, philosophical, and rhetorical appeal of originalism, proponents of substantive due process can no longer ignore the question whether the doctrine is defensible on originalist grounds.

An originalist defense of substantive due process under the Fifth Amendment Due Process Clause would be particularly important for at least three reasons. First, such a defense would provide a textual footing in the Fifth Amendment for important substantive rights that bind the federal government only through that Amendment's Due Process Clause,²³ such as the right to "fundamental fairness" in criminal and civil proceedings,²⁴ the right to equal protection of the laws,²⁵ and the right to an equally weighted vote in elections for federal office.²⁶ Second, most authorities hold that the original meanings

²⁰ Cf. Rosenthal, *supra* note 5, at 9 ("[I]t is difficult to understand why one would adopt a constitutional text if not to memorialize its then-understood meaning as organic law.").

²¹ During President Reagan's administration, the Department of Justice was reported to have used fidelity to originalist interpretive method as an important factor in federal judicial nominations. O'NEILL, *supra* note 9, at 146. President Reagan's nomination of then-Circuit Judge Robert Bork to the Supreme Court brought arguments over originalism into the realm of popular public debate, and the question whether a judge will "strictly interpret the Constitution" is now common fare at all Supreme Court confirmation hearings. See, e.g., *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST, Sept. 13, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300979.html> (Senator Grassley asking then-Judge Roberts whether he would uphold decisions "which [he] found not to be based on the original intent of the Constitution"); see also Comm'n on Pres. Debates, Unofficial Debate Transcript: The First Gore-Bush Presidential Debate (Oct. 3, 2000), <http://www.debates.org/pages/trans2000a.html> (George W. Bush stating, "Voters will know I'll put competent judges on the bench, people who will strictly interpret the Constitution and will not use the bench to write social policy"); *U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court*, WASH. POST, Jan. 10, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001418.html> (Senator Graham asking then-Judge Alito whether he was a "strict constructionist").

²² See, e.g., MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 280 (1990) (suggesting that all theories of constitutional interpretation are in some sense originalist); Barnett, *supra* note 16, at 613 (asserting that originalism is now the "prevailing approach to constitutional interpretation"). For a succinct account of the considerable influence of originalism on contemporary constitutional law, see Rosenthal, *supra* note 5, at 3-9.

²³ Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 711-12 (1974) [hereinafter Grey, *Unwritten Constitution*].

²⁴ See, e.g., *Lassiter v. Dep't Soc. Serv.*, 452 U.S. 18, 25 (1981); *Estes v. Texas*, 381 U.S. 532 (1965).

²⁵ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

²⁶ Cf. *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (holding that unequal weighting of votes by county-unit system used in statewide primary for nomination to the Senate violates fundamental principle of political equality implicit in the Fifteenth Amendment). Compare *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)

of the Fifth and Fourteenth Amendment Due Process Clauses are the same.²⁷ An originalist defense of Fifth Amendment substantive due process, therefore, would create a presumption that this doctrine is likewise encompassed by the original meaning of the Fourteenth Amendment Due Process Clause, thereby dramatically altering the interpretive landscape surrounding the latter clause. In that event, opponents of substantive due process would no longer be able to passively stand on the entrenched conventional wisdom that the earlier clause is merely procedural, but would have to affirmatively explain how and why an understanding of due process that encompassed the protection of substantive unenumerated rights in 1791 came to be abandoned in favor of an understanding that confined such protection to procedural rights in 1868. And finally, an originalist defense of Fifth Amendment substantive due process would demonstrate that originalism is not inconsistent with the progressive, common law recognition and protection of individual rights championed by the Supreme Court since the mid-twentieth century.

Critics of the historical argument for Fifth Amendment substantive due process,²⁸ as well as its less numerous supporters,²⁹ have largely overlooked the interpretive significance of both public-meaning originalism and the reception of the classical natural law tradition in late eighteenth-century America. For example, some critics have argued that substantive due process is founded on a mistaken understanding of the original meaning of the

(holding that malapportioned congressional districts violate Article I's requirement that the House be elected "by the People"), with LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-3, at 1064 (2d ed. 1988) (criticizing *Wesberry's* location of this right in Article I as "historically dubious").

²⁷ See, e.g., *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring in part); *Hurtado v. California*, 110 U.S. 516, 534–35 (1884); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80 (1873); BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 6, at 204; 2 CROSSKEY, *supra* note 8, at 1102–03; ELY, *supra* note 8, at 15; MEYER, *supra* note 8, at 125; Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (pt. 1), 20 NOTRE DAME LAW. 183, 184 (1945); Reeder, *supra* note 8, at 194.

²⁸ See *supra* note 8 and accompanying text.

²⁹ See, e.g., CHESTER JAMES ANTIEAU, *THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT* ch. 18 (1997); James W. Ely, Jr., *The Ozymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999) [hereinafter Ely, *Ozymoron Reconsidered*]; Grey, *Unwritten Constitution*, *supra* note 23, at 711–12; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) [hereinafter Grey, *Fundamental Law*]; Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1270–73, 1322–23 (1990); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941; cf. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1132 (1987) (arguing that the founders understood certain natural and customary rights to be binding as constitutional law and enforceable by courts despite their lack of enumeration in the Constitution or Bill of Rights).

thirteenth-century Magna Carta in which the norm of due process is rooted.³⁰ But whether those who developed substantive due process misunderstood the original meaning of Magna Carta is irrelevant: public-meaning originalism specifies that the meaning of a constitutional text is its public meaning at the time it was drafted and ratified, but does not demand that this public meaning be historically accurate. Critics and supporters have also generally ignored the classical natural law tradition's normative definition of "law," despite this tradition's powerful influence during the founding era and its crucial relevance to that era's understanding of state law-of-the-land clauses and the federal Due Process Clause. The legal literature contains only two comprehensive examinations of late eighteenth-century judicial decisions and other authorities bearing on the original meaning of the "due process of law" in the Fifth Amendment,³¹ neither of which considers these authorities in light of the now-dominant originalism of public meaning or the classical definition of law. This Article fills these gaps.

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

³⁰ See, e.g., Berger, "Law of the Land," *supra* note 8, at 221–44; Jurov, *Untimely Thoughts*, *supra* note 8, at 279.

³¹ See Berger, "Law of the Land," *supra* note 8, at 221–44 (concluding that due process limitations were never understood to limit legislative power, and that no sound late eighteenth-century authority supports the view that the Fifth Amendment Due Process Clause authorized the federal judiciary to protect unenumerated substantive rights against congressional encroachment); Riggs, *supra* note 29, at 973–74 (concluding that seventeenth- and eighteenth-century authorities support the view that the framers intended the Fifth Amendment Due Process Clause to protect unenumerated substantive rights against congressional encroachment).

³² See *infra* Part I.B.

³³ See *infra* Part I.B.1.

³⁴ See *infra* Part I.B.2.

Coke's reading of substance into due process was adopted by the American colonies and adapted to their struggle against Britain in the 1760s and 1770s.³⁵ The English Civil War, the Interregnum, and the Glorious Revolution resulted in England's eventual abandonment of natural and customary rights as constitutional limitations on the king and Parliament, in favor of a constitutional understanding that limited the king by vesting full sovereignty in Parliament.³⁶ Higher-law constitutionalism, however, lived on in the American colonies. Indeed, the clash of these two conflicting understandings of the English constitution lay at the heart of the American Revolution.³⁷ When the colonies declared themselves independent in 1776, they reconstituted the legislative, executive, and judicial departments of their republican governments by means of written constitutional documents,³⁸ but left natural and customary rights where they had always been—under the protection of higher-law constitutionalism,³⁹ as is evident from judicial decisions and arguments of counsel in the years following independence.⁴⁰ The subsequent drafting and ratification of the federal Constitution in 1787 followed the same pattern.⁴¹

The eighteenth-century American adoption of seventeenth-century English higher-law constitutionalism is the necessary backdrop for the argument that the doctrine of substantive due process was within the original understanding of the Fifth Amendment. It is evident from the ratification controversy over the Constitution's initial lack of a bill of rights that late eighteenth-century Americans understood natural and customary rights to be invested with an existence and normative force as "higher" or "constitutional" law that did not depend upon their enumeration in a written constitution.⁴² Although the sparse legislative history of the drafting and ratification of the Fifth Amendment offers no insight into the meaning of the Due Process Clause,⁴³ the Clause was likely understood to protect natural and customary rights against congressional action through a particular understanding of "law" inherited from the classical natural law tradition.⁴⁴ Cicero, Augustine, Aquinas, and others in that tradition

³⁵ See *infra* Part II.

³⁶ See *infra* Part II.A.

³⁷ See *infra* Part II.B.

³⁸ See *infra* Part II.C.2.

³⁹ See *infra* Part II.C.1.

⁴⁰ See *infra* Part II.C.3.

⁴¹ See *infra* Part II.D.

⁴² See *infra* Part III.

⁴³ See *infra* Part III.A.

⁴⁴ See *infra* Part III.B.

maintained that an unjust law was not really a “law,”⁴⁵ and American judges and attorneys in the late eighteenth century understood “law” in this restrictive manner—as having a normative content beyond mere positivist compliance with the rule of recognition. Legislative acts that violated natural or customary rights, therefore, were not considered to be actual “laws,” irrespective of their compliance with written constitutional prescriptions for the creation of positive law. Accordingly, deprivations of life, liberty, or property effected on the authority of such acts were not understood to comply with the “law” of the land or the due process of “law,” because they were not accomplished in accordance with a true “law,” regardless of the process the acts afforded. If a congressional act were not truly a “law,” in other words, deprivations accomplished pursuant to that act did not satisfy the Fifth Amendment’s requirement that deprivations be accomplished in accordance with the due process of “law.”

The classical understanding of “law” in the Fifth Amendment Due Process Clause is evident in legal dictionaries and in judicial decisions and arguments of counsel during the years immediately before and after ratification of the Bill of Rights in 1791,⁴⁶ and criticisms of it are irrelevant or unpersuasive on originalist grounds.⁴⁷ On balance, there is sufficient historical evidence to support the conclusion that at least one common, public understanding of the Due Process Clause of the Fifth Amendment at the time it was ratified in 1791 was that it protected unenumerated natural and customary rights against encroachment by Congress.⁴⁸

I. MAGNA CARTA, SIR EDWARD COKE, AND SEVENTEENTH-CENTURY DUE PROCESS

A. *Due Process and Magna Carta*

It is universally agreed that the concept of “due process of law” is rooted in Magna Carta, or the “Great Charter,” which was forced upon John I by a group of feudal barons at Runnymede in 1215. Without doubt the most influential provision of Magna Carta has been the “law of the land” clause of Chapter 29: “No free man shall be arrested or imprisoned, or disseised or outlawed or

⁴⁵ See *infra* Part III.B.1.

⁴⁶ See *infra* Part III.B.2.

⁴⁷ See *infra* Part III.C.

⁴⁸ See *infra* Conclusion.

exiled or in any way victimized, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.”⁴⁹ Chapter 29 assumed the form that would influence centuries of Anglo-American jurisprudence following six parliamentary reaffirmation statutes enacted during the reign of Edward III in the fourteenth century.⁵⁰ These reaffirmation statutes memorialized a critical understanding of Chapter 29 that defined the “law of the land” as the “due process of law,” or “procedure by original writ or by an indicting jury,”⁵¹ verbal formulations that suggested substantive as well as procedural protection.⁵² These reaffirmations also confirmed that the “lawful judgment of his peers” meant trial by jury, and that Chapter 29 protected “all persons” of “whatever estate or condition.”⁵³

The Charter and its many reaffirmations during the thirteenth and fourteenth centuries coincided with the rise of the English common law and the royal courts. Because these courts had a national jurisdiction, they displaced the many manorial, shire, and other local courts, and their decisions came to be known as the “common law of England.”⁵⁴ Indeed, the classic definition of the “common law”—“the law and customs common to the whole kingdom of England, . . . administered by a centralized court system with nationwide

⁴⁹ *Magna Carta* (1215 & 1225), reprinted in RALPH V. TURNER, *MAGNA CARTA THROUGH THE AGES* app. at 226, 231 (2003). References to this clause here and elsewhere in this Article are to Chapter 29 of the 1225 version of the Charter affirmed by Henry II, which is preferred by historians over Chapter 39 of the 1215 version subsequently repudiated by John. See GEORGE BURTON ADAMS, *CONSTITUTIONAL HISTORY OF ENGLAND* 138 (1934); HELEN M. CAM, *MAGNA CARTA—EVENT OR DOCUMENT?* 3, 13 (1965); J.C. HOLT, *MAGNA CARTA* 393–94 (2d ed. 1992) [hereinafter HOLT, *MAGNA CARTA*].

⁵⁰ The question whether the agreement of any king to the provisions of Magna Carta bound his successors was dealt with by regular reaffirmation of Magna Carta, by the crown in coronation charters, and later by Parliament in enacted statutes. ADAMS, *supra* note 49, at 130–31.

⁵¹ HOLT, *MAGNA CARTA*, *supra* note 49, at 10; A.E. DICK HOWARD, *MAGNA CARTA* 15 (rev. ed. 1998).

⁵² See, e.g., FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 4–5 (1986) (arguing that the existence in Magna Carta of remedies for dispossession of feudal estates “would seem to resolve in the affirmative the question whether chapter [2]9 was intended to protect substantive property rights”); Riggs, *supra* note 29, at 956–57 (“Finding substantive overtones in the Edwardian statutes is consistent with the position of McKechnie, Holdsworth and Thompson, among others, that in the fourteenth century ‘due process of law’ and ‘law of the land’ were essentially equivalent terms having substantive as well as procedural content.”).

⁵³ CAM, *supra* note 49, at 18–19; HOLT, *MAGNA CARTA*, *supra* note 49, at 10.

⁵⁴ ADAMS, *supra* note 49, at 135–36; S.H. BAILEY & M.J. GUNN, *SMITH AND BAILEY ON THE MODERN ENGLISH LEGAL SYSTEM* 4 (3d ed. 1996); C.H. MCILWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 86, 88 (1939); GARY SLAPPER & DAVID KELLY, *ENGLISH LAW* 3 (2000); David A. Thomas, *Origins of the Common Law: Common Law Under the Early Normans* (pt. 3), 1986 *BYU L. REV.* 109, 120–22.

competence”⁵⁵—points to the origins of common law in the displacement of baronial courts by royal courts.⁵⁶

Both Magna Carta and the common law came to be viewed as remnants of a romanticized ancient Saxon legal tradition ruptured by the Norman invasion.⁵⁷ The coincidence of widespread belief in the ancient roots of the Charter’s rights and remedies with purported discovery by royal courts of a similarly ancient common law indelibly linked the Charter and the common law in the English legal tradition.⁵⁸ This association proved to be critical because, in medieval and early modern England, the common law was understood to be the “constitution of the kingdom.”⁵⁹ By the end of the fourteenth century, the “myth of Magna Carta” was well-entrenched in English legal culture: Magna Carta declared fundamental English law,⁶⁰ meaning that the rights and remedies it declared against the king formed part of the common law.⁶¹

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

Magna Carta originated as a limitation on the crown, which exercised the primary lawmaking authority in the thirteenth century through royal decrees and judgments of the king’s courts.⁶² It was precisely this understanding of Magna Carta as a check on royal power that Sir Edward Coke and others championed against the absolutism of the Stuart kings. One of the crucial stories behind substantive due process is how Magna Carta, the due process of law, and the common law evolved into “fundamental” or “higher law”

⁵⁵ Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 1), 2 OXFORD U. COMMONWEALTH L.J. 155, 157 (2002) [hereinafter Postema, *Classical Common Law*].

⁵⁶ See MCILWAIN, *supra* note 54, at 140.

⁵⁷ See, e.g., CAM, *supra* note 49, at 7; MCILWAIN, *supra* note 54, at 172; Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt. 1), 42 HARV. L. REV. 149, 170 (1928) [hereinafter Corwin, “Higher Law” Background]; Thomas, *supra* note 54, at 122–25.

⁵⁸ See ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 79–80 (1966); MCILWAIN, *supra* note 54, at 127.

⁵⁹ Postema, *Classical Common Law*, *supra* note 55, at 155.

⁶⁰ HOLT, MAGNA CARTA, *supra* note 49, at 14; HOWARD, *supra* note 51, at 24; MCILWAIN, *supra* note 54, at 172, 174.

⁶¹ CAM, *supra* note 49, at 17, 20; MCILWAIN, *supra* note 54, at 135; Corwin, “Higher Law” Background, *supra* note 57, at 179.

⁶² Ely, *Oxymoron Reconsidered*, *supra* note 29, at 320; Corwin, “Higher Law” Background, *supra* note 57, at 168.

limitations on royal and parliamentary power in early seventeenth-century England.

1. “Higher Law” Constitutionalism

During the fifteenth and sixteenth centuries, the energetic rule of the Tudor monarchs loosened the customary restraints on royal power represented by common law (including Magna Carta) and Parliament.⁶³ By the late sixteenth century, Chapter 29 and the rest of the Charter had fallen into disuse, rendered apparently obsolete by the Tudors’ many accretions of power.⁶⁴ When the first Stuart king, James I, took the throne, he sought to formalize and consolidate this shift of power to the king.⁶⁵ In particular, James maintained that the king could not be subject to law, because law was merely a means of executing the royal will.⁶⁶

To combat James’s assertion of royal absolutism, Coke resurrected and extended the “myth of Magna Carta”—the traditional (and historically dubious) belief that Magna Carta declared ancient legal constraints on royal power.⁶⁷ The argument that Magna Carta limited the royal prerogative was based on a simple syllogism:

1. Magna Carta declared the existence of fundamental English laws and customs that formed part of the common law;
2. By ruling the kingdom in violation of these laws and customs, King John had been a tyrant;
3. Therefore, any ruler who failed to observe Magna Carta likewise violated the common law and was similarly guilty of tyrannous behavior.⁶⁸

⁶³ See Pound, *supra* note 27, at 208.

⁶⁴ ADAMS, *supra* note 49, at 142; see HOLT, MAGNA CARTA, *supra* note 49, at 11, 396.

⁶⁵ See ADAMS, *supra* note 49, at 265; Grey, *Fundamental Law*, *supra* note 29, at 851; see also Pound, *supra* note 27, at 214 (“James I and his successors undertook to set up in England an absolute monarchy after the fashion of the Continent.”).

⁶⁶ See FREDERICK GEORGE MARCHAM, A CONSTITUTIONAL HISTORY OF MODERN ENGLAND, 1485 TO THE PRESENT 121 (1960).

⁶⁷ CAM, *supra* note 49, at 20–21; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 49, 51, 282 (5th ed. 1956); Grey, *Fundamental Law*, *supra* note 29, at 851–52; Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 584–85 (2006); Paul Raffield, *Contract, Classicism, and the Common-Weal: Coke’s Reports and the Foundations of the Modern English Constitution*, 17 L. & LIT. 69, 90 (2005).

⁶⁸ HOLT, MAGNA CARTA, *supra* note 49, at 403.

Coke put this syllogism to good use, using it to characterize Magna Carta as a “higher law” which safeguarded important English liberties held by all subjects of the realm.⁶⁹ By treating Magna Carta and the liberties it declared as possessed of a more fundamental status than ordinary law, Coke meant to invest Magna Carta with a place in the English system that was prior to and more foundational than the actions of the king or, perhaps, even Parliament.⁷⁰

In Coke’s view, the English constitution did not vest sovereignty in the king or any of the estates,⁷¹ but in the common law and the courts.⁷² Magna Carta and common law liberties constituted law that was “higher” than the actions of the king or estates, law that policed their interactions and limited what they could do even by consensus.⁷³ As Professor Grey summarized, Parliament, the king, and his courts “all were thought of as institutions controlled by an overarching fundamental law to which they were all jointly responsible.”⁷⁴ Coke not only revived the myth of Magna Carta, therefore, he also reinterpreted it to provide for broader and more substantive protection of individual liberty.⁷⁵ This recasting of the ancient myth is evident in Coke’s confrontation with James over the respective jurisdictions of common law and ecclesiastical courts, in judicial opinions authored or reported by Coke—notably *Bonham’s Case* and several anti-monopoly cases—and, most clearly, in Coke’s monumental *Institutes of the Law of England*, published at the end of his life.

⁶⁹ *Id.* at 9.

⁷⁰ See JAMES STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 27 (1992) [hereinafter STONER, *LIBERAL THEORY*]; Grey, *Fundamental Law*, *supra* note 29, at 858; see also Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 367 (1928) [hereinafter Corwin, “Higher Law” Background (pt. 2)] (“[Coke’s] basic doctrine was ‘that the King hath no prerogative, but that which the law of the land allows.’” (quoting Proclamations, (1611) 77 Eng. Rep. 1352, 1354 (K.B.))).

⁷¹ England in the early seventeenth century understood itself to have a “mixed monarchy,” which meant that the king governed only with the consensus of the three traditional English social classes or “estates”—royalty, represented in Parliament by the king; nobility and clergy, represented in Parliament by the “lords temporal and spiritual”; and the people, represented in Parliament by the Commons. Thomas G. Barnes, *Introduction to Coke’s “Commentary on Littleton”* (1995), in *LAW, LIBERTY, AND PARLIAMENT: SELECTED ESSAYS ON THE WRITINGS OF SIR EDWARD COKE* 1, 21 (Allen D. Boyer ed., 2004) [hereinafter *ESSAYS ON COKE*].

⁷² JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 24–25 (2003); Corwin, “Higher Law” Background (pt. 2), *supra* note 70, at 367; Raffield, *supra* note 67, at 73, 78–79.

⁷³ See MARCHAM, *supra* note 66, at 122; Barnes, *supra* note 71, at 21.

⁷⁴ Grey, *Fundamental Law*, *supra* note 29, at 855.

⁷⁵ HOLT, *MAGNA CARTA*, *supra* note 49, at 12; Alan Cromartie, *The Constitutionalist Revolution: The Transformation of Political Culture in Early Stuart England*, 163 PAST & PRESENT 76, 80 (1999).

a. *Writs of Prohibition*

Although Coke is best known as a common law judge, his earliest statement of higher-law constitutionalism did not appear in a judicial opinion, but in accounts of an audience of all the judges of the Court of Common Pleas demanded by James. The Archbishop of Canterbury had complained to the King about “writs of prohibition” issued by Coke and other common law judges against attempts by ecclesiastical courts to take or retain equity jurisdiction of cases that could have been filed in common law courts.⁷⁶ In an argument that doubtless appealed to the absolutist James, the Archbishop maintained that in questions of ecclesiastical jurisdiction, “the King himself may decide it in his Royall person; and that the Judges are but the delegates of the King, and that the King may take what Causes he shall please to determine, from the determination of the Judges, and may determine them himself.”⁷⁷

Coke describes himself as having refuted this argument with an erudite explanation replete with citations to prior decisions, maxims, and other common law authorities.⁷⁸ James was not persuaded, responding that “he thought the Law was founded upon reason, and that he and others had reason, as well as the Judges.”⁷⁹ In reply, Coke acknowledged that “God had endowed his Majesty with excellent Science, and great endowments of nature,”⁸⁰ but insisted that James

was not learned in the Lawes of his Realm of England, and causes which concern the life, inheritance, or goods, or fortunes of his Subjects; they are not to be decided by naturall reason but by the artificial reason and judgment of Law, which Law is an act which

⁷⁶ *Prohibitions del Roy*, (1607) 77 Eng. Rep. 1342 (C.P.), reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 478 (Steve Sheppard ed., 2003); see CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634), at 295, 302–03 (1956); Cromartie, *supra* note 75, at 89.

⁷⁷ *Prohibitions del Roy*, 77 Eng. Rep. at 1342, reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 479 (Steve Sheppard ed., 2003); see also BOWEN, *supra* note 76, at 300–01 (describing how this argument was foreshadowed by Lord Ellesmere’s argument in the litigation of *Calvin’s Case*); Cromartie, *supra* note 75, at 90 (observing that a significant source of tension between the common law and the church courts “stemmed from the theological commitment among a growing faction of the clergy to an autonomous church polity whose fate was ultimately controlled by king-in-Convocation, not king-in-Parliament”).

⁷⁸ *Prohibitions del Roy*, 77 Eng. Rep. at 1342–43, reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 479–80 (Steve Sheppard ed., 2003); see also BOWEN, *supra* note 76, at 303–04.

⁷⁹ *Prohibitions del Roy*, 77 Eng. Rep. at 1343, reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 481 (Steve Sheppard ed., 2003).

⁸⁰ *Id.*

requires long study and experience, before that a man can attain to the cognizance of it.⁸¹

An enraged James accused Coke of treason for suggesting that the King was subordinate to law, to which Coke coolly (at least in his own account) quoted Bracton, ““The king ought not to be under any man, but under God and the Law.””⁸²

b. Bonham’s Case

Just two years later, Coke seemed to declare that higher-law constitutionalism limited Parliament as well as the crown. *Dr. Bonham’s Case* involved the imprisonment of Thomas Bonham by the London College of Physicians for unlicensed practice of medicine in violation of the college’s royal charter.⁸³ Bonham brought an action for false imprisonment against the members of the college.⁸⁴ The defendants pleaded in defense “Letters Patents”—a royal grant pursuant to which the King had given the college exclusive power to license practitioners of medicine within the city of London, with the power to fine and imprison those who practiced without the college’s license.⁸⁵ The grant, moreover, had been twice confirmed by parliamentary act.⁸⁶ As Professor Orth has observed, this grant and its confirmations meant that the “law in this case was not merely the product of custom but had been solemnly adopted by the highest political powers in the state.”⁸⁷

The court found for Bonham by construing the grant to have given the college the power to imprison only for malpractice, and not for mere unlicensed practice.⁸⁸ There being no evidence of malpractice by Bonham—he

⁸¹ *Id.* Coke’s argument here echoes Fortescue and other medieval jurists. See Corwin, “*Higher Law*” *Background*, *supra* note 57, at 182.

⁸² *Prohibitions del Roy*, 77 Eng. Rep. at 1343, *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 481 & n.8 (Steve Sheppard ed., 2003).

⁸³ *Dr. Bonham’s Case*, (1610) 77 Eng. Rep. 646, 650 (K.B.), *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 264, 268–70 (Steve Sheppard ed., 2003).

⁸⁴ *Id.* at 646, *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 265 (Steve Sheppard ed., 2003).

⁸⁵ *Id.* at 647–48, *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 265–67 (Steve Sheppard ed., 2003).

⁸⁶ *Id.*, *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 266 (Steve Sheppard ed., 2003).

⁸⁷ ORTH, *supra* note 72, at 23.

⁸⁸ *Bonham’s Case*, 77 Eng. Rep. at 647–48, 651–52, *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 273–75 (Steve Sheppard ed., 2003).

had a medical degree from Cambridge—the court held that the King had not authorized the college to imprison him.⁸⁹

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

The Censors, cannot be Judges, Ministers, and parties; Judges, to give sentence or judgment; Ministers to make summons; and Parties, to have the moyety of the forfeiture [i.e., one-half of the fine], *because no one ought to be a judge in his own cause, it is wrong to be the judge of his own property*; and one cannot be Judge and Attorney for any of the parties. And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such act to be void.⁹⁰

Coke's dictum, that judges could void government acts contrary to fundamental common law, is evident in other decisions he authored,⁹¹ and was affirmed by his immediate successor on Common Pleas,⁹² and by the Chief Justice of King's Bench nearly a century later.⁹³

Even so, disagreement persists over whether Coke really meant what he appeared to have said.⁹⁴ Most commentators have concluded that Coke merely

⁸⁹ *Id.* at 650–51, *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 272–73 (Steve Sheppard ed., 2003).

⁹⁰ *Id.* at 652 (author's translation from Latin in italics) (internal citation omitted), *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 275 (Steve Sheppard ed., 2003).

⁹¹ *See, e.g.,* James Bagg's Case, (1615) 77 Eng. Rep. 1271, 1279 (K.B.) (citing Magna Carta to require a conviction "by course of Law" before a "Free-man" can be removed by a corporation), *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 404, 415 (Steve Sheppard ed., 2003); Clark's Case, (1596) 77 Eng. Rep. 152 (C.P.) (holding that, under Magna Carta, a town may not impose imprisonment under a bylaw), *reprinted in* 1 THE SELECTED WRITINGS OF EDWARD COKE 134 (Steve Sheppard ed., 2003).

⁹² *See* Day v. Savadge, (1614) 80 Eng. Rep. 235, 237 (C.P.) (per Hobart, J.) ("[B]ecause even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in it self . . .").

⁹³ *See* City of London v. Wood, (1703) 88 Eng. Rep. 1592, 1603 (K.B.) (per Holt, C.J.).

⁹⁴ *See, e.g.,* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 55 (expanded ed. 1992) [hereinafter SCHWARTZ, THE GREAT RIGHTS] ("Coke did not mean to assert the theory of a fundamental common law empowering the courts to nullify statutes . . ."); Haines, *supra* note 8, at 389 ("There is no indication, except in some of the implications of the language of Coke, that the provision was intended to serve as a limitation on the powers of Parliament.").

stated a rule of construction.⁹⁵ Others, however, insist that Coke's dictum is broader and more significant,⁹⁶ especially because it came hard on the heels of Coke's dangerous insistence to James that the king was subject to law. Coke's opinion did not merely argue that the college's conflict of interest denied Bonham a fair trial before an impartial decision maker, but pressed the further position that actions of Parliament that effect unwarranted deprivations of substantive liberty, such as granting to a private group monopoly powers over a lawful calling, are limited by fundamental law.⁹⁷ As Orth has argued:

Coke had been defending not only Dr. Bonham's right to a fair trial but also the law's supremacy over the powers that be. . . . Coke was trying to give content to the law's restraint on power; that is, he was trying to give substance to due process. There were, he thought, things that the supreme power in the state, even the king in Parliament, could not lawfully do, no matter how hard he tried.⁹⁸

c. *Royal Monopolies*

In *Bonham's Case*, Coke argued that the Royal College's licensing authority was a monopoly that violated the freedom of English subjects to practice lawful trades and professions without interference by the crown.⁹⁹ This argument reflected the general seventeenth-century understanding that grants of royal monopolies over so-called "ordinary trades or callings" violate the common law.

The English kings had long exercised political control and raised revenue by granting to royal favorites the exclusive right to provide certain goods or

⁹⁵ See, e.g., SCHWARTZ, *THE GREAT RIGHTS*, *supra* note 94, at 55 ("The modern consensus is that the passage states a canon of construction rather than a constitutional theory."); S.E. THORNE, *ESSAYS IN ENGLISH LEGAL HISTORY 276-77* (1985) ("These cases, then, support no theory of higher law, binding upon Parliament and making Acts that contravene it void.")

⁹⁶ See, e.g., STONER, *LIBERAL THEORY*, *supra* note 70, at 58 ("To read the famous sentence in *Bonham's* as an instance of 'mere' statutory construction is too narrow an interpretation. Such a concept . . . presumes a distinction between construing statutes and voiding them that [Coke] does not acknowledge.")

⁹⁷ PLUCKNETT, *supra* note 67, at 51.

⁹⁸ ORTH, *supra* note 72, at 29.

⁹⁹ See Harold J. Cook, *Against Common Right and Reason: The College of Physicians Versus Dr. Thomas Bonham*, 29 AM. J. LEGAL HIST. 301, 320 (1985) ("[Coke] seems to have seen the [Royal] College [of Physicians] as a strange combination of two kinds of bodies: an economic monopoly and a learned fraternity. As a learned fraternity, he had no dispute with the College's charter. But as an economic monopoly, he found no justification for a small group of learned physicians trying to restrict the practices of others, particularly university-trained physicians.")

services.¹⁰⁰ By the early seventeenth century, these royal monopolies were completely out of control, subjecting large numbers of people to fines and imprisonment merely for pursuing common trades or businesses.¹⁰¹

The crown's practice of granting such monopolies came under attack in *Darcy v. Allen*, also known as the *Case of Monopolies*, where the court invalidated a royal monopoly on playing cards, observing that monopolies violate the common law by interfering with "the liberty of the subject" to pursue ordinary trades, damaging other subjects by raising the price and diminishing the quality of the monopolized product or service, and depriving subjects of an otherwise lawful means of earning a living.¹⁰² The court elaborated its holding and rationale in a subsequent monopoly decision, observing that "at the Common Law no man might be forbidden to work in any lawful Trade, for the Law doth abhor idleness, the mother of all evil," and thus "the Common Law doth abhor all Monopolies, which forbid any one to work in any lawful Trade"¹⁰³ The court went on to hold that restraints imposed by a trade guild on someone who had in fact served his apprenticeship were "against the Freedom and Liberty of the Subject, and are a means of Extortion in drawing moneys" to the guild, both of which were "against Law, and against the Commonwealth."¹⁰⁴

d. *The Institutes*

Coke confirmed the preeminent constitutional place of Magna Carta and common law in the *Institutes of the Lawes of England*, his monumental effort to demonstrate the continuity of seventeenth-century common law with

¹⁰⁰ See ADAMS, *supra* note 49, at 280 (describing the state of the English royal monopoly system under the Tudors and Stuarts).

¹⁰¹ See *id.* ("By this time so undeniable were the abuses complained of that the king made no attempt to prevent parliament from dealing with them."); BOWEN, *supra* note 76, at 172 (detailing the conflict between the monarchy and the "Parliament of the Monopolies"); STRONG, *supra* note 52, at 8, 11 (describing the awarding of privileges under Elizabeth I and James I); THORNE, *supra* note 95, at 228, 229 ("The system . . . was open to abuses of the gravest kind.").

¹⁰² *Case of Monopolies*, (1602) 77 Eng. Rep. 1260 (K.B.), reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 394, 395–96, 398–400 (Steve Sheppard ed., 2003).

¹⁰³ *Case of the Tailors of Ipswich*, (1614) 77 Eng. Rep. 1218, 1218–20 (K.B.), reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 390, 391–93 (Steve Sheppard ed., 2003); see also Raffield, *supra* note 67, at 87 (observing that the natural law "abhorred idleness because it was synonymous with disorder").

¹⁰⁴ *Tailors*, 77 Eng. Rep. at 1220, reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 390, 394 (Steve Sheppard ed., 2003).

pre-Norman Anglo-Saxon law at the dawn of English history.¹⁰⁵ In the *First Institute*, published in 1628, six years before his death,¹⁰⁶ Coke characterized the rights and remedies of Magna Carta as both ancient and constitutionally supreme.¹⁰⁷ More radically, Coke declared that judgments and statutes contrary to the Charter “are adjudged voide,” thereby making Magna Carta fundamental and preeminent English law.¹⁰⁸ In Coke’s view, Magna Carta did not merely confirm and restore the common law, but also declared the bedrock constitutional principle that the common law bound and limited both the crown and Parliament—a view that Coke emphatically and publicly reaffirmed in the debates surrounding the drafting and execution of the Petition of Right, Parliament’s declaration of fundamental common law liberties enacted as a statutory bill under Coke’s influence in 1628.¹⁰⁹

Coke reaffirmed these principles in the *Second Institute*, written in the early 1630s but not published until after his death.¹¹⁰ He again maintained that Chapter 29 and Magna Carta generally were declarations of the ancient rights of Englishmen, and thus limits on the actions of both the king and

¹⁰⁵ SIR EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND: OR A COMMENTARY UPON LITTLETON* (London, Society of Stationers 1628), *excerpted in* 2 *THE SELECTED WRITINGS OF EDWARD COKE* 577 (Steve Sheppard ed., 2003) [hereinafter *FIRST INSTITUTE*].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* § 108, at 697.

¹⁰⁸ *Id.* at 697–98.

¹⁰⁹ JOHN FULTON [S.M. JOHNSON, pseud.], *FREE GOVERNMENT IN ENGLAND AND AMERICA: CONTAINING THE GREAT CHARTER, THE PETITION OF RIGHT, THE BILL OF RIGHTS, THE FEDERAL CONSTITUTION* 325, 328 (New York, Carleton 1864); *see* STONER, *LIBERAL THEORY*, *supra* note 70, at 45–47. A provision in earlier drafts of the Petition expressly affirmed the “sovereign power” of the king, which Coke famously condemned as inconsistent with the higher-law understanding of Magna Carta as a fundamental limit on both royal and parliamentary power:

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

BOWEN, *supra* note 76, at 496 (quoting Coke). In higher constitutional theory, natural and customary rights bound the king regardless of whether they were enumerated in a writing like the Petition. In practice, however, these rights were obviously more secure when the king formally agreed to observe them, as in the Petition. The Anti-Federalists made an analogous argument for the Bill of Rights, arguing that a constitutional declaration of natural and customary rights would make them more secure. *See infra* text accompanying note 283.

¹¹⁰ EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWEES OF ENGLAND* (London, Flesher & Young 1642), *excerpted in* 2 *THE SELECTED WRITINGS OF EDWARD COKE* 745 (Steve Sheppard ed., 2003) [hereinafter *SECOND INSTITUTE*].

Parliament.¹¹¹ It was also in the *Second Institute* that Coke clearly equated the law of the land with the due process of law.¹¹² Moreover, Coke characterized Chapter 29's prohibition of deprivations and forfeitures inconsistent with the law of the land or the due process of law as having clear substantive import, being declaratory of ancient English law that a person's liberty shall be infringed only when such infringements are justified by "the Common Law, Statute Law, or Custome of England."¹¹³ The liberty protected by Chapter 29, according to Coke, "signifieth the freedoms, that the Subjects of England have,"¹¹⁴ meaning substantive as well as procedural rights.¹¹⁵

Coke also strengthened his argument against monopolies in the *Second Institute* by replacing general recourse to the common law with the more specific assertion that monopolies violate Chapter 29,¹¹⁶ a law "of definite content and traceable back to one particular document of ancient and glorious origin."¹¹⁷ Coke condemned the grant of royal monopolies for the manufacture or provision of useful articles as a violation of the individual liberty protected by Magna Carta:

So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of Cards, or the sole dealing with any other trade, that graunt is against the liberty, and freedom of the Subject,

¹¹¹ *Id.* at 745, 751–52.

¹¹² *Id.* at 858–59. "Law of the Land" is defined by reference to one of the six statutes wherein the phrase is defined as "due process of Law," and further glossed as

by indictment of presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common law.

Without being brought in to answere but by due Proces of the Common law.

No man be put to answer without presentment before Justices, or thing of record, or by due proces, or by writ originall, according the old law of the land.

Id.; see also ORTH, *supra* note 72, at 7–8 ("[T]he 'law of the land,' Coke said, meant the common law, and the common law required 'due process.'"); STRONG, *supra* note 52, at 14 (asserting that Coke "gave permanence to the concept of 'due process by law' by asserting its equivalence to *per legem terrae* of chapter 29 of Magna Carta").

¹¹³ SECOND INSTITUTE ch. 29, *supra* note 110, at 849.

¹¹⁴ *Id.* at 851; accord 1 THE SELECTED WRITINGS OF EDWARD COKE 249 (Steve Sheppard ed., 2003).

¹¹⁵ See HOWARD, *supra* note 51, at 23 ("Magna Carta's power lay . . . in the symbolism and moral force that it carried for later times, an influence so great that by the seventeenth century the best-read of lawyers traced almost anything that was worthy and good back to the Charter, including trial by jury, habeas corpus, and Parliament's right to control taxation."); STONER, LIBERAL THEORY, *supra* note 70, at 21 (asserting that Coke's use of Magna Carta to refer "specifically to the freedom of subjects from interference in basic pursuits" points to its use "to comprehend the whole of the fundamental laws of the realm").

¹¹⁶ See, e.g., SECOND INSTITUTE ch. 29, *supra* note 110, at 851.

¹¹⁷ Corwin, "Higher Law" Background (pt. 2), *supra* note 70, at 378.

that before did, or lawfully might have used that trade, and consequently against this great Charter.¹¹⁸

Coke did not attack monopolies because of the *manner* in which they deprived individuals of their right to practice a trade or calling, but rather for the deprivation itself. In language foreshadowing the Fifth Amendment's Due Process Clause, Coke emphasized that a man's trade is his life, and "therefore the monopolist that taketh away a mans trade, taketh away his life."¹¹⁹ The violation of Chapter 29 lies not in the fact that monopolies deprive individuals of life or property without trial by jury or other legal process, but in the fact that monopolies effect such deprivations at all. Thus, Coke flatly declared, "Generally all monopolies are against this great Charter, because they are against the liberty and freedom of the Subject, and against the Law of the Land."¹²⁰

2. *Natural Law and Common Law*

Coke's invocation of "common right and reason" in *Bonham's Case* had a natural law resonance that is not as immediately apparent today. Although during the late medieval and early modern eras it was widely maintained that the common law somehow reflected or incorporated natural law principles,¹²¹ common law decisions generally did not make explicit natural law arguments or otherwise expressly refer to the natural law.¹²² The natural law entered into

¹¹⁸ SECOND INSTITUTE ch. 29, *supra* note 110, at 851.

¹¹⁹ EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES* 181 (Lawbook Exchange 2002) (1644).

¹²⁰ SECOND INSTITUTE ch. 29, *supra* note 110, at 852.

Coke also condemned the practice by which kings (and occasionally Parliament) sought to rid themselves of troublesome political opponents by appointing them to posts outside of England. Acceptance of the appointment took the appointee (conveniently) out of English politics, while refusal triggered punitive forfeiture of lands and privileges, and sometimes even imprisonment. Coke argued that this practice and its associated penalties constituted a "banishment" or "exile" that violated the plain language of Chapter 29 when imposed without a prior felony conviction. As with monopolies, the crux of the violation of Chapter 29 was not lack of process when a royal appointee incurred penalties upon rejection of the appointment, but rather the penalties themselves. *Id.* at 852–53; see BOWEN, *supra* note 76, at 482 (detailing the efforts of Coke and others in Parliament to champion subjects' rights against imprisonment without cause).

¹²¹ Postema, *Classical Common Law*, *supra* note 55, at 176–77; see NORMAN DOE, *FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW* 3–5 (1990) (describing how "[m]orality, of divine origin" was incorporated into English law); Cromartie, *supra* note 75, at 81–82, 84 (stating that "decisions by the bench had taken natural law into account"); Richard O'Sullivan, *The Natural Law and Common Law*, 3 U. NOTRE DAME NAT. L. INST. PROC. 9, 19–20, 29, 32 (1950).

¹²² DOE, *supra* note 121, at 176; Postema, *Classical Common Law*, *supra* note 55, at 177–78; Pound, *supra* note 27, at 228; Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (pt. 2), 20 NOTRE DAME LAW. 347, 364 (1945).

the common law implicitly through the notion of *resoun*, an evocative Norman French cognate of “reason,” which combined notions of “rightness” and “reasonableness” and was employed by judges and lawyers to describe the essence of the common law.¹²³ Usually rendered “reason” or “right reason,” *resoun* conveyed at once the notion of a living community and its sense of justice.¹²⁴ A decision that had “reason” or “right reason” was “fitting” in a dual sense, both consistent with customary precedent, and expressive of a morally correct outcome.¹²⁵ Indeed, in the classical common law tradition, “reason” was sometimes understood as the equivalent of “justice.”¹²⁶ As Professor Postema has observed, “reason” in the classical common law stood for “the situated, experience-informed judgment of the judge using all the resources the vast body of the law provides, thinking by analogy and extension from all that he knows, to fashion a just and workable solution.”¹²⁷

Although this close relationship between the common law and the natural law was widely assumed in the seventeenth century, the common lawyers never formally explained it. They rhetorically grounded common law in both custom and natural law without ever confronting the improbability of deriving one from the other.¹²⁸ This problem became increasingly acute as the modern

¹²³ H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM* 77 (1993); see STONER, *LIBERAL THEORY*, *supra* note 70, at 173 (noting the classical common law maxim, “what is not reason is not law”); Gerald J. Postema, *Classical Common Law Jurisprudence* (pt. 2), 3 OXFORD U. COMMONWEALTH L.J. 1, 21 (2003) [hereinafter Postema, *Classical Common Law* (pt. 2)] (arguing that in the seventeenth century, the “artificial reason” of the common law “was seen largely as the most reliable procedure for approximating” natural justice); see also CHRISTOPHER SAINT GERMAN, *ST. GERMAN’S DOCTOR AND STUDENT* 33–35 (T.F.T. Plucknett & J.L. Barton eds., Selden Society 1974) (1523) (arguing that the first ground of the law of England is the law of reason).

¹²⁴ POWELL, *supra* note 123, at 78; see DOE, *supra* note 121, at 176 (arguing that an “idea[] of abstract right” was implied by the “resemblance between the practitioners’ reason, upon which the common law was founded, and the theorists’ justice, which required that each be given his due”; and observing that although common lawyers rarely invoked the natural law, they employed “comparably moral ideas,” appealing to “conscience and ideas of divine law”); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 7 (1986) [hereinafter POSTEMA, *COMMON LAW TRADITION*] (“Common Law is seen to be the *expression* or manifestation of commonly shared values and conceptions of reasonableness and the common good.”).

¹²⁵ See POSTEMA, *COMMON LAW TRADITION*, *supra* note 124, at 7.

¹²⁶ DOE, *supra* note 121, at 120; see also *id.* at 115 (noting that “reason” was deployed at common law for substantially the same ends as equity was deployed in the chancery courts).

¹²⁷ Postema, *Classical Common Law*, *supra* note 55, at 179; accord DOE, *supra* note 121, at 177 (arguing that, for common lawyers of the fifteenth and sixteenth centuries, “the authority of morality (manifested in natural law, divine law, justice or conscience) and good sense and proportionality (manifested in reason) were of crucial importance for the existence and development of law”).

¹²⁸ James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1352–61 (1991); see POSTEMA, *COMMON LAW TRADITION*, *supra* note 124, at 35–36 (observing that the common law conception of reason was “practical and historical; the ‘natural law’ involved is not external to the tradition, but implicit in it, not socially transcendent, but immanent”).

era matured and natural law came to mean “deductive reasoning” rather than “divine law” or “practical wisdom.”¹²⁹ It is unclear, for example, how one could derive the customary common law right to a jury trial from human existence in the state of nature, or by any other form of deductive reasoning.

Coke shared the widespread and confused belief of his era that the common law incorporated the natural law.¹³⁰ The concept of *resoun* was clearly at work in Coke’s understanding that certain common law rights and principles constitute “higher law.” Both *Prohibitions del Roy* and *Bonham’s Case*, for example, rested on *resoun*. As Coke was at pains to inform James, “reason” in the common law was not the natural reason possessed by all humanity, but rather an “artificial” reason developed by deep study and long experience in the profession.¹³¹ In *Bonham’s Case*, Coke used the ubiquitous common law

Professor Whitman argues that this casual “mingling” of common law and natural law was the result of an “evidentiary crisis of custom” in the late medieval and early modern eras. Whitman, *supra*, at 1323. According to Whitman, the basic norm of both the continental and English legal systems was local custom. *Id.* at 1329–40. As centralized courts replaced local courts, however, it became impossible for judges to consult local witnesses to prove the local customs that governed the outcome of the cases before them. *Id.* at 1330–31, 1340–47, 1352–56.

Lacking local witnesses, early modern lawyers were forced to seek an alternative means of determining custom. The alternative they chose was to blend customary and natural law into a peculiar concoction, which they called the “common custom of the realm,” and which they embodied in treatises that could be consulted in lieu of consulting local witnesses. The consequence was a thorough confusion of custom and reason

Id. at 1331.

Once the customs that grounded the common law were claimed to be reasonable, they could be proved by recourse to reason rather than testimony. *See, e.g., id.* at 1356 (“[T]he common law is reasonable usage, throughout the whole realm, approved time out of mind in the king’s courts of record which have jurisdiction over the whole kingdom, to be good and profitable for the commonwealth.” (quoting Thomas Hedley, Speech to Parliament in 1610, in J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 272–73 (2d ed. 1987))); *accord id.* at 1359.

¹²⁹ *See id.* at 1362 (“[W]hen eighteenth-century lawyers spoke of ‘reason,’ they most often meant, not craftsmanlike reason, nor revealed truth, but the activity of reasoning from first principles.”); *see also* POSTEMA, COMMON LAW TRADITION, *supra* note 124, at 37 (noting a “deep ambiguity in Common Law theory, for it is not clear whether Common Law is regarded as itself defining standards of reason and justice in this area of social life (Common Law regarded *as* reason), or whether Common Law is the working out of reason (reason regarded as working *in* and *through* Common Law)”).

¹³⁰ *See, e.g.,* Cromartie, *supra* note 75, at 86 (“Coke shared Sir John Doddridge’s sense that common law was natural law applied to English life.”).

¹³¹ *Id.* at 83; Postema, *Classical Common Law*, *supra* note 55, at 178; *see also* STONER, LIBERAL THEORY, *supra* note 70, at 177 (“The common law proceeds by reason, but by reason that collects and judges particulars—by a sort of Aristotelian practical reason—rather than by reason in the modern, Enlightenment, analytical sense—the reason that breaks apart and reassembles. It stresses continuity rather than novelty, though it demands some reason greater than custom alone, for by common law, unreasonable customs have no legal force.”).

phrase, “against common right and reason,” to describe royal and parliamentary actions that were void and unenforceable as violations of higher law.¹³² A decision or result “against common right and reason” (or, more simply, “against reason”) would violate both the legal order, in the sense that it would be inconsistent with custom and precedent,¹³³ and the natural order, in the sense that it would violate broader principles of natural justice and right.¹³⁴

II. DUE PROCESS AND UNENUMERATED RIGHTS BEFORE THE FIFTH AMENDMENT

Coke was not alone in developing and using higher-law constitutionalism during the seventeenth century.¹³⁵ For example, both John Seldon and Sir Matthew Hale, seventeenth-century common lawyers of great distinction, acknowledged the influence of natural law on common law,¹³⁶ and defended the position that judicial application of common law defined the limits of the royal prerogative.¹³⁷ Nevertheless, American colonists looked almost exclusively to Coke in formulating higher-law arguments against their perceived oppression by Britain.

During the century following England’s Glorious Revolution in 1688, parliamentary supremacy replaced Coke’s understanding that due process and higher law checked royal and parliamentary encroachments on substantive liberties. Higher-law constitutionalism, however, was received and adapted by the American colonies in their revolutionary struggle with Britain. Parliamentary supremacy slowly displaced higher-law constitutionalism during the eighteenth century in Britain, but not in America, thereby framing the

¹³² See Edward S. Corwin, *Natural Law and Constitutional Law*, 3 U. NOTRE DAME NAT. L. INST. PROC. 45, 54 (1950) [hereinafter Corwin, *Natural Law*]; Pound, *supra* note 27, at 228.

¹³³ See STONER, LIBERAL THEORY, *supra* note 70, at 25, 54 (“Coke appears to use *reason* to refer not to a first principle but to a guarantor of consistency in the law as a whole”); Postema, *Classical Common Law*, *supra* note 55, at 178 (noting that for “a custom, practice, rule or judgment to be ‘against reason . . . was for it to be inconsistent with the law as a whole”).

¹³⁴ See Corwin, *Natural Law*, *supra* note 132, at 79; DOE, *supra* note 121, at 176 (finding that “there is a resemblance between the practitioners’ reason, upon which the common law was founded, and the theorists’ justice”; and observing that absurd results or arguments were considered “against reason”); STONER, LIBERAL THEORY, *supra* note 70, at 58, 173 (observing that a violation of “common right and reason” was an absurd or unjust result that, as such, did not bind the courts).

¹³⁵ See Raffield, *supra* note 67, at 78.

¹³⁶ See, e.g., Postema, *Classical Common Law* (pt. 2), *supra* note 123, at 27.

¹³⁷ See STONER, LIBERAL THEORY, *supra* note 70, at 131–33 (contrasting Hale’s idea of common law reason with Hobbes’s concept of an absolute sovereign); Raffield, *supra* note 67, at 78.

constitutional conflict that led to the American Revolution and, ultimately, to the American Constitution and Bill of Rights.

A. *The English Constitutional Transition*

Despite the best efforts of Coke and his contemporaries, Magna Carta, due process, and common law courts did not prove adequate to cabin the absolutist claims of the Stuarts. The efforts of Parliament, however, were another story. During the 1640s, Parliament—more accurately, the Commons—fought, deposed, and beheaded James's son and successor, Charles I.¹³⁸ After a decade of theocratic despotism under “Lord Protector” Oliver Cromwell and his son Richard, Parliament removed Richard in 1660 and restored the monarchy, placing the son of the executed Charles on the throne as Charles II.¹³⁹ Nearly three decades of fierce disagreement with Charles II and his successor, the openly Catholic James II, ended in Parliament's orchestration of the Glorious Revolution of 1688, in which James II was forced from the throne, and the Dutch-Protestant William of Orange and his wife Mary, James II's daughter, were installed as king and queen.¹⁴⁰

In the span of less than half a century, then, Parliament had successively impeached, deposed, and executed one king, overthrown the Puritan dictatorship that followed, reconstituted the monarchy, driven yet another king into exile, and (finally) installed his successor.¹⁴¹ That it was necessary for Parliament to take these actions at all is perhaps the best evidence that higher-law constitutionalism was not up to the task of reining in abuses of prerogative by the Stuarts. What eventually arose in place of higher-law constitutionalism was a different constitutional understanding, under which Parliament itself wielded absolute constitutional authority as the sovereign in the British constitutional system. Having vanquished the royal foes of English liberty, Parliament formalized the protection of that liberty in itself.¹⁴² As Professor

¹³⁸ ADAMS, *supra* note 49, at 316–21.

¹³⁹ *Id.* at 334–38; 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 13 (2d ed. 2002).

¹⁴⁰ ADAMS, *supra* note 49, at 338–57.

¹⁴¹ Edmund S. Morgan, *Constitutional History Before 1776*, in AMERICAN CONSTITUTIONAL HISTORY 1, 7 (Leonard Levy et al. eds., 1989).

¹⁴² See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 200 (enlarged ed. 1992) [hereinafter BAILYN, IDEOLOGICAL ORIGINS] (noting that Parliament's actions were partially the result of pressures from both Royalists and extreme libertarians, who promoted individual rights against all types of government); 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 55 (1987) [hereinafter REID, CONSTITUTIONAL HISTORY] (comparing Parliament's exercise of authority to that of the deposed kings).

Reid has observed, the Glorious Revolution was “the triumph of liberty, but of a liberty that had been institutionalized in Parliament’s supremacy over the crown.”¹⁴³ The supremacy of Magna Carta, due process, and the common law, in which Coke had placed so much faith, was replaced by the supremacy of Parliament.¹⁴⁴

As the British seventeenth century gave way to the eighteenth, the authority of *Bonham’s Case* and the constitutional understanding that common law judges might challenge royal and parliamentary power in defense of individual liberty slowly receded.¹⁴⁵ By the mid-1700s, a competing understanding of the English constitution had taken its place alongside higher-law constitutionalism.¹⁴⁶ This new understanding held the English constitution to be what Parliament chose to enact or repeal as law, even when such actions violated natural or common law.¹⁴⁷ Though this new constitution of “sovereign command” would not clearly displace that of higher-law constitutionalism until the nineteenth century,¹⁴⁸ already in 1765 Blackstone could declare that there was no constitutional remedy for parliamentary violation of the fundamental common law rights protected by the English constitution.¹⁴⁹

¹⁴³ 4 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 67; *accord* ARTHUR L. GOODHART, “LAW OF THE LAND” 50 (1966) (“It was clear that there was no prerogative power vested in [the King] which was not subject to ultimate control by Parliament.”); Morgan, *supra* note 141, at 8.

¹⁴⁴ See ORTH, *supra* note 72, at 25 (“The only institution that was a match for the Crown was Parliament, as demonstrated . . . in the Glorious Revolution of 1688.”).

¹⁴⁵ POWELL, *supra* note 123, at 81.

¹⁴⁶ See 1 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 76 (“The meaning of constitutionality was drastically transformed.”); 3 *id.* at 63–70; 4 *id.* at 55.

¹⁴⁷ See POWELL, *supra* note 123, at 107 (“Blackstone, and English legal opinion of his day generally, rejected any claim that judges could enforce this law of nature (or reason) in the teeth of positive law.”); *cf.* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 26–27 (2d ed. 1998) (describing the eighteenth-century development of the Commons into “a kind of independent body distinct from the people,” and the “correlative conception of the sovereignty of Parliament, that is, that Parliament was the final and supreme authority for all law even against the wishes of the people whom it supposedly represented”).

¹⁴⁸ See Wayne McCormack, Lochner, *Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 446 (2005) [hereinafter McCormack, *Lochner*] (“Although the British courts eventually developed the doctrine of Parliamentary Supremacy, . . . Lords Coke and Holt viewed even Acts of Parliament as being subject to the established rights of Englishmen.”).

¹⁴⁹ See 1 WILLIAM BLACKSTONE, COMMENTARIES *91. Blackstone argued that acts of Parliament leading to absurd results were void, but that the courts were without power to enforce this rule, even against parliamentary violations of fundamental English rights. *Id.*; *accord* 2 *id.* at *156–57 (“True it is, that what the Parliament doth, no authority upon earth can undo. . . . So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.”).

B. *Constitutional Ambiguity in the American Revolution*

Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke's career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law.¹⁵⁰ A large number of seventeenth-century American lawyers studied law in England, where Coke's *Reports* and *Institutes* were a staple of legal education,¹⁵¹ just as they were in the American colonies until the publication of Blackstone's *Commentaries* in 1765.¹⁵² Even after Blackstone, Coke's higher-law constitutionalism remained the more influential school of thought before and during the Revolution, when the arguments of Locke and the Whigs of the Glorious Revolution dominated legal and political thought in the colonies.¹⁵³

Consequently, American lawyers were well-informed about English constitutional principles, including Chapter 29 and the "myth of Magna Carta," *Bonham's Case*, and all the other resources of higher-law constitutionalism.¹⁵⁴ The influence of higher-law constitutionalism was evident in the colonies as early as the mid-1650s.¹⁵⁵ When the revolutionary conflict arose in the

¹⁵⁰ Barnes, *supra* note 71, at 24; Corwin, "Higher Law" Background (pt. 2), *supra* note 70, at 394; Grey, *Fundamental Law*, *supra* note 29, at 850; Pound, *supra* note 27, at 229; Pound, *supra* note 122, at 349; Riggs, *supra* note 29, at 945, 958–59.

¹⁵¹ See BOWEN, *supra* note 76, at 506–07 (noting how ubiquitous Coke's writings were in English legal education); RODNEY L. MOTT, DUE PROCESS OF LAW § 31, at 87–88 (1973) (1926) (describing how Americans who studied in London returned with a strong appreciation for Coke).

¹⁵² See BAILYN, IDEOLOGICAL ORIGINS, *supra* note 142, at 30–31 ("In the later years of the Revolutionary period, Blackstone's *Commentaries* and the opinions of Chief Justice Camden became standard authorities."); BOWEN, *supra* note 76, at ix, 506–07 (noting that "Coke's *Reports* . . . went into many printings, abridgments, [and] translations"); POWELL, *supra* note 123, at 81 (describing Blackstone's "remarkable publishing success"); STONER, LIBERAL THEORY, *supra* note 70, at 4, 13 (noting that Blackstone, Locke, and Montesquieu replaced Coke as the authority on the common law); Barnes, *supra* note 71, at 24–25 (describing how Coke influenced some of the Founding Fathers); Meyler, *supra* note 67, at 34, 36 (comparing the underlying constitutional theories of Coke, Hale, and Blackstone).

¹⁵³ See BAILYN, IDEOLOGICAL ORIGINS, *supra* note 142, at 30 (observing that colonial citations to Coke were almost as frequent as those to Locke, Montesquieu, and Voltaire); Corwin, "Higher Law" Background (pt. 2), *supra* note 70, at 376 (describing how Coke's theories continued to be influential in America after the founding era); Pound, *supra* note 122, at 349 ("What the medieval cases and tradition were to Coke, Coke's Second Institute and the decisions of the common-law courts he discusses or that followed him were to the American lawyers before the Revolution.").

¹⁵⁴ See ADAMS, *supra* note 49, at 333, 360–61; BAILYN, IDEOLOGICAL ORIGINS, *supra* note 142, at 45; STRONG, *supra* note 52, at 14; WOOD, *supra* note 147, at 297.

¹⁵⁵ *E.g.*, Giddings v. Browne (Salem, Mass. County Ct., June 22 & Aug. 20, 1657) (voiding as a violation of fundamental law a financial assessment voted by the majority of the town of Ipswich for the purpose of providing a house for their pastor, because "laws positive do lose their force and are no laws at all, which are directly contrary to the . . . native or fundamental [law]," and "if no king or parliament can justly enact and

mid-eighteenth century, the colonists bolstered their arguments against Britain with the higher-law constitutionalism of the seventeenth century, not the sovereign-command constitutionalism of the eighteenth century.¹⁵⁶

The Revolution took place against this backdrop of constitutional polarity in Britain and the American colonies.¹⁵⁷ The higher-law constitutionalism of Coke and seventeenth-century common lawyers was receding, while the constitutionalism of parliamentary supremacy and sovereign command was ascendant.¹⁵⁸ George III and the Tory majority in Parliament acted in accordance with the new constitutional understanding, under which enactment of a statute by Parliament was, by definition, consistent with the English constitution.¹⁵⁹ They saw nothing constitutionally problematic in Parliament's imposition of revenue-raising and internal regulatory measures on the colonies. The colonists and the Whig minority, on the other hand, continued to understand the colonies' relationship to the king and Parliament in terms of seventeenth-century higher-law constitutionalism.¹⁶⁰ They accordingly reacted to parliamentary taxation and internal regulation of the colonies by invoking

cause that one man's estate, in whole or in part, may be taken from him and given to another without his own consent, then surely the major part of a town or other inferior powers cannot do it," *rev'd* (Mass. Gen. Ct. Oct. 14, 1657) (holding that the decision of the majority in such matters properly binds the whole), *reported in* THOMAS J. HUTCHINSON, A COLLECTION OF ORIGINAL PAPERS RELATIVE TO THE HISTORY OF THE COLONY OF MASSACHUSETTS-BAY 287–91, 308–09 (Boston, Thomas & John Fleet 1769) (spellings modernized); *see* MOTT, *supra* note 151, § 33, at 93–95 (noting that nine provisions of Magna Carta were included in the Massachusetts "Body of Liberties" drawn up in the 1630s in response to intrusive and trivial laws promulgated by Governor Winthrop); POWELL, *supra* note 123, at 108 (observing that "late colonial American lawyers" understood Coke in *Bonham's Case* "to have asserted a judicial power to disregard or invalidate unreasonable and unconstitutional statutes"); Corwin, "*Higher Law*" *Background* (pt. 2), *supra* note 70, at 394–95 (noting that during the seventeenth century, Magna Carta became closely identified in the colonies with "all documents of constitutional significance, and thereby a symbol and reminder of principles binding on government," and that Coke's dictum in *Bonham's Case* was occasionally cited outside New England, "even before its notable revival by Otis").

¹⁵⁶ *See, e.g.*, PLUCKNETT, *supra* note 67, at 40–41 ("It was mediaevalists in England, armed with Bracton and the Year Books, who ended Stuart statecraft, and the Constitution of the United States was written by men who had *Magna Carta* and Coke upon Littleton before their eyes."); POWELL, *supra* note 123, at 82 (arguing that the "subversion of the classical common law in England was substantially ignored in America"); Corwin, "*Higher Law*" *Background* (pt. 2), *supra* note 70, at 367 (suggesting that few judicial pronouncements are more important to the origins of American constitutional theory than Coke's dictum in *Bonham's Case*).

¹⁵⁷ 4 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 4, 56.

¹⁵⁸ *See id.* at 4–5; Grey, *Fundamental Law*, *supra* note 29, at 866–67 ("According to the new theory, England's constitution was no more than the set of laws, institutions and traditional principles for governing the nation and was legally subject to alteration by Parliament at any time."); Meyler, *supra* note 67, at 12.

¹⁵⁹ *See* BAILYN, IDEOLOGICAL ORIGINS, *supra* note 142, at 30–31, 47; JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 211 (1996); WOOD, *supra* note 147, at 13–15; *supra* notes 147–49 and accompanying text.

¹⁶⁰ *See supra* Part II.A.

Magna Carta, due process, and fundamental common law rights.¹⁶¹ Ultimately, of course, this conflict was resolved by revolution and independence.

In resisting parliamentary control during the pre-revolutionary period, the colonists relied heavily on the arguments of higher-law constitutionalism from seventeenth-century England, including Magna Carta and Coke's dictum in *Bonham's Case*.¹⁶² *Paxton's Case*, for example, involved a royal customs officer who sought a "writ of assistance," or general search warrant, to give him unbounded authority to search the home of any colonist for smuggled goods.¹⁶³ Opposing the writ, colonial lawyer James Otis appealed directly to higher-law constitutionalism, citing *Bonham's Case*: "As to Acts of Parliament, an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void."¹⁶⁴ Citing Magna Carta and Coke's *Second Institute*, Otis concluded that Parliament was not "the final arbiter of the justice and constitutionality of its own acts"; rather, "the validity of statutes must be judged by the Courts of Justice,"¹⁶⁵ thereby foreshadowing, in the words of reporter John Adams, the basic principle of American constitutionalism, "that it is the duty of the judiciary to declare unconstitutional statutes void."¹⁶⁶

¹⁶¹ 2 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 14, 138; Grey, *Fundamental Law*, *supra* note 29, at 879–80, 887.

¹⁶² See MOTT, *supra* note 151, § 49, at 127 ("[T]he fundamental character of the constitution of the British Empire was quite generally recognized as being unalterable by simple parliamentary fiat."); RAKOVE, *supra* note 159, at 212, 245; JOHN PHILLIP REID, THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY 65 (2005) [hereinafter REID, ANCIENT CONSTITUTION] (describing the way in which the Founding Fathers viewed legal history); see also JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 169 (1943) (observing that "natural law and the rights of Englishmen" constituted sources of constitutional argument deployed by the colonists against Britain).

¹⁶³ See *Paxton's Case of the Writ of Assistance* (Mass. Bay Super. Prov. Ct. 1761), reported in 1 JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 51–57, app. I-A, at 395–405 (Boston, Little, Brown, & Co. 1865) [hereinafter *Paxton's Case*]. For a description of the case and its origins in the abusive issuance of writs of assistance, see MILLER, *supra* note 162, at 46–47.

¹⁶⁴ *Paxton's Case*, *supra* note 163, app. I-D, at 471, 474 & n.20 (report of John Adams) (citing Viner ("Reason of ye Com. Law to control an Act of Parliament"); Dr. Bonham's Case, (1610) 77 Eng. Rep. 646, 651 (K.B.), reprinted in 1 THE SELECTED WRITINGS OF EDWARD COKE 265 (Steve Sheppard ed., 2003)); see *id.* app. I-I, at 521–24 (listing Otis's quotations from Coke on Magna Carta).

¹⁶⁵ *Id.* app. I-I, at 520–21; see *id.* app. I-I, at 521 n.23 (citing *Bonham's Case*); *id.* app. I-E, at 483–85 (listing Otis's quotations from Coke on Magna Carta). Otis's citation to the *Second Institute* references the section in which Coke explicates Chapter 29 line-by-line. See SECOND INSTITUTE, *supra* note 110, at 848–73.

¹⁶⁶ *Paxton's Case*, *supra* note 163, app. I-I, at 521.

Although the court in *Paxton's Case* ultimately granted the writ, Otis's higher-law argument that courts may invalidate parliamentary acts against Magna Carta and common law rights quickly became a staple of colonial constitutional argument.¹⁶⁷ Otis's contemporaries immediately grasped the rhetorical power of subjecting governmental institutions and positive laws to "fundamentals" and "principles," as Otis seemed to have done in arguing against British governance of the colonies.¹⁶⁸ Indeed, the colonists understood Otis to have gone far beyond Coke by arguing that an ordinary court could overturn the specifically enacted will of Parliament,¹⁶⁹ and they accordingly treated *Bonham's Case* as a virtual rule permitting courts to void any act of Parliament against natural justice or the common law.¹⁷⁰ After Otis published his argument in pamphlet form,¹⁷¹ a number of prominent colonial revolutionaries relied on it as the basis for their own constitutional arguments against parliamentary actions.¹⁷² Although some of these arguments emphasized the writtleness of a constitution, they also emphasized that even a written constitution did not create or eclipse fundamental rights, but merely declared and guaranteed them.¹⁷³ Although the colonists did not always cite

¹⁶⁷ SCHWARTZ, *THE GREAT RIGHTS*, *supra* note 94, at 57–58; Corwin, "Higher Law" *Background* (pt. 2), *supra* note 70, at 398–99; Riggs, *supra* note 29, at 971.

¹⁶⁸ Pound, *supra* note 122, at 368; Riggs, *supra* note 29, at 970; e.g., James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), in 1 *COLLECTED WORKS OF JAMES WILSON* 3, 3–4 (Kermit L. Hall & Mark David Hall eds., 2007).

¹⁶⁹ Corwin, "Higher Law" *Background* (pt. 2), *supra* note 70, at 398; see also SCHWARTZ, *THE GREAT RIGHTS*, *supra* note 94, at 56 ("During the conflict that led to the Revolution, Americans increasingly took the dictum in *Dr. Bonham's Case* literally, as a statement that there was a fundamental law limiting Parliamentary powers. Had not my Lord Coke concluded, they argued among themselves, that when an Act of Parliament is contrary to such fundamental law, it must be adjudged void? Did this not mean that when the British government acts toward the colonies in a manner contrary to common right and reason, its decrees too must be given no legal force?").

¹⁷⁰ See Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 *L. & HIST. REV.* 439, 440 (2003).

¹⁷¹ JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (Boston, Edes & Gill 1764).

¹⁷² See, e.g., ANTIEAU, *supra* note 29, at 351 (Samuel Adams); BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 181–82 (Samuel Adams); *id.* at 182–83 (Samuel Cook); Corwin, "Higher Law" *Background*, *supra* note 57, at 169 (John Adams); Corwin, "Higher Law" *Background* (pt. 2), *supra* note 70, at 400 (Massachusetts Circular Letter of 1768); Riggs, *supra* note 29, at 970 (John Adams's petition against the Stamp Act); *id.* at 970–71 (Benjamin Franklin); *id.* at 971 (Daniel Dulany); see also BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 184 (defining a constitution as a "'set of fundamental rules by which even the supreme power of the state shall be governed' and which the legislature is absolutely forbidden to alter" (quoting and paraphrasing a revolutionary pamphlet)).

¹⁷³ See, e.g., BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 183 ("[A]ll the great rights which man never mean, nor ever ought, to lose should be *guaranteed*, not *granted*, by the constitution" (quoting ANONYMOUS, *FOUR LETTERS ON INTERESTING SUBJECTS* 22 (Philadelphia 1776))).

Chapter 29, in most cases they relied on the concept of higher-law constitutionalism embedded in the seventeenth-century concept of due process of law.¹⁷⁴ With Coke,¹⁷⁵ the colonists understood Chapter 29 and due process as general protections against arbitrary and oppressive government,¹⁷⁶ which left only a short step to understanding the common law “as a limitation upon the impairment of vested rights or the tyrannical exercise of the police power” by Parliament.¹⁷⁷

The extent to which the colonists incorporated higher-law constitutionalism into their constitutional thinking in the years following *Paxton’s Case* is evident in *Robin v. Hardaway*, a 1772 decision reported by Thomas Jefferson.¹⁷⁸ George Mason, who would later participate in the Philadelphia convention (but refuse to endorse its constitutional product), represented Native American plaintiffs challenging a Virginia colonial statute providing that descendants of Native American women were slaves.¹⁷⁹ Citing *Bonham’s Case*, Mason argued as a general constitutional rule that “all acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.”¹⁸⁰ Mason also drew an analogy that showed how higher-law constitutionalism had become central to colonial thought in the decade since *Paxton’s Case*, arguing that natural law had the same normative force with respect to the statute in question in *Robin* as the

¹⁷⁴ See, e.g., MOTT, *supra* note 151, § 50, at 132 (arguing that general citations to Magna Carta during the revolutionary era probably referred to the concept of due process, because of the ubiquitousness of quotations from Chapter 29 in the revolutionary protest literature); Corwin, *Natural Law*, *supra* note 132, at 55–56 (summarizing arguments against writs of assistance, the Stamp Act, and other parliamentary acts).

¹⁷⁵ See *supra* Part I.B.1.

¹⁷⁶ See, e.g., REID, *ANCIENT CONSTITUTION*, *supra* note 162, at 84 (“The jurisprudence of Magna Carta in the eighteenth century, therefore, was a rejection of the constitutionalism of arbitrary power.”); see also MOTT, *supra* note 151, § 54, at 142 (observing that for the American colonists, “[d]ue process of law” resembled “a catch-all phrase for human rights rather than a phrase with a well defined content”).

Professor Reid argues that late eighteenth-century English Whigs had a comparable understanding of Magna Carta as “a virtual constitution of individual rights,” an organic law whose general function was “to enhance individual liberty and restrain governmental discretion.” REID, *ANCIENT CONSTITUTION*, *supra* note 162, at 82, 83.

¹⁷⁷ See MOTT, *supra* note 151, § 47, at 123; see also LEVY, *supra* note 8, at 4 (noting that American views on law, religion, and political theory were informed by “a highly selective and romanticized image of seventeenth-century England, and they perpetuated it in America even as that England changed”); THORNE, *supra* note 95, at 237 (suggesting that England and the United States alike “are indebted to [Coke] for an unhistorical but profoundly influential commentary on Magna Carta, and for much fundamental constitutional law not completely supported by the sources”).

¹⁷⁸ 1 Va. (Jeff.) 109 (Va. Gen. Ct. 1772).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 114 (citing Dr. Bonham’s Case, (1610) 77 Eng. Rep. 646 (K.B.); Calvin’s Case, (1608) 77 Eng. Rep. 377 (K.B.)).

colonies claimed for it in arguing against oppressive acts of Parliament.¹⁸¹ The court did not reach this issue, however, finding that the challenged act had already been repealed.¹⁸²

By the early 1770s, therefore, the meaning attributed to Chapter 29 had merged with the broader concept of higher-law constitutionalism, which held king and Parliament alike to limitations prescribed by the natural and customary rights recognized at common law. By then, the colonists had also adopted the seventeenth-century tenet that English common law liberties reflected and reinforced natural law and natural rights, thereby importing this confused relationship into American law.¹⁸³ The colonists multiplied the confusion by largely abandoning the purportedly ancient Saxon origin of the common law as the source of its authority, in favor of the common law's purported implementation of natural law and natural rights,¹⁸⁴ even though that

¹⁸¹ *Id.*

¹⁸² *Id.* at 123.

¹⁸³ See, e.g., Meyler, *supra* note 67, at 18 (arguing that “the common law occupied a disunified field” in late eighteenth-century America and that its “very definition and scope,” including “its relation to the ‘ancient constitution’ securing the rights of the people,” was the subject of serious dispute among the founding generation); Whitman, *supra* note 128, at 1324–25 (observing that “[l]egal thought among the American revolutionary lawyers presented a picture of apparent intellectual chaos, drawn from a variegated mass of traditions”); and further noting that the “apparent disorder was worst in the many writings that commingled talk of ‘natural law’ or the ‘law of reason’ with talk of the English constitution and customary law”); *id.* at 1365 (observing that the colonists were well-read in Pufendorf, Coke, Hale, Blackstone, and other “seventeenth- and eighteenth-century literature that embodied the mix of custom and reason,” which resulted in the colonists applying “the deductive idea of reason they learned from their eighteenth-century readings . . . within the mingling tradition of the seventeenth century”); see also MILLER, *supra* note 162, at 171 (“Americans continued to insist that the British constitution was founded upon natural laws and that God and Nature had ordained that there were certain things—clear to every man—which King and Parliament could not do.”).

¹⁸⁴ See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 184–86 (describing the exchange between Judge Martin Howard, Jr. and James Otis, in which they questioned what would happen if government “threatened rather than protected” the inalienable rights of man); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860: THE CRISIS OF LEGAL ORTHODOXY* 7–9 (1992) (discussing statements by eighteenth-century American judges and lawyers, including John Adams and James Kent, that the common law constituted a fixed body of discoverable rules precisely because it was grounded in natural reason); WOOD, *supra* note 147, at 299 (noting that the “haphazard and piecemeal introduction of the common law into the colonies” contributed to the idea that the law’s authority came not just from “its being old or being English”); see also BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 78 (“The great corpus of common law decisions and the pronouncements of King and Commons were but expression of ‘God and nature The natural absolute personal rights of individuals are . . . the very basis of all municipal laws of any great value.’” (quoting John Dickinson)); CARL L. BECKER, *THE DECLARATION OF INDEPENDENCE* 98–99 (1958) (summarizing and quoting Samuel Adams’s belief that all legislation is subordinate to the English constitution, “an authority higher than any positive law,” because it is “‘fixed,’ having its foundation in ‘the law of God and nature’”); STONER, *LIBERAL THEORY*, *supra* note 70, at 194–95 (arguing that Jefferson believed that common law and natural law “actually do tell similar stories: Both look back to a past where the power of hereditary authority is limited, in the one case by settled custom and the other by popular consent, and both insist of law

identification had been only implicitly and sporadically present in the seventeenth century.¹⁸⁵ Like the English in the seventeenth century, the Americans never worked out the identification of natural law with common law. The colonists adopted the common law, not because it was customary, but because they believed that it reflected “‘the highest Reason.’”¹⁸⁶ This belief led them to an improbable attempt to synthesize liberal political principles with common law adjudication.¹⁸⁷

The colonists were somewhat clearer on the consequences of higher-law constitutionalism than were the seventeenth-century common law lawyers and judges. “Law” for the colonists, Professor Wood concluded, “was basically what the principles of right reason declared to be law, the codification of which was hardly inclusive,” even when such codifications were rooted in the common law.¹⁸⁸ Though they believed that common law incorporated natural rights, they also believed that in case of tensions and conflicts, it was law that must give way to right.¹⁸⁹

and constitution that they meet the test of reason”); Whitman, *supra* note 128, at 1326 & n.18 (observing that the Massachusetts Circular Letter of 1768 identified “‘the fundamental rules of the British constitution’ with ‘an essential, unalterable right, in nature,’” and that Richard Bland and Alexander Hamilton held comparable beliefs).

¹⁸⁵ See *supra* Part I.B.2.

¹⁸⁶ See, e.g., WOOD, *supra* note 147, at 9 (quoting Roger Sherman); *accord* Page v. Pendleton (Va. High Ct. Ct. 1793), reported in GEORGE WYTHE, DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY 211, 215 n.(e) (B.B. Minor ed., J.W. Randolph 1852) (equating the “law of nature” with the “unwritten or common law,” and arguing that positive law is valid only to the extent that it conforms with “natural reason”); CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 40 (1993) (noting St. George Tucker’s project of demonstrating that “reason should be the ultimate test in determining the soundness of the law and its application”); Whitman, *supra* note 128, at 1365 (arguing that the colonial impulse to ground the common law in the natural law “informed Otis’s frantic efforts to reconcile common law and natural law”).

¹⁸⁷ See POWELL, *supra* note 123, at 79 (“The equation of the common law tradition with ‘the rights of Englishmen,’ and of the latter with Enlightenment concepts of individual autonomy and the rule of law, enabled many Americans . . . to make the theoretically improbable assumption that liberal political principles could be explicated in the forms of the common law.”); Whitman, *supra* note 128, at 1326 (noting that revolutionary writers “often speak of ‘reason’ as a body of ‘fixed principles,’ of ‘immutable maxims of reason and justice’ to be discovered through deductive thought, not through lived experience”).

¹⁸⁸ WOOD, *supra* note 147, at 295; cf. Haines, *supra* note 8, at 276 (noting several opinions of common law lawyers and judges).

¹⁸⁹ WOOD, *supra* note 147, at 9, 299; Haines, *supra* note 8, at 24–25, 276; e.g., WOOD, *supra* note 147, at 303 (“When there is a contrariety between law and reason, . . . the judges *must be* embarrassed.”) (quoting Anonymous, *Rudiments of Law and Government Deduced from the Law of Nature* 35 (1783), reprinted in 1 CHARLES S. HYNEMAN & DONALD S. LUTZ, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760–1805, at 588 (1983)).

“Magna Carta” eventually became a shorthand referent for natural and customary rights, which the colonists understood to be guaranteed to them by the English constitution.¹⁹⁰ Citing “Magna Carta” was understood, not (or not merely) as an invocation of Chapter 29 or any other particular chapter, but as a general appeal to all of the seventeenth-century terms and arguments used to identify unconstitutional acts.

In sum, by the time the colonies declared their independence in 1776, due process and Magna Carta had become an integral part of the colonial argument against parliamentary taxes and regulation of the colonial police power. As Dean Manion observed, pre-revolutionary colonial courts “were constantly hearing arguments and deciding cases on the natural rights theory projected by Coke as a basic principle of the common law.”¹⁹¹ The colonists’ central constitutional claim was that they, no less than other English subjects, were entitled to all of the unwritten natural and customary rights that had been recognized at English common law and granted to English subjects. Adopting Coke’s higher-law constitutionalism, the colonists argued that Chapter 29 and the due process of law protected them from arbitrary and unjust actions by Parliament as well as the king. The colonists also adopted (and exaggerated) Coke’s view that Chapter 29 was not confined to a guarantee of procedural fairness but also limited the substantive goals that the king and Parliament could pursue.

¹⁹⁰ E.g., REID, ANCIENT CONSTITUTION, *supra* note 162, at 84; see MOTT, *supra* note 151, § 27, at 74–75 (“Some scholars see in chapter thirty-nine of the Great Charter from the very first the protection of general justice and right.”); Hill, *supra* note 29, at 1271–72 (referring to “law-of-the-land” clauses in state constitutions, which were derived from the Magna Carta and “understood to be the equivalent of the due process clause”); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397, 401 (1993–94) [hereinafter McCormack, *Economic Substantive Due Process*] (referring to the “variety of nascent, unenumerated rights” included in the concept of the “law of the land” clause of Magna Carta).

¹⁹¹ Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers*, 1 U. NOTRE DAME NAT. L. INST. PROC. 3, 25 (1949); accord Haines, *supra* note 8, at 397 (concluding that the colonists identified “due process of law” with “the natural and inalienable rights’ philosophy which was developed in the Revolutionary times and was crystallized into specific form in the Declaration of Independence and in the bills of rights of state constitutions,” and that the “law of the land” was understood “to mean that no power was delegated to the legislature to invade the great *natural rights* of the individual, and that where express limits were lacking implied checks must be found”).

As Dean Manion’s and Professor Haines’s quotations illustrate, the natural law approach to constitutional interpretation was thought to be quite congenial to founding-era constitutionalism and conservative principles generally before the Reagan Administration’s adoption of originalism in the late twentieth century.

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

Colonial independence in 1776 necessitated two adjustments in American constitutional thought: a more explicit natural rights formulation of the constitutional basis for unenumerated rights and a reconstitution of the state governments into republics from colonial administrations subject to British monarchical rule. Both of these developments support the thesis that higher-law constitutionalism continued beyond independence, as reflected in the states' continued amalgamation of natural and customary rights, their constitutional distinction of "forms," "frames," and "plans" of governments from "declarations" and "guarantees" of rights, and the manner in which state courts dealt with such "declarations" and "guarantees" in decisions that implicated natural or customary rights.

1. *Higher-Law Constitutionalism and Natural and Customary Rights*

The English constitution provided an incomplete justification of the American Revolution because revolt necessarily entailed withdrawal from that constitutional system.¹⁹² Thus, the Declaration of Independence begins with the natural rights theory drawn from Locke's *Second Treatise*, rather than arguments of higher-law constitutionalism drawn from the English common law.¹⁹³ Nevertheless, the colonial belief that the common law captured and reflected natural rights and the natural law, imported from the English seventeenth century,¹⁹⁴ enabled them to combine the Declaration's appeal to natural rights with arguments about customary rights based on the common law.¹⁹⁵ The confused amalgamation of natural right and common law that characterized both seventeenth-century and pre-revolutionary constitutional jurisprudence was thereby carried into independence.¹⁹⁶

The Declaration follows its natural law introduction with a long list of common law rights and liberties which George III was alleged to have either

¹⁹² STONER, LIBERAL THEORY, *supra* note 70, at 186; Grey, *Fundamental Law*, *supra* note 29, at 890.

¹⁹³ See BECKER, *supra* note 184, at 20–21 (noting that the separation from Great Britain was justified on the ground of natural rights rather than British law); Corwin, "Higher Law" Background (pt. 2), *supra* note 70, at 383 (referring to the conveyance of Locke's "natural law ideas into American constitutional theory").

¹⁹⁴ See *supra* Part I.B.2.

¹⁹⁵ See RAKOVE, *supra* note 159, at 293; 1 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 5; STONER, LIBERAL THEORY, *supra* note 70, at 186.

¹⁹⁶ See, e.g., RAKOVE, *supra* note 159, at 293 (noting the "tension in the Declaration of Independence between the preambular invocation of natural rights and the legalist appeal to specific English rights in the body of the text").

violated, neglected, or failed to secure against parliamentary encroachment.¹⁹⁷ The Declaration even accused the King of conspiring with Parliament to subject the colonies “to a jurisdiction foreign to *our constitution* and unacknowledged by *our laws*,”¹⁹⁸ employing the term “constitution” in the same manner as the English Whigs did to refer to fundamental laws that limited government,¹⁹⁹ and echoing Otis’s and Mason’s respective higher-law constitutional arguments in *Paxton’s Case* and *Robin v. Hardaway*.²⁰⁰

The Declaration’s basic argument—that Britain’s violation of natural and customary rights justified revolution—fit neatly with the seventeenth-century notion that the “law of the land” and the “due process of law” limited the actions of the crown and Parliament.²⁰¹ In the eyes of the colonists, it was

¹⁹⁷ THE DECLARATION OF INDEPENDENCE (U.S. 1776). According to the Declaration, the “history of the present king of Great Britain is a history of repeated injuries and usurpations,” including indefinite dissolution of colonial legislatures, veto of laws providing for an independent colonial judiciary, maintenance of standing armies in the colonies during times of peace, quartering of troops in the colonists’ homes, embargoing colonial trade, imposition of taxes without colonial consent or representation in Parliament, and depriving colonists of trial by jury and at the venue. *Id.*; see REID, ANCIENT CONSTITUTION, *supra* note 162, at 110 (referring to the “listing of constitutional grievances” in the Declaration); 1 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 92 (noting that the rights listed in the Declaration derived from British constitutional theory or English common law); STONER, LIBERAL THEORY, *supra* note 70, at 187 (describing the objections listed in the Declaration); Sherry, *supra* note 29, at 1127, 1133 (referring to the rights declared in the English Bill of Rights, the Declaration of Independence, and state declarations of rights).

¹⁹⁸ THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776) (emphasis added); accord JAMES WILSON, AN ADDRESS TO THE INHABITANTS OF THE COLONIES (1776), reprinted in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 168, at 46, 58 (arguing that the “Grand Object of the Union of the Colonies” was “the Reestablishment and Security of their constitutional Rights”).

¹⁹⁹ See STONER, LIBERAL THEORY, *supra* note 70, at 188. The term “constitution” in the Declaration “could not have meant . . . anything so narrow as the particular colonial charters,” but rather

must be taken to mean, as the term then meant when used in reference to the British, the whole amalgam of offices, principles, and fundamental laws that give the polity its form. . . . What the whole sentence suggests is that independence, though necessarily a step beyond the existing constitution and thus necessarily based on the most fundamental political principles, still proceeds down a well-trod path.

Id. at 188–89.

²⁰⁰ See *supra* notes 164–66, 179–81, and accompanying text.

²⁰¹ See, e.g., MOTT, *supra* note 151, §30, at 84–85 (“Locke’s suggestion that the power of the Legislature should not extend to the issuance of extemporary decrees, special or partial laws, or laws which are against the ‘law of Nature,’ is very closely akin to the modern concept, if not to the original meaning, of due process of law.”); see also STONER, LIBERAL THEORY, *supra* note 70, at 189 (arguing that the “specifics of the common law and the ancient constitution” gave Locke’s natural rights theory “its distinctive form,” while that theory ordered the particulars of the common law).

precisely the failure of Britain to respect these limits that justified their withdrawal from the empire.²⁰²

2. *Constituting Post-Revolutionary State Governments*

Upon their formal separation from Britain, the newly independent states needed to constitute their governments as sovereign entities without the royal appointments that had formed a crucial part of the colonial governments, and without relying on the royalty and nobility that characterized the British constitutional monarchy.²⁰³ The states generally adapted the British constitutional monarchy to republican government by providing for a popularly elected bicameral legislature, and an emasculated executive stripped of most prerogative powers and largely subordinated to the legislature.²⁰⁴ Most states also provided for a separate judiciary, although it is doubtful that this signified genuine independence for the courts.²⁰⁵ In any event, there was little doubt that the state legislatures were the most important and most powerful part of the new governments.²⁰⁶

That revolutionary Americans carried higher-law constitutionalism into independence, as I have argued,²⁰⁷ is reflected in their post-independence

²⁰² See MILLER, *supra* note 162, at 8 (referring to British restraints on colonial trade); McCormack, *Lochner*, *supra* note 148, at 446–47 (referring to the “limitation on government” suggested in the Declaration of Independence).

²⁰³ See, e.g., BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 71 (referring to the organization of English government around royalty, nobility, and commons, and noting that “the balance of the [American] constitution was not expected to be the result of the symmetrical matching of social orders with powers of government”); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 100 (1973) (noting that since the “old ties with England had been snapped,” the states “put their basic political decisions in the form of written constitutions”); RAKOVE, *supra* note 159, at 21, 306 (referring to the “collapse of royal government,” which provided the colonists with the opportunity to “establish new and superior forms of government”); WOOD, *supra* note 147, at 157 (noting that the colonists’ experiences caused them to “repudiate, more decisively than Englishmen ever had the means by which” royalty and nobility oppressed the liberties of the people).

²⁰⁴ See RAKOVE, *supra* note 159, at 214 (“By stripping the executive of its political independence and prerogatives, the new state constitutions gave the assemblies the same supremacy Parliament had enjoyed since 1689.”); WOOD, *supra* note 147, at 135–51, 163 (describing the approaches of various states in establishing new governmental entities); *infra* app. (describing the attributes of various state constitutions at the time of the American Revolution).

²⁰⁵ See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 71 (observing that the colonists did not see a clear separation of powers between the legislative, executive, and judicial branches of government); WOOD, *supra* note 147, at 153–54, 157–61 (noting that the courts were alternately conceptualized as a division of the executive department or an extension of the legislature); Haines, *supra* note 8, at 391 (describing the extensive perversion and control exercised by legislatures over the state courts).

²⁰⁶ WOOD, *supra* note 147, at 162–63.

²⁰⁷ See *supra* Part II.B.

constitutions. A state “constitution” generally consisted of a written plan or frame of government that was positively enacted or affirmed by the state legislature, together with natural and customary rights whose existence predated any constitutional text, and that may not have been reduced to any writing at all.²⁰⁸ Like the British version, American higher-law constitutionalism presupposed that natural and customary rights are prior to any frame of government or, indeed, to any writing at all.²⁰⁹ As Professor Sherry has argued, following independence, “the written [state] constitution or charter served as the sole source of fundamental law for determining the [state] government’s internal structure, but not for describing its relationship to the citizenry.”²¹⁰ Because natural and customary rights were believed to exist independently of any writing, it was not necessary to enumerate them textually or to otherwise enact them into positive law for them to function as limits on the actions of the newly framed state governments.²¹¹ Textual enumeration did make clear that these rights and liberties were understood to be a natural birthright rather than a royal or parliamentary concession,²¹² and that they were enforceable against legislative as well as executive action,²¹³ but a textual enumeration was not understood to have created the rights it listed.

The distinction between frames of government enacted as positive law, and natural and customary rights existing independent of positive law, is evident in

²⁰⁸ See FRIEDMAN, *supra* note 203, at 103 (referring to the two functions of a constitution—providing a “terse exposition of the permanent shape of the government” and listing essential rights); Sherry, *supra* note 29, at 1146 (referring to a constitution as a “declaration of first principles” and “a charter of government or allocation of powers among parts of the government”); see also MCLWAIN, *supra* note 54, at 244 (implying that some revolutionary state constitutions formally distinguished a “bill of rights” from a “frame of government”).

²⁰⁹ Sherry, *supra* note 29, at 1133; see *supra* text accompanying notes 178–206.

²¹⁰ Sherry, *supra* note 29, at 1135; accord McCormack, *Lochner*, *supra* note 148, at 446–47 (“[T]he idea of ‘inalienable rights’ places limits on the claims that government can make on an individual, and posits that those claims are not dependent on human laws and constitutions but belong naturally to all persons.”); see also WOOD, *supra* note 147, at 286–87 (observing that the understanding that identified the state “constitutions” more closely with positively enacted forms of government was abandoned during the 1780s, in favor of an understanding of such constitutions as limitations on the powers of the government it created, which correspondingly protected individual rights).

²¹¹ See Sherry, *supra* note 29, at 1146 (referring to the “non-positive” nature of constitutions); see also BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 188 (“Legal rights are ‘those rights which we are entitled to by the eternal laws of right reason’; they exist independent of positive law, and stand as the measure of its legitimacy.” (quoting Philip Livingston)). But see RAKOVE, *supra* note 159, at 309 (suggesting that the state bills of rights functioned less as enforceable constitutional law than as statements of first principles, which provided standards according to which the people could judge the performance of their elected officials).

²¹² See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 142, at 184–88 (suggesting that the enumerated rights existed before they were enacted).

²¹³ WOOD, *supra* note 147, at 272.

the language used in the written constitutions enacted by the states following independence. Whereas these constitutions *created* the frames of state government, they merely *declared* or *guaranteed* natural and customary rights.²¹⁴ For example, five of the original thirteen states, plus Vermont,²¹⁵ enacted extensive textual enumerations of natural and customary rights, which they called declarations or bills of such rights, and which they formally separated from the texts that framed the new state governments.²¹⁶ Virginia and North Carolina even placed their frames of government and declarations of rights in wholly different texts that their legislatures enacted at different times.²¹⁷ The distinction between frames of government and declarations of rights was also evident in the ratification debates.²¹⁸ The remaining original

²¹⁴ E.g., MASS. CONST. OF 1780, pt. 1 (“A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts”), reprinted in 1 BENJAMIN PERLEY POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 956, 957 (Washington, Gov’t Printing Office, 2d ed. 1878); VA. BILL OF RIGHTS OF 1776, at 1908 (“A declaration of rights . . .”), reprinted in 2 POORE, *supra*, at 1908; see WOOD, *supra* note 147, at 269, 271 (referring to “ringing declarations of universal principles”); see also BAILYN, IDEOLOGICAL ORIGINS, *supra* note 142, at 189 (“No voice was raised in objection when in 1776 the idea was proclaimed, and acted upon, that ‘all the great rights . . . should be *guaranteed*’ by the terms of a written constitution.” (alteration in original) (citations omitted)).

In 2008, the Supreme Court repeatedly emphasized that the Second Amendment did not create, but merely codified, the pre-existing natural right of self-defense. *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2804, 2809, 2812–13 (2008).

²¹⁵ Vermont was not formally admitted as a state until 1790, after Massachusetts, New Hampshire, and New York formally renounced their respective claims to its territory. It had, however, organized its own government and had functioned as a separate, independent colony since the early 1770s, and consequently adopted its own constitution in the wake of the others’ declarations of independence in 1776. See 2 POORE, *supra* note 214, at 1857 nn.* & †; WOOD, *supra* note 147, at 133; Samuel B. Hand, *History, in THE VERMONT ENCYCLOPEDIA* 8, 8–10 (John J. Duffy, Samuel B. Hand, & Ralph H. Orth eds., 2003).

²¹⁶ See *infra* app. (Maryland, Massachusetts, North Carolina, Pennsylvania, Vermont, and Virginia). New Hampshire enacted a constitution on this pattern in 1784, Delaware in 1792, and Kentucky upon its admission as a state in 1792. *Id.*

²¹⁷ For Virginia, compare VA. BILL OF RIGHTS OF 1776, reprinted in 2 POORE, *supra* note 214, at 1908, with VA. CONST OF 1776, reprinted in 2 POORE, *supra* note 214, at 1910. Both documents were enacted by the same constitutional convention. See *id.* at 1910 n.*. For North Carolina, see N.C. CONST. OF 1776, reprinted in 2 POORE, *supra* note 214, at 1409, 1411 (separating “A Declaration of Rights, &c.” from “The Constitution, or Form of Government, &c.”); JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 2–3 (1993) (noting that the “declaration of rights” was enacted December 17, 1776, while the “constitution” was enacted December 18, 1776).

²¹⁸ See, e.g., THE FEDERALIST NO. 78, at 527 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that judicial independence is necessary “to guard the constitution and the rights of individuals”); *id.* at 528 (arguing that judicial independence is essential not only “with a view to infractions of the constitution,” but also to protect against “injury of the private rights of particular classes of citizens, by unjust and partial laws”); *id.* at 529 (endorsing “inflexible and uniform adherence to rights of the constitution and of individuals”); see also THE FEDERALIST NO. 84 (Alexander Hamilton), *supra*, at 575 (noting that the “constitution of New-York has no bill of rights prefixed to it”).

states, with one exception,²¹⁹ interwove enumerations of a few natural and customary rights into the texts that framed their forms of government.²²⁰ Finally, eight of the original thirteen states, plus Vermont, enacted “law of the land” clauses—paraphrases of Chapter 29, which generally declared or guaranteed that citizens could not be deprived of life, liberty, property, or privilege, except by the “lawful judgment of their peers or the law of the land.”²²¹

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

The historical record of judicial decisions and arguments of counsel following the Revolution is mixed, although the weight of this authority supports the proposition that the colonists carried higher-law constitutionalism with them into independence. Several cases involved clear arguments or holdings based on higher-law constitutionalism. *Rutgers v. Waddington*, for example, involved a claim under New York’s general trespass statute by a homeowner whose property was used by a British merchant during the occupation of New York City during the Revolutionary War.²²² The court held that the law of nations—long considered a branch of natural law reasoning²²³—properly determined the outcome, reasoning that the law of nations was part of the common law and, therefore, necessarily limited the reach of the statute.²²⁴ The court accordingly decided that the merchant was not liable under the statute for any use of the property.²²⁵

In *Trevett v. Weeden*, the court held that a Rhode Island criminal statute prescribing banknotes as legal tender and mandating bench trials for those

²¹⁹ Rhode Island neither enacted a new state constitution nor affirmed its colonial charter as such. *See infra* app.; *see also* *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 656 (1829); WOOD, *supra* note 147, at 133–34.

²²⁰ *See infra* app. (Connecticut, Delaware, Georgia, New Hampshire, New Jersey, New York, and South Carolina). New Hampshire enacted a frame of government and a declaration of rights in 1784, and Delaware followed suit in 1792. *Id.*

²²¹ *See infra* app. (Connecticut, Maryland, Massachusetts, New York, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia).

²²² *Rutgers v. Waddington* (N.Y. City Mayor’s Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 392 (Julius Goebel, Jr. ed., 1964) [hereinafter *Rutgers v. Waddington*].

²²³ *See, e.g.*, M.D. VATEL [EMER DE VATEL], THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS §§ 4–6, at 47–48 (Northampton, Mass., Simeon Butler, 1820) (1758) (unattributed English translation of VATEL, LE DROIT DES GENS) (“We must then apply to nations the rules of the law of nature, in order to discover what are their obligations, and what are their laws; consequently, the *law of nations* is originally no more than the *law of nature* applied to nations.”).

²²⁴ *Rutgers v. Waddington*, *supra* note 222, at 399, 402–06.

²²⁵ *Id.* at 399–415.

accused of refusing to accept the banknotes was “void” for violation of the “constitutional” right to trial by jury.²²⁶ Although Rhode Island had no written post-independence constitution or declaration of rights, the court accepted counsel’s argument that the state’s “constitution” included Magna Carta and other natural and customary English rights.²²⁷ Counsel also attacked the statute on substantive grounds, arguing that its requirement that banknotes be accepted at par with gold and silver specie was an “abominable act” against “common right or reason,” though the court did not reach this issue.²²⁸

In *Butler v. Craig*,²²⁹ a Maryland court refused to enforce a statute which provided that the offspring of illegal marriages between free whites and enslaved blacks were themselves slaves, apparently accepting counsel’s argument that depriving the defendant of her freedom without a jury trial, based solely on the conviction of her parents for an unlawful marriage, violated the law of the land or due process guarantees set forth in Chapter 29 of Magna Carta.²³⁰ Although the Maryland Declaration of Rights contained both law-of-the-land and jury-trial guarantees,²³¹ counsel did not discuss or cite them, relying solely on Coke’s *Second Institute*, Edwardian confirmations of Chapter 29, and other English common law authorities.²³²

The strongest judicial statement of higher-law constitutionalism prior to 1791 appears in *Ham v. McClaws*.²³³ In *Ham*, a South Carolina court considered the state’s attempt to impose a statutory fine and forfeiture against a newly arrived family in the state for illegal importation of slaves,²³⁴ based on a statute enacted while defendants were in transit on the high seas.²³⁵ South Carolina’s Declaration of Rights contained a law-of-the-land clause, but defendants’ counsel and the court relied solely on the arguments and sources of higher-law constitutionalism.²³⁶ Conceding that defendants fell within the

²²⁶ See *Trevett v. Weeden* (R.I. 1786), *private report reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417 (Bernard Schwartz ed., 1971) (argument of James Varnum).

²²⁷ *Id.* at 417, 420–21, 423 (letters modernized).

²²⁸ *Id.* at 425–26.

²²⁹ 2 H. & McH. 214 (Md. 1787).

²³⁰ *Id.* at 232–33 (citation omitted).

²³¹ See *infra* app.

²³² *Id.* at 233–34 (citation omitted).

²³³ 1 S.C.L. (1 Bay) 91 (S.C. Ct. Com. Pl. 1789).

²³⁴ *Id.*

²³⁵ *Id.* at 92. Testimony existed that revealed that, prior to immigrating, the defendants had actually inquired whether they could bring their slaves with them, and had correctly ascertained that the then-current law of South Carolina permitted the act. *Id.* at 91.

²³⁶ *Id.* at 92–95.

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

For there were certain fixed and established rules, founded on the reason and fitness of things, which were paramount to all statutes; and if laws are made against those principles, they are null and void. For instance, statutes made against common right and reason, are void. So statutes made against natural equity, are void; and so also are statutes made against Magna Carta.²³⁷

The court agreed, declaring that it “is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles,”²³⁸ and holding that it was obligated to construe the statute in a manner “consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law.”²³⁹ As Dean Treanor has observed, eighteenth-century courts often avoided unjust results by construing a statute not to apply to a situation that was clearly within its language, a practice akin to declaring a statute unconstitutional “as applied” to a particular individual or situation.²⁴⁰ Thus, noting that application of the statute against defendants “would be evidently against common reason,”²⁴¹ the court held that the legislature must not have intended the statute to apply to persons in the defendants’ situation, and the jury accordingly returned a verdict for the defendants.²⁴²

On the other hand, several courts declined to decide cases on the basis of higher-law constitutionalism and instead relied directly on the texts of

²³⁷ *Id.* at 93–94 (letters modernized) (emphasis omitted) (citation omitted).

²³⁸ *Id.* at 95–96 (emphasis omitted).

²³⁹ *Id.* at 96.

²⁴⁰ William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 500–01 (2005).

²⁴¹ *McClaws*, 1 S.C.L. (1 Bay) at 96 (emphasis omitted).

²⁴² *Id.* *Symsbury Case* might be added to *Trevett*, *Rutgers*, *Butler*, and *McClaws* as yet another example of post-revolutionary reliance on higher-law constitutionalism, but the reporter’s failure to state clearly either the court’s reasoning or counsel’s arguments makes it difficult to determine whether the court relied on higher-law reasoning and authority in deciding the case. See *Symsbury Case*, 1 Kirby 444, 452–53 (Conn. 1785) (holding legislative act that settled a municipal boundary dispute by divesting the town of title to certain property described in its charter invalid, on the ground that the legislature lacked power to divest the town of title without the town’s consent).

enumerated rights. In *Holmes v. Walton*,²⁴³ for example, a defendant found guilty of illicit war trade with the British protested the confiscation of his smuggled goods because he had been tried to a six-person jury, “contrary to the constitution, practices, and laws of the land,” even though the New Jersey constitution neither contained a twelve-person-jury guarantee nor a law-of-the-land clause.²⁴⁴ The court declined the invitation to decide the case according to Chapter 29 and instead construed the general jury-trial guarantee in the New Jersey constitution to require twelve-person juries, based on the “common law of England,” “immemorial custom,” and prior colonial charters.²⁴⁵ Likewise, *Bayard v. Singleton* invalidated a North Carolina statute that eliminated the right to a jury trial in certain property disputes where the title devolved from a British sympathizer, based on the North Carolina constitution’s law-of-the-land and jury-trial clauses, which the court called “the fundamental law of the land.”²⁴⁶

Finally, one other authority from this period requires extended discussion. In early 1787, Alexander Hamilton delivered a speech to the New York legislature in which he explicated the meaning of New York’s law-of-the-land clause. Perhaps because Hamilton and New York had multiple connections with higher-law constitutionalism and the concept of due process during the founding era,²⁴⁷ this speech is widely cited in the debate about the original meaning of the Due Process Clause.

In a debate on a proposed statute that would have prohibited privateers who sailed for the British during the Revolution from holding public office in New York,²⁴⁸ Hamilton argued that the statute violated the New York constitution’s law-of-the-land clause, as well as a due process clause enacted only weeks earlier as part of a statutory bill of rights:

²⁴³ *Holmes v. Walton* (N.J. 1780), reported by Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456 (1899), cited and described in *State v. Parkhurst*, 9 N.J.L. 427 app. (1802).

²⁴⁴ Scott, *supra* note 243, at 456–58.

²⁴⁵ *Id.* at 458–59.

²⁴⁶ *Bayard v. Singleton*, 1 N.C. (Mart.) 42, 45 (1787).

²⁴⁷ Hamilton was counsel to the plaintiff in *Rutgers v. Waddington*, a principal author of *The Federalist*—and sole author of its essays on judicial review—and a resident of New York, which was the only state to suggest an amendment to the Constitution guaranteeing the “due process of law” rather than the “law of the land.” Some commentators believe that Madison lifted the language of the Due Process Clause directly from New York’s suggested amendment. *E.g.*, MEYER, *supra* note 8, at 148; SCHWARTZ, *THE GREAT RIGHTS*, *supra* note 94, at 151–54.

²⁴⁸ See Ely, *Oxymoron Reconsidered*, *supra* note 29, at 325–26.

Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words “*due process*” have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.²⁴⁹

Some commentators have seized upon the last sentence of this quotation as conclusive proof that Hamilton did not believe that the legislature was limited by the concept of due process.²⁵⁰ In fact, Hamilton was actually arguing precisely the opposite, by expressly adopting Coke’s equation of the “law of the land” with the “due process of law.”²⁵¹ Coke may have been mistaken in equating these two phrases, but, as Hamilton’s argument illustrates, Coke’s position was widely held in late eighteenth-century America.²⁵²

Hamilton believed that the proposed statute violated the statutory due process clause.²⁵³ If this belief was not clear from his initial statement, any

²⁴⁹ Alexander Hamilton, Remarks on an Act for Regulating Elections, New York Assembly (Feb. 6, 1787), in 4 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett ed., Columbia Univ. Press 1962), reprinted in 5 THE FOUNDERS’ CONSTITUTION 313 (Philip B. Kurland & Ralph Lerner eds., 1987).

²⁵⁰ See, e.g., Berger, “*Law of the Land*,” *supra* note 8, at 12 (noting Hamilton’s remarks in conjunction with the view that due process applies to court procedure, not acts of the legislature).

²⁵¹ See *supra* text accompanying note 118.

²⁵² E.g., *Butler v. Craig*, 2 H. & McH. 214, 233–34 (Md. 1787); see, e.g., ORTH, *supra* note 72, at 31, 100; Ely, *Oxymoron Reconsidered*, *supra* note 29, at 325; Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 218 (1988); Riggs, *supra* note 29, at 992–93; Whitten, *supra* note 8, at 741–42; Wolfe, *supra* note 8, at 221; see also *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) (equating the meaning of the Due Process Clause of the Fifth Amendment with the law-of-the-land clause of Chapter 29); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 542–43 (1997) (observing that the “equivalence of due process clauses and clauses forbidding deprivations of life, liberty, or property except by ‘the law of the land’” was “a commonplace of nineteenth century constitutional law”).

Other commentators acknowledge that late eighteenth-century Americans equated “law of the land” with “due process of law,” but argue either that these phrases were not understood to guarantee substantive rights, see, e.g., BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 6, at 223–24; Reeder, *supra* note 8, at 197; Whitten, *supra* note 8, at 742, 794–95; or that this equation was a historical error perpetrated by Coke, see, e.g., 2 CROSSKEY, *supra* note 8, at 1103; MEYER, *supra* note 8, at 130, 137, 140; Jurow, *supra* note 8, at 271–72, 279; Whitten, *supra* note 8, at 741.

²⁵³ See Ely, *Oxymoron Reconsidered*, *supra* note 29, at 326.

ambiguity was removed by the two rhetorical questions he asked immediately after: “Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?”²⁵⁴

Coke may not actually have held the position that the law of the land or the due process of law limited Parliament, but late eighteenth-century Americans believed that he did, and this belief was a cornerstone of their constitutional argument against British control of the colonies.²⁵⁵ At a minimum, then, Hamilton’s speech is strong evidence of his twin beliefs that the law-of-the-land and the due process clauses were synonymous and that they bound the legislature as well as the executive.

Finally, it is likely that Hamilton understood both clauses to have imposed substantive as well as procedural limitations on legislative action. Hamilton argued that the process by which a legislature enacts a law does not satisfy the guarantee of process owed under New York’s statutory due process clause, which he considered a guarantee of judicial, rather than legislative, process.²⁵⁶ In other words, a legislature’s mere compliance with the formal requirements for enacting a law did not mean that its acts necessarily accorded with the “law of the land,” or constituted the “process of law” owed to a person suffering a deprivation of life, liberty, or property. Moreover, by citing Coke, Magna Carta, and due process, Hamilton invoked three weighty symbols of higher-law constitutionalism in opposition to the contemplated legislative deprivations of the customary right to vote.²⁵⁷ Once again, it seems unlikely that Hamilton would have cited such trenchant symbols of substantive limits on legislative action if he did not believe that they imposed any such limits.

Hamilton seems to have adapted an argument about vested real property rights to the more esoteric “property” suggested by rights to an office. A legislature violates the “law of the land” or the “due process of law” when it deprives a person of title to property without a trial by jury because this right was a procedural right long recognized at common law. However, the government also violates the “law of the land” or the “due process of law” by

²⁵⁴ 4 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 249, at 35–36, *quoted in* Ely, *Oxymoron Reconsidered*, *supra* note 29, at 326.

²⁵⁵ *See supra* notes 190–93, 206.

²⁵⁶ *See* WOOD, *supra* note 147, at 454 (noting Hamilton’s argument that terms of the New York constitution guaranteeing due process of law “were applicable only to the proceedings of courts of justice”).

²⁵⁷ Ely, *Oxymoron Reconsidered*, *supra* note 29, at 326; ORTH, *supra* note 72, at 7–8 & n.9 (author’s translation).

depriving a person of title to property for a private purpose without compensation because the common law had long recognized public purpose and due compensation as substantive restrictions on the government's exercise of its sovereign power of eminent domain.²⁵⁸

Hamilton's position constitutes support for substantive due process if one assumes that rights to political participation were considered a kind of property in the late eighteenth century; in that case, those rights could not have been taken by legislative act. Even without this assumption, it is difficult to see how Hamilton's speech constitutes support for the narrow procedural understanding of due process because he follows Coke in equating the law of the land with due process of law, as well as the American reading of Coke that these two concepts limited legislative power. It is improbable that Hamilton would accept these two central aspects of higher-law constitutionalism, while rejecting the third aspect of substantive limitation.

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

By the time the Constitutional Convention convened in Philadelphia during the summer of 1787, most of the states in existence since 1776 had been governing for some years under positively enacted or affirmed frames of government that had replaced their colonial administrations, together with textual declarations or enumerations of at least some natural and customary rights, including a Chapter 29 analogue.²⁵⁹ There were two basic models. One model, adopted by seven states (including Vermont), enacted a frame of

²⁵⁸ For example, *Symsbury Case* is a vested property rights decision that sounds in substantive due process, though the court did not cite either a state law-of-the-land clause or Chapter 29. See generally *supra* note 242. *Symsbury* reviewed an act of the Connecticut colonial legislature purporting to resolve a boundary dispute by confirming title in one of the parties. *Id.* The court held the statute void as beyond the legislative power, and further held that the town of *Symsbury* had title to the disputed property because its grant was prior in time to that of the defendant, reasoning as follows:

[The statute] could not legally operate to curtail the land before granted to the proprietors of the town of Symsbury, without their consent; and the grant to Symsbury being prior to the grant made to the towns of Hargord and Windsor, under which the defendant claims, we are of the opinion the title of the lands demanded is in the plaintiffs.

1 Kirby 444, 447 (Conn. 1785) (letters modernized); *accord* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796) (holding that the alteration of the terms of Revolutionary War debts mandated by the Treaty of 1783 violated "immutable principles of justice" whose existence predated their textual declaration in the Takings Clause of the Fifth Amendment). Dean Treanor reads the *Symsbury* holding as authority for the proposition that "dispute resolution concerning competing claims to property was a matter for the courts, not the legislature." See Treanor, *supra* note 240, at 488.

²⁵⁹ See *supra* Part II.C.

government and recognized an extensive list of natural and customary rights from the English constitution as adapted by the colonists in their conflicts with Britain prior to independence.²⁶⁰ The other model, followed by six other states, enacted a frame of government and interwove within that enactment the declaration of a few natural and customary rights and liberties from the English constitution.²⁶¹ Both models were premised on the notion that natural and customary rights preexisted state governments and bound state executives and legislatures regardless of whether they were textually enumerated in a constitutional writing.²⁶² As Professor Corwin once emphatically pronounced, “*judicial review initially had nothing to do with a written constitution.*”²⁶³

Although there is little evidence of a conscious decision to choose one model over the other, the document produced by the Philadelphia Convention in fact reflected the sensibilities of the second model.²⁶⁴ Virtually all of the provisions of the 1787 Constitution framed the three branches of the national government or defined their relationship with each other or the states. The Constitution enumerated very few individual rights and liberties,²⁶⁵ and even these were criticized by some delegates as “irrelevant and useless.”²⁶⁶ A suggestion near the end of the Convention to include a bill of rights in the Constitution did not draw the support of a single state delegation.²⁶⁷

When the Convention reported the Constitution to the states for ratification, however, the lack of a national bill of rights in the Constitution emerged as an

²⁶⁰ See *infra* app. (Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia).

²⁶¹ See *infra* app. (Connecticut, Delaware, Georgia, New Jersey, New York, and South Carolina).

²⁶² See Corwin, *Natural Law*, *supra* note 132, at 58; cf. McCormack, *Lochner*, *supra* note 148, at 446–47 (observing that the “unwritten law” of natural rights “places limits on the claims that government can make on an individual, and posits that those claims are not dependent on human laws and constitutions but belong naturally to all persons”).

²⁶³ Corwin, *Natural Law*, *supra* note 132, at 58.

²⁶⁴ SCHWARTZ, *THE GREAT RIGHTS*, *supra* note 94, at 78; see WOOD, *supra* note 147, at 536 (“A bill of rights had scarcely been discussed in the Philadelphia Convention.”); Haines, *supra* note 8, at 419; Pound, *supra* note 122, at 356 (noting that a bill of rights was given little consideration because “the powers of the federal government were only those given it by the Constitution, and it was thought that power to do things feared and guarded in by bills of rights, had not been given to the general government”).

²⁶⁵ Excluding the provisions that once protected property in slaves, the 1787 constitutional text enumerates only individual rights against bills of attainder, ex post facto laws, suspension of the writ of habeas corpus, state interference with contractual obligations, and state deprivation of the privileges and immunities of nonresidents. See U.S. CONST. art. I, § 9, cls. 1–3; *id.* § 10, cl. 1; *id.* art. IV, § 2, cl. 1.

²⁶⁶ WOOD, *supra* note 147, at 536.

²⁶⁷ RAKOVE, *supra* note 159, at 288.

issue almost immediately.²⁶⁸ The Anti-Federalists focused on the Necessary and Proper and Supremacy Clauses, arguing that the former would permit the national government to exercise implied powers and that the latter would render state constitutions ineffective in protecting natural and customary rights against the use of implied powers.²⁶⁹ They also emphasized (with some exaggeration) that virtually every state had a constitutional declaration or reservation of fundamental rights and liberties.²⁷⁰ Even Thomas Jefferson, a supporter of the original Constitution who was serving as Ambassador to France during the Convention and ratification debates, saw the lack of a federal bill or declaration of rights as a serious flaw.²⁷¹

The Federalists made two arguments in reply. First, they maintained that an enumeration of natural and customary rights was unnecessary, because the Constitution nowhere delegated to the national government any power to infringe upon such rights.²⁷² Second, they argued that an enumeration of rights

²⁶⁸ E.g., Letter from Richard Henry Lee to Governor Edmund Randolph (Oct. 16, 1787), in VA. GAZ. (Petersberg), Dec. 6, 1787 (attacking the Constitution for its lack of a bill of rights), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 465, 467, 470 (Bernard Bailyn ed., 1993); Letter from James Madison to George Washington (Sept. 30, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra*, at 42, 43 (recounting Lee's attempt to persuade the Confederacy Congress to add a bill of rights to the Constitution before referring it to the states for ratification); see SCOTT DOUGLAS GERBER, TO SECURE THESE RIGHTS 66 (1995) (noting that the Anti-Federalists' "chief objection" was "the absence of a bill of rights"); RAKOVE, *supra* note 159, at 147 (emphasizing the Anti-Federalists' conviction that "no republican constitution could be complete or safe unless it contained a declaration of the reserved rights of the people"); STONER, LIBERAL THEORY, *supra* note 70, at 220 ("After the Convention . . . the Anti-Federalists made the lack of a bill of rights a rallying cry of their opposition."); WOOD, *supra* note 147, at 536–37 ("[O]nce the Antifederalists grasped the consolidating aspects of the new Constitution . . . they rose in defense of a declaration of rights . . .").

²⁶⁹ E.g., George Mason, *Objections to the Constitution*, VA. J. (Alexandria), Nov. 12, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 345, 348; *George Mason Fears for the Rights of the People* (Virginia Ratifying Convention, June 4, 1788), in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 605–06, 609; *George Mason Fears the Power of the Federal Courts: What Will Be Left to the States?* (Virginia Ratifying Convention, June 19, 1788), in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 720–21; *An Old Whig* (Oct. 12, 1787), in 2 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 122–26; Brutus II (Nov. 1, 1787), in THE ESSENTIAL BILL OF RIGHTS 295, 299 (Gordon Lloyd & Margie Lloyd eds., 1998); see RAKOVE, *supra* note 159, at 146; WOOD, *supra* note 147, at 536; Mark Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View from 1787/1791*, 9 U. PA. J. CONST. L. 357, 377–78 (2006).

²⁷⁰ WOOD, *supra* note 147, at 537; e.g., Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), in VA. GAZ. (Petersberg), Dec. 6, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 465, 470.

²⁷¹ See WOOD, *supra* note 147, at 537.

²⁷² E.g., THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 218, at 578–79; see, e.g., James Wilson's Speech at a Public Meeting (Oct. 6, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 63–64; Remarks of Thomas McKean, Pennsylvania Ratifying Convention (Nov. 28, 1787), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 641, 643; Remarks of James Wilson, Pennsylvania Ratifying Convention (Dec. 4, 1787), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at

and liberties against the national government would supply a dangerous basis for recognizing unenumerated governmental powers.²⁷³ They argued that delegates could not possibly enumerate all of the rights and liberties individuals held and that those that were not enumerated would be presumed to have been ceded to the national government or not to exist at all.²⁷⁴

Both Federalist arguments were undermined by the Constitution's enumeration of a few natural and customary rights,²⁷⁵ as Anti-Federalists were quick to argue.²⁷⁶ Nevertheless, both Federalist arguments rested on the twin assumptions that natural and customary rights existed independently of the federal Constitution or any other text, and that the federal judiciary would be empowered to invalidate acts of Congress or state legislatures intruding upon such rights.²⁷⁷ For example, Edmund Randolph argued during the Philadelphia

633–46; Remarks of James Iredell, North Carolina Convention Debates (July 29, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 945, 949–51.

²⁷³ E.g., James Wilson's Speech at a Public Meeting (Oct. 6, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 63–64 (arguing that because in case of state constitutional powers, "every thing which is not reserved is given," whereas in case of federal constitutional powers, "every thing which is not given is reserved," it would have been "superfluous and absurd" for the Constitution to enumerate rights "of which we are not divested"); THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 218, at 579 (arguing that bills of rights "are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted").

²⁷⁴ E.g., James Wilson and John Smilie Debate the Need for a Bill of Rights, Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 807–08 ("[F]or who will be bold enough to undertake to enumerate all the rights of the people? And when the attempt to enumerate them is made, it must be remembered that if the enumeration is not complete, every thing not expressly mentioned will be presumed to be purposely omitted."); Remarks of James Iredell at North Carolina Convention Debates (July 29, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 945, 949–51; see Graber, *supra* note 269, at 18 (noting the Federalists' concern "that textual guarantees for presently acknowledged liberties might inhibit protection for liberties acknowledged in the future"); Sherry, *supra* note 29, at 1162 ("A limited enumeration, [the Federalists] argued, would inaccurately imply that the rights themselves were limited to those enumerated.").

²⁷⁵ See *supra* note 265.

²⁷⁶ E.g., James Wilson and John Smilie Debate the Need for a Bill of Rights, Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 807–10 ("It seems however that the members of the federal convention were themselves convinced, in some degree, of the expediency and propriety of a bill of rights, for we find them expressly declaring that the writ of Habeas Corpus and the trial by jury in criminal cases shall not be suspended or infringed."); Brutus II (Nov. 1, 1787), in THE ESSENTIAL BILL OF RIGHTS, *supra* note 269, at 299 (asserting that the drafters of the Constitution "would not have made certain reservations, while they totally omitted others of more importance").

²⁷⁷ STONER, LIBERAL THEORY, *supra* note 70, at 199, 208 (arguing that the framers intended the courts as the "immediate guarantor" of justice and the guardians against "unjust and partial" laws); see Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006) [hereinafter Barnett, *Ninth Amendment*] (arguing that the Ninth Amendment was designed to address Federalist arguments about the dangers of enumerating natural and customary rights by ensuring that such rights retained the same

Convention that “any individual conceiving himself injured or oppressed by the partiality or injustice of a law of any particular State may resort to the National Judiciary, who may adjudge such law to be void, if found contrary to the principles of equity and justice.”²⁷⁸ Theophilus Parsons similarly argued during the Massachusetts ratifying convention that a bill of rights limiting the national government was unnecessary; because the Constitution did not give the national government power to infringe upon natural rights, any such infringement would be void and unenforceable.²⁷⁹ Hamilton’s essay on the judiciary is likewise permeated by the presupposition that the federal courts would defend unenumerated natural and customary rights beyond those few enumerated in the constitutional text;²⁸⁰ indeed, some commentators have

fundamental stature after ratification of the Bill of Rights as they had enjoyed before); Haines, *supra* note 8, at 279 (arguing that the Federalists expected the federal judiciary to protect “vested rights of property and contract, both by express and implied constitutional limitations”).

²⁷⁸ Edmund Randolph, Suggestions for the Conciliation of the Small States ¶ 5 (July 10, 1787), in 4 THE FOUNDERS’ CONSTITUTION, *supra* note 249, at 597.

²⁷⁹ 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 161–62 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1891) [hereinafter ELLIOT’S DEBATES] (“[N]o power was given to Congress to infringe on any one of the natural rights of the people by this Constitution; and should they attempt it without constitutional authority, the act would be a nullity, and could not be enforced.”); Massachusetts Convention Debates (Jan. 23, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 681, 688 (“Is there a single natural right we enjoy, uncontrolled by our own legislature, that Congress can infringe? Not one. Is there a single political right secured to us by our constitution, against the attempts of our own legislature, which we are deprived of by this Constitution? Not one, that I recollect.”).

²⁸⁰ Throughout *Federalist No. 78*, Hamilton generally distinguishes the “rights of individuals” as separate from and in addition to the “constitution.” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 218, at 527 (“This independence of the judges is equally requisite to guard the constitution *and the rights of individuals*” from unusual federal actions that might seriously burden political minorities (emphasis added)); *id.* at 529 (referring to the indispensability of “inflexibility and uniform adherence to the rights of the constitution *and of individuals*” (emphasis added)); *accord id.* at 528.

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

Id. (emphasis added). At one point, Hamilton seems to contradict himself by limiting the reach of the courts to enumerated rights, *see id.* at 524 (“By a limited constitution I understand one which contains *certain specified exceptions* to the legislative authority; such for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like.”), but the immediately following sentence returns to the assumption that the judicial power extends to the protection of rights beyond the four corners of the constitutional text, *see id.* (“Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the *manifest tenor of the constitution* void.” (emphasis added)).

flatly concluded that *Federalist No. 78* is basically an argument for judicial enforcement of unenumerated natural and customary rights.²⁸¹ Finally, while some framers preferred to speak in terms of judicial enforcement of limits on the enumerated powers rather than judicial protection of individual rights,²⁸² the two were generally understood as functional equivalents.²⁸³

Anti-Federalist arguments were more equivocal. Anti-Federalist criticism that the Constitution failed to include a declaration of natural and customary rights shared the Federalist assumption that such rights already existed even though they were not textually enumerated. The Anti-Federalists, however, believed that failure to declare the existence of these rights in a textual enumeration made them less secure. For example, one form of Anti-Federalist criticism was that the lack of a bill of rights meant that the Constitution would not protect the natural and customary rights of citizens, and would thus fail in the very purpose of republican government. As one Anti-Federalist argued, the Constitution not only rendered state declarations of rights ineffectual by virtue of the Supremacy Clause, but the Constitution was also “proposed without any kind of stipulation for any of those natural rights, the security whereof ought to be the end of all governments.”²⁸⁴ Less specifically, George Mason opposed the Constitution because it failed to secure the people’s right to “the enjoyment of the benefits of the common law” and its Supremacy Clause rendered

²⁸¹ See, e.g., GERBER, *supra* note 268, at 112–13 (arguing that an “often overlooked” aspect of *Federalist No. 78* “is Hamilton’s explanation about the primary reason judicial review is necessary: to help protect the natural rights of the American people”); STONER, *LIBERAL THEORY*, *supra* note 70, at 204 (“Hamilton grants the courts the power to declare void statutes they find in violation of the Constitution and even to limit statutes which, though not infringing the document itself, nonetheless threaten justice or constrict rights.”).

²⁸² E.g., 3 ELLIOT’S DEBATES, *supra* note 279, at 443 (remarks of George Nicholas at the Virginia ratifying convention) (“But . . . who is to determine the extent of [the enumerated] powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void.”); 2 ELLIOT’S DEBATES, *supra* note 279, at 196 (remarks of Oliver Ellsworth at the Connecticut ratifying convention) (“This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.”); see Hill, *supra* note 29, at 1313–14 (attributing to the Federalists the view that “the legislature exceeds its delegated powers when it impairs fundamental rights, even in the absence of express constitutional limits on those powers”).

²⁸³ See, e.g., Letter from James Madison to George Washington (Dec. 5, 1789), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 1189, 1190 (“If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”).

²⁸⁴ Essay by the Impartial Examiner, VA. INDEP. CHRON., Mar. 5, 1788, reprinted in THE COMPLETE BILL OF RIGHTS 357–58 (Neil H. Cogan ed., 1997).

nugatory even those state constitutional provisions that expressly affirmed the common law.²⁸⁵

Some criticism in this vein, however, seemed to presuppose that the natural and customary rights left without explicit textual protection were purely procedural. For example, in one of his “Federal Farmer” essays, Richard Henry Lee made clear his belief that Chapter 29 of Magna Carta protected unwritten natural and customary *procedural* rights and liberties.²⁸⁶ He also expressed skepticism that these rights would be protected in the absence of enumeration; because the United States was so new, Lee did not believe that Americans would be recognized as holding any fundamental rights by “immemorial usage.”²⁸⁷

The Anti-Federalists won the bill-of-rights battle, although the Federalists won the ratification war. In Massachusetts,²⁸⁸ New York,²⁸⁹ and Virginia,²⁹⁰ three states whose approval was essential for organization of a viable national government, a majority opposed ratification without a bill of rights.²⁹¹ The necessary majority in these states was obtained only after pro-ratification forces promised amendment of the Constitution to include a bill of rights once the post-ratification national government was organized.²⁹² Even so, the ratification margins were dangerously narrow. In all, seven states, including Massachusetts, New York, and Virginia, proposed amendments as part of their ratification; New York, North Carolina, and Virginia included a paraphrase of Chapter 29 in their proposed amendments.²⁹³

²⁸⁵ George Mason, *Objections to the Constitution of Government Formed by the Convention* (Oct. 1787), in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 268, at 346.

²⁸⁶ Richard Henry Lee, *The Federal Farmer*, No. 16 (Jan. 20, 1788), in THE COMPLETE BILL OF RIGHTS, *supra* note 284, at 356.

²⁸⁷ *Id.* at 357.

²⁸⁸ RAKOVE, *supra* note 159, at 188–200.

²⁸⁹ *Id.* at 125–28.

²⁹⁰ *Id.* at 122–25.

²⁹¹ *Id.* at 113–14.

²⁹² *Id.* at 96, 116, 120.

²⁹³ See THE COMPLETE BILL OF RIGHTS, *supra* note 284, ¶¶ 10.1.2.1–4, at 348–49; 2 THE DEBATE ON THE CONSTITUTION, *supra* note 269, at 537, 560, 567.

III. AN ORIGINALIST READING OF THE “DUE PROCESS OF LAW” IN THE FIFTH AMENDMENT

While the early eighteenth century saw Britain slowly moving away from the seventeenth-century higher-law constitutionalism of Coke toward the new constitutionalism of parliamentary supremacy, Coke’s higher-law constitutionalism remained highly influential in the colonies. When Britain began to intervene more closely in colonial affairs, the colonists adapted higher-law constitutionalism as a defense to the consequent taxation and regulation of their internal affairs, as illustrated by the arguments of counsel in *Paxton’s Case*²⁹⁴ and *Robin v. Hardaway*,²⁹⁵ which were popularized as the foundation of colonial arguments under the English constitution.

The colonists also adopted the confused seventeenth-century notion that the common law reflected the natural law and natural rights,²⁹⁶ carrying it into the Declaration of Independence.²⁹⁷ Following independence, they adopted written constitutions that created republican frames of government, but which merely declared or guaranteed already existing natural and customary rights. The Federalist defense of the Philadelphia Convention’s near-complete failure to protect such rights in the 1787 Constitution reflected the higher-law belief that such rights were enforceable against federal and state government action independent of any constitutional enumeration or writing. All these perspectives are confirmed in post-revolutionary decisions reported after independence.²⁹⁸

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

²⁹⁴ *Paxton’s Case*, *supra* note 163, app. I-D, at 474 (report of John Adams).

²⁹⁵ 1 Va. (Jeff.) 109 (Va. Gen. Ct. 1772).

²⁹⁶ See *supra* text accompanying notes 199–202.

²⁹⁷ See *supra* text accompanying note 211.

²⁹⁸ See *supra* Part III.B.2.

A. *The Drafting and Ratification of the Due Process Clause*

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

*No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.*²⁹⁹

Although this proposed amendment underwent significant changes before it was reported out to the states and ratified, there is no record of any discussion of the Due Process Clause itself in any of the ensuing reports or debates of the proposed amendments.

The proposed amendment containing the Due Process Clause was reported out of the House on August 24, 1789,³⁰⁰ and a somewhat different version reported out of the Senate on September 9, 1789.³⁰¹ Following House–Senate conference negotiations, the final version of the proposed amendment containing the Due Process Clause was reported to the states as “Article the seventh” in a joint resolution of the House and Senate on September 28, 1789:

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.*³⁰²

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

²⁹⁹ 1 ANNALS OF CONG. 451–52 (Joseph Gales ed., 1834) (proposal of James Madison on June 8, 1789) (emphasis added), reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 284, ¶ 10.1.1.1.a, at 337.

³⁰⁰ *Id.* at 808–09, reprinted in THE COMPLETE BILL OF RIGHTS, *supra* note 284, ¶ 10.1.1.8, at 340.

³⁰¹ THE COMPLETE BILL OF RIGHTS, *supra* note 284, ¶ 10.1.1.12, at 342 (citation omitted).

³⁰² *Id.* ¶ 10.1.1.22, at 348 (emphasis added) (citation omitted).

B. “Law” in Late Eighteenth-Century America

1. The Classical Understanding of “Law”

The argument for an exclusively procedural understanding of the Fifth Amendment Due Process Clause implicitly projects an anachronistic positivist meaning onto the term “law” in the crucial phrase “due process of law.” In this positivist understanding, a “law” is any legislative or other governmental act that has satisfied the rule of recognition; in other words, any such act that effects a deprivation of life, liberty, or property necessarily comports with the due process of law because the act that effects the deprivation has satisfied the formal requirements for lawmaking.³⁰³ Under this reading, Congress complies with the Due Process Clause—that is, it satisfies the “due process of law” in depriving a person of life, liberty, or property—so long as it accomplishes the deprivation by means of a congressional act passed in accordance with the lawmaking provisions of Article I of the Constitution.³⁰⁴

By contrast, classical natural law theory has long assigned normative as well as positivist content to the definition of “law.”³⁰⁵ To fall within the meaning of “law” in the classical view, a legislative or other governmental act required more than mere positivist compliance with the rule of recognition; it also needed to be just.³⁰⁶ Cicero, for example, maintained that an unjust

³⁰³ See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995).

[I]f one reads the word “law” as late twentieth century speakers use that word . . . [.] then one cannot easily explain how something that has the *form* of law, and that was *enacted* in accord with all relevant structural requirements for lawmaking by the relevant juridical entities, is to be treated as something less than “law” simply because its substantive content flunks various tests, either static or evolving, for how lawmakers may regulate various spheres of economic or social life.

Id.; cf. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155 (1893) (“No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the minds of legislators with thoughts of mere legality, of what the constitution allows.”).

³⁰⁴ U.S. CONST. art. I, § 7, cls. 2–3 (providing that a congressional act becomes law when passed by a majority of the Senate and the House and either signed by the President, allowed to become law without his signature, or reenacted by a two-thirds majority of each of the Senate and the House over a presidential veto).

³⁰⁵ See, e.g., PLUCKNETT, *supra* note 67, at 40 (arguing that the idea of “law which was directly based upon the divine attribute of justice” proved to be both a practical and an intellectual answer to social problems in the middle ages).

³⁰⁶ E.g., CICERO, DE RE PUBLICA, DE LEGIBUS 385 (Clinton Walker Keyes trans., Harvard Univ. Press 1928) (51 BCE) (“[I]n the very definition of the term ‘law’ there inheres the idea and principle of choosing what is just and true.”); *id.* at 317–19 (“[T]he origin of Justice is to be found in Law, for Law is a natural force;

statute, even though clearly adopted and accepted by the nation it governs, is not a “law.”³⁰⁷ Augustine likewise suggested that “a law that is not just is not a law.”³⁰⁸ Aquinas formalized this view into the argument that since law derived its essential character from its conformity to “right reason,” whose “first rule is the law of nature,” a law that violates the natural law “is no longer a law but a corruption of law.”³⁰⁹

it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.”); see SOPHIE VAN BIJSTERVELD, *THE EMPTY THRONE: DEMOCRACY AND THE RULE OF LAW IN TRANSITION* 239 (2002) (observing that natural law theorists “adopt the view that there is more to law than the authoritative and correct establishment of a rule and the content of such rule. There are ‘higher’ truths or values which a concrete rule, as it has been adopted, must reflect and adhere to”); *id.* at 15–16 (referring to the ancient and medieval idea that natural law is “a standard of good law, ultimately superseding actual law”); Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 CAN. J.L. JURIS. 201, 205 (2007) (attributing to classical natural law theory the view that positive laws “cannot count as law if they are too unjust”); see also JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 185 (Weidenfeld & Nicholson 1955) (1832) (criticizing as “stark nonsense” the classical view that “human laws which conflict with the Divine law are not binding, that is to say, are not laws”).

³⁰⁷ CICERO, *supra* note 306, at 385.

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

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

³⁰⁸ ST. AUGUSTINE, *ON FREE CHOICE OF THE WILL* bk. i, Q. 5, at 11 (Anna S. Benjamin & L.H. Hackstaff trans., The Bobbs-Merrill Company 1964) (ca. 395). In defending laws that justify killing in self-defense or as part of a military force, Augustine declares, “We shall not, shall we, dare say that these laws are unjust—or rather, are not laws at all, for I think that a law that is not just is not a law.” *Id.*

³⁰⁹ 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Q. 95, art. 2, at 227–28 (Father Laurence Shapcote trans., rev. by Daniel J. Sullivan, Encyclopaedia Britannica, Inc. 2d ed. 1990) (internal citation omitted); *accord id.*, Q. 96, art. 4, at 233 (quoting AUGUSTINE, *supra* note 308, bk. i, Q. 5, at 11) (internal citation omitted).

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

Id.; *accord* CICERO, *supra* note 306, at 317–19.

Law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is

The classical natural law tradition was still vibrant in late eighteenth-century America, when the Fifth Amendment was drafted and ratified, and the term “law” had not yet acquired the almost entirely positivist connotation that it carries today. To call a legislative act a “law” during that era did not mean that the act merely satisfied constitutional requirements for lawmaking, but rather signified that it conformed to substantive limitations on legislative power represented by natural and customary rights.³¹⁰ Legislative acts that violated these limitations would not have been considered “laws,” even when they satisfied the constitutional requirements for lawmaking.³¹¹ In other words, such an act might have given “due process,” but the process owed and given by the act would not have been a process *of law*.³¹² Under this reading, the Due Process Clause required that a congressional deprivation of life, liberty, or property be accomplished by a “law,” and to be a “law,” a

Law. . . . Now if this is correct, . . . then the origin of Justice is to be found in Law, for Law is a natural force; it is the mind and reason of the intelligent man, the standard by which Justice and Injustice are measured.

Id.; see also RÉMI BRAGUE, *THE LAW OF GOD* 221 (Lydia G. Cochrane trans., 2007) (attributing to Aquinas the view that “the law cannot be reduced to a commandment that would merely be the imposition of a will. The law is rational and, at least within itself, intelligible”).

³¹⁰ See *supra* text accompanying notes 192–202, 222–42; cf. Harrison, *supra* note 252, at 525 (describing but not endorsing this definition of “law”); *supra* note 155 (noting reliance on this definition of “law” by seventeenth century colonial court); Tribe, *supra* note 303, at 1297 n.247.

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

Id.

³¹¹ Cf. Harrison, *supra* note 252, at 525–26 (describing but not endorsing this definition of “law”).

³¹² See, e.g., 2 CROSSKEY, *supra* note 8, at 1151 (describing without endorsing this reading of “due process of law”); Harrison, *supra* note 252, at 525 (same); Wolfe, *supra* note 8, at 224 (same). As Professor Wolfe explained, the emphasis on the “law” of “due process of law” suggested that

[i]f the law under which one is being deprived of life, liberty, or property turns out not to be a law really—if it lacks some essential element of law—then it might be argued that such a law violated the due process clause and that punishment under it (deprivation of life, liberty, and property), was invalid, prohibited.

Id.

Professor Crosskey rejected this reading outright, although his analysis focused on the meaning of the Due Process Clause of the Fourteenth rather than the Fifth Amendment. See 2 CROSSKEY, *supra* note 8, at 1151. Professor Harrison similarly concludes that this reading is implausible for the Due Process Clause of either Amendment. See Harrison, *supra* note 252, at 530–34. Wolfe, by contrast, finds this reading a plausible one, though not the most plausible one. See Wolfe, *supra* note 8, at 224–26.

congressional act must not have exceeded the limits of legislative power marked by natural and customary rights.

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

Legal dictionaries from the late eighteenth century repeated Aquinas’s argument nearly *verbatim*, reasoning that because “laws” derive their obligatory force from their conformity to the natural law, those that do not so conform fall outside the definition of “law.”³¹³ Echoing Aquinas,³¹⁴ and notwithstanding his ideas about Parliamentary supremacy,³¹⁵ Blackstone similarly concluded that “absurd or unjust” decisions were not simply “bad law,” but “not law” at all, because “what is not reason is not law.”³¹⁶ Indeed, even in eighteenth-century England, there were members of Parliament who argued that the more extreme acts passed by Parliament to regulate and punish colonial intransigence were not “law” even though properly enacted.³¹⁷

The classical understanding of law is implicit in the ubiquitous language of nullity and voidness that runs throughout late eighteenth-century judicial decisions and arguments of counsel involving legislative acts held to have violated natural or customary rights.³¹⁸ Then as now, a void law had no existence; it made sense to think of it as never having been a “law” at all.

³¹³ A NEW LAW DICTIONARY 405 (Giles Jacob ed., London, Woodfall & Strahan, 8th ed. 1762) (“All *Laws* derive their Force a *Lege Nature*; and those which do not, are accounted as no *Laws*. No *Law* will make a Construction to do wrong.” (citing Sir John Fortescue, a judge on King’s Bench during the reign of Henry VI)); accord JOHN MILTON, DEFENCE OF THE PEOPLE OF ENGLAND (1651), reprinted in 6 THE WORKS OF JOHN MILTON 204 (London, William Pickering 1851) (appealing to “that Fundamental Maxim in our Law, . . . by which nothing is to be accounted a Law, that is contrary to the Laws of God, or of Reason”), quoted in 1 JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW WITH NOTES 51 n.6 (Cambridge, Mass., University Press 1895); see also 8 OXFORD ENGLISH DICTIONARY 714 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (“What is or is considered right or proper; justice or correctness of conduct”; with usage examples from 1200 to 1450).

The identical definition appeared in the “corrected and greatly enlarged” American edition of Jacob’s dictionary published in 1811. See 4 THE LAW-DICTIONARY 89 (T.E. Tomlins ed., Philadelphia, P. Byrne 1st Am. ed. 1811).

³¹⁴ See Soper, *supra* note 306, at 201.

³¹⁵ See *supra* text accompanying note 149.

³¹⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *70 (emphasis omitted).

³¹⁷ See 4 REID, CONSTITUTIONAL HISTORY, *supra* note 142, at 29–33.

³¹⁸ For judicial opinions, see *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18–20 (1800) (presupposing without exercising judicial power to declare a state law “void” as contrary to state or federal constitution, or both) (separate opinions of Washington, Chase, Paterson, & Cushing, JJ.); *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252, 254 (S.C. Ct. Com. Pl. 1792) (holding that legislative act resolving boundary dispute by vesting title in one of the parties was “*ipso facto* void” because it violated Magna Carta and “common right”); *Ham v.*

The classical understanding was sometimes even made explicit. For example, the classical theory's normative definition of "law" is expressly invoked in *Vanhorne's Lessee v. Dorrance*, a case involving a boundary dispute between Pennsylvania and Connecticut, which the states settled by legislatively vesting title to disputed property in certain claimants at the expense of others.³¹⁹ The disappointed claimants challenged the settlement act in the federal circuit trial court in diversity. Justice Paterson charged the jury that the legislature's act of "divesting one citizen of his freehold and vesting it in another, even with compensation" was "void" because it violated natural and customary rights.³²⁰ This charge meant, he explained, that the settlement act "never had Constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made."³²¹

The classical view is also explicit in *Marbury v. Madison*.³²² Chief Justice Marshall famously held in *Marbury* that "an act of the legislature, repugnant to the constitution, is void."³²³ Immediately thereafter, as he introduced the question whether courts are bound to enforce an unconstitutional law, Marshall expressly assumed that a legislative act found to be void because of its inconsistency with the constitution is not really a "law": "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other

McCraws, 1 S.C.L. (1 Bay) 91, 93, 98 (S.C. Ct. Com. Pl. 1789) (observing that "statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles," and declining to subject defendants to a statute enacted while defendants were en route to the state on the high seas, because such application "would be evidently against common reason").

For arguments of counsel, see *Cooper*, 4 U.S. (4 Dall.) at 16 ("If a law is contrary to the constitution, the law is void.") (argument for plaintiff); *Paxton's Case*, *supra* note 163, app. I-D, at 474 ("As to Acts of Parliament, an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void.") (argument of James Otis as reported by John Adams); *Trs. of the Univ. v. Foy*, 3 N.C. (2 Hayw.) 310, 325 (1804) (arguing that a legislative act divesting state university of title to property lawfully conveyed by prior legislative act "is against the constitution and void") (argument of John Haywood); *Robin v. Hardaway*, 1 Va. (Jeff.) 109, 114 (Va. Gen. Ct. 1772) ("[A]ll acts of legislature apparently contrary to natural right and justice, are, in our laws, and must be in the nature of things, considered as void.") (argument of George Mason).

³¹⁹ *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857).

³²⁰ *Id.* at 310, 316; *accord id.* at 310 (labeling the act "inconsistent with the principles of reason, justice and moral rectitude," "incompatible with the comfort, peace, and happiness of mankind," "contrary to the principles of social alliance in every free government," and "contrary both to the letter and spirit of the [state] Constitution"; in short, "what every one would think unreasonable and unjust in his own case").

³²¹ *Id.* at 316.

³²² 5 U.S. (1 Cranch) 137 (1803).

³²³ *Id.* at 177.

words, *though it be not law*, does it constitute a rule as operative *as if it was a law?*"³²⁴

Finally, the classical understanding of "law" is clearly evident in state judicial condemnations of the positivist construction of "law" in late eighteenth-century decisions construing the meaning of the "law of the land." These decisions illustrate the original meaning of the Due Process Clause because late eighteenth-century Americans understood the meanings of the "due process of law" and the "law of the land" to be identical.³²⁵ For example, two judges in *Zylstra v. Corp. of Charleston* emphatically held that a city charter permitting the levying of fines without trial by jury could not be considered part of the "law of the land" even if authorized by the legislature:

How then can a law be valid, which constrains a citizen to submit his person and his property, to a tribunal, that proceeds to give judgment on both, without the intervention of a jury? Does [sic] these words of the constitution "*or by the law of the land,*" authorise it? Do they mean *any law* which may be passed, directing a different mode of trial? Such a construction would be incompatible with the declaration of this privilege; it would be taking away all the security which that intended to give it; it would do more, it would be making the constitution itself authorise the means of destroying a right which it afterwards declares shall be inviolably preserved. For if the law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature.³²⁶

The author of this opinion later cited its reasoning in *Lindsay v. Commissioners* to invalidate a municipal taking, arguing that if "the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared, should for ever be inviolably preserved," and dismissing this reading as "too absurd a construction to be the true one."³²⁷ *Trustees of*

³²⁴ *Id.* (emphasis added).

Later in *Marbury*, however, Chief Justice Marshall uses the term "law" more loosely, as if it included unconstitutional as well as constitutional legislative acts. *See, e.g., id.* at 178 (posing the question, "if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case," whether "the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law").

³²⁵ *See supra* note 252 and accompanying text.

³²⁶ 1 S.C.L. (1 Bay) 382, 390–91 (S.C. Ct. Com. Pl. 1794) (per Waties, J., joined by Bay, J.).

³²⁷ 2 S.C.L. (2 Bay) 38, 59 (S.C. Const. Ct. App. 1796); *see also* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 579–81 (1819) (arguing that the meaning of New Hampshire's "law of the land" clause included recognition that "[e]verything which may pass under the form of an enactment, is not . . . to be considered the law of the land") (argument of Daniel Webster); *Currie's Adm'r v. Mutual Assurance Soc'y*, 14

the University of North Carolina v. Foy similarly rejected the positivist construction when it invalidated a state legislature's unilateral revocation of title to property that the legislature had previously conveyed, reasoning that if the protections of the "law of the land" guaranteed by the North Carolina constitution did not bind the legislature because the legislature was empowered to alter the "law of the land" at will, the clause would be rendered a nullity.³²⁸

Perhaps the clearest statement of the classical understanding of "law" is the oft-quoted dictum of Justice Chase in *Calder v. Bull*, a U.S. Supreme Court decision handed down in 1798, only seven years after the ratification of the Fifth Amendment.³²⁹ In *Calder*, the Court reviewed a state statute that had vacated a probate court's invalidation of a will and ordered a new trial of the will despite the statute of limitations for appeals having run; the new trial resulted in validation and recording of the will, which was upheld on appeal in the state courts.

Va. (4 Hen. & M.) 315, 346–47 (1809) (per Roane, J.) (rejecting argument of counsel that "the legislature had a right to pass any law, however just, or unjust, reasonable, or unreasonable," and warning that such a conception of untrammelled legislative power would "lay prostrate, at the footstool of the legislature, all our rights of person and of property, and abandon those great objects, for the protection of which, alone, all free governments have been instituted").

³²⁸ *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 62 (1805); *see also* *Trs. of the Univ. v. Foy*, 3 N.C. (2 Hayw.) 310, 320–24 (1804) (argument of John Haywood).

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

....

The meaning then of the term we are considering, was, that a man should not be deprived of his freehold, &c. but by the judgment of a *court of justice*, regularly constituted and authorised to decide what the law is, and to pronounce it in cases coming before them: which court shall ascertain facts by the verdict of a jury, where proper; or where that would be improper, by such other means as the law has appointed. How different is this from the idea which makes every act of the Legislature a law of the land, and vests in them the arbitrary and despotic power of prostrating all those rights so dear to mankind whenever they please! The term, law of the land, had a precise legal meaning when used by the [North Carolina Constitutional] Convention, and signified the lawful proceedings of the *proper tribunals* of the country.

....

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

Id.

³²⁹ 3 U.S. (3 Dall.) 386 (1798).

The issue before the Court was whether the statute violated the Constitution's prohibition of ex post facto legislation by the states.³³⁰ The Court unanimously upheld the statute, though on varying grounds.³³¹ Beyond this holding, most of the Justices also commented on the limits of legislative power generally.³³² Justice Chase opined that the legislative power was constrained by natural and customary rights, even if these limits were not declared by positive constitutional law:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence.³³³

After making the Lockean argument that legislative power is limited by the social contract,³³⁴ Chase emphasized that such limits are not exhausted by written constitutional restraints or other positive law enactments, and reiterated that the principal purpose of both federal and state government is the protection of natural and customary rights:

There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established.³³⁵

As examples of acts beyond proper legislative authority, Chase suggested:

[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

³³⁰ U.S. CONST. art. I, § 9. cl. 3.

³³¹ *Calder*, 3 U.S. (3 Dall.) at 386–87.

³³² See POWELL, *supra* note 123, at 102 (arguing that one issue in *Calder* was whether constitutional interpretation was restricted to “exegesis” of the constitutional text or might include “other sorts of political arguments”).

³³³ *Calder*, 3 U.S. (3 Dall.) at 387–88 (letters modernized).

³³⁴ *Id.* at 388.

³³⁵ *Id.* Here and elsewhere, Chase made clear that his argument applies equally to congressional and state legislative action. See *id.*

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.³³⁶

Chase then directly invoked the classical view, arguing that because such actions violate natural and customary rights, they are not “law” even when enacted pursuant to the constitutionally prescribed procedures for lawmaking: “An Act of the Legislature (*for I cannot call it a law*) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”³³⁷ Chase ended with an explicit appeal to higher-law constitutionalism: “The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.”³³⁸

Justice Chase’s famous invocation of the classical understanding was directly challenged by the equally famous dictum of Justice Iredell in the same case. Iredell argued that the only judicially enforceable limits on legislative power were those positively enacted into a constitutional text:

If . . . a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.³³⁹

His support for the conclusion that natural, customary, or other unwritten limits on legislative power are not cognizable by the courts was none other than Blackstone’s doctrine of parliamentary supremacy.³⁴⁰

Chase’s position was almost certainly more widely held in the United States of the 1790s. Blackstone’s doctrine was a consequence of the constitution of sovereign command, asserted by George III and the eighteenth-century parliamentary majority in support of their governance of the colonies,

³³⁶ *Id.*

³³⁷ *Id.* (emphasis added).

³³⁸ *Id.* Compare *id.*, with THE FEDERALIST NO. 44 (James Madison), *supra* note 218, at 301.

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

Id.

³³⁹ *Calder*, 3 U.S. (3 Dall.) at 398.

³⁴⁰ *Id.* at 398–99 (citation omitted).

and resisted by the colonists, who had adopted the higher-law constitutionalism of Coke and seventeenth-century England. As I have shown, post-independence state constitutions, arguments of counsel, and judicial decisions make clear that higher-law constitutionalism remained the conceptual foundation of American constitutional thinking through the founding era. Moreover, it was precisely the anarchic consequences stemming from actions of state legislatures claiming absolute legislative power that led to the Philadelphia Convention.³⁴¹ The supremacy of positive law, therefore, was an unlikely constitutional argument for Justice Iredell to raise less than a generation after the Revolution was fought to vindicate its constitutional opposite.³⁴²

Justice Iredell's position, moreover, was largely rejected by state constitutional decisions of the period, which generally held that the "law of the land" signified natural and customary rights that constrained legislative action and could not be altered by the exercise of ordinary legislative power. Only two reported decisions relied on the legislative supremacy argued by Iredell in his dictum. Toward the end of its opinion in *Rutgers v. Waddington*, the court remarked that it was not necessary to question the "supremacy of the Legislature," observing that "if they think fit *positively* to enact a law, there is no power which can controul them,"³⁴³ a virtual quotation of Blackstone's argument that a "law" is whatever the legislature positively enacts.³⁴⁴

The court's holding in *Rutgers*, however, suggests the opposite. The court decided the case under the law of nations—a branch of the natural law—because the statute was subject to the common law, which included the law of nations.³⁴⁵ Notwithstanding appearances to the contrary, *Rutgers* held that positive law must be construed so that it does not violate the common law, thereby implicitly rejecting the positivist understanding.³⁴⁶

³⁴¹ See FRIEDMAN, *supra* note 203, at 106–07; WOOD, *supra* note 147, at 319.

³⁴² See Barnett, *Ninth Amendment*, *supra* note 277, at 30 n.122 (noting that James Wilson's lectures at the University of Pennsylvania "undermine the claim that, by the time of the Constitution, Americans had lost their Lockean and revolutionary ardor for natural rights in favor of a more conservative Blackstonian positivism that favored legislative supremacy").

³⁴³ *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 222, at 415. *Compare supra* Part I.I.C.3, with *supra* text accompanying notes 330–33.

³⁴⁴ See *supra* note 149 and accompanying text.

³⁴⁵ *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON, *supra* note 222, at 399–415.

³⁴⁶ See *supra* text accompanying notes 222–24.

The second case, *State v. ———*, involved a collection lawsuit by North Carolina under a statute that permitted the attorney general to obtain judgments against those in debt to the state without notice or trial on the validity of the debt.³⁴⁷ The state made two motions for judgment against the defendant debtor under the statute, both of which the court denied on the ground that the statute violated North Carolina's law-of-the-land clause by depriving the debtor of his customary rights to notice and jury trial before judgment.³⁴⁸ The state maintained that the "law of the land" clause prohibited only deprivations imposed by "foreign" law or royal prerogative,³⁴⁹ that the clause could not bind the legislature because the "law of the land" included legislative acts, and that the legislature had full power to amend or alter common law rights as it saw fit (including, presumably, the power to eliminate the customary rights of notice and trial prior to judgment).³⁵⁰

Undaunted, the state's attorney moved for judgment yet again on the same grounds though before a different set of judges. Judge Ashe indicated that he had "very considerable doubts" about the state's position, but deferred to the confident opinion of his colleague that the statute was constitutionally sound. Accordingly, Judge Ashe announced judgment for the attorney general under the statute, though he confessed—in words that no doubt still resonate with judges everywhere—that "he did not very well like it."³⁵¹

Whatever modest precedential value attached to *State v. ———* evaporated when another North Carolina court expressly adopted the classical view of "law" in construing the state law-of-the-land clause little more than a decade later. *Trustees of the University of North Carolina v. Foy* involved a challenge to a state statute that funded the operation of the University of North Carolina

³⁴⁷ 2 N.C. 28, 29, 1 Hayw. 38, 39 (1794).

³⁴⁸ *Id.* at 29, 1 Hayw. at 39 ("No freeman ought to be taken, imprisoned or disseised of his freehold, liberties, or property, &c. but by the law of the land'; and these words mean, according to the course of the common law; which always required the party to be cited, and to have a day in court upon which he might appear and defend himself [before a jury]." (quoting N.C. BILL OF RIGHTS art. 12)).

³⁴⁹ *Id.* at 33, 1 Hayw. at 43.

³⁵⁰ *Id.* at 33–34, 1 Hayw. at 44.

³⁵¹ *Id.* at 40, 1 Hayw. at 50. The following is the reporter's account of Ashe's announcement of judgment:

Judge Ashe gave the opinion of the court, saying he and Judge Macay had conferred together—that for himself he had very considerable doubts, but that Judge Macay was very clear in his opinion that the judgments might be taken, and had given such strong reasons, that his (Judge Ashe's) objections were vanquished, and therefore that the Attorney-General might proceed—but that yet he did not very well like it.

Id.

by granting the university title to “all the property that has heretofore or shall hereafter escheat to the state.”³⁵² A decade later, however, the legislature repealed the prior funding act, held void the title to all property that the prior act had vested in the university, and statutorily revested title back in the state.³⁵³ The university then challenged the constitutionality of the repeal statute under, *inter alia*, the law-of-the-land clause in North Carolina’s bill of rights.³⁵⁴ The state’s attorney argued, along the lines of the judgment in *State v. —*, that the law-of-the-land clause “does not impose any restrictions on the Legislature, who are capable of making the law of the land.”³⁵⁵ This time, however, the court flatly rejected this construction of the clause, noting that it would bind the courts to the will of the legislature, “whether agreeable to their ideas of justice or not,” and would render the law-of-the-land clause “a dead letter.”³⁵⁶ Concluding that the clause “is applicable to the legislature” and must have been “intended as a restraint on their acts,” the court went on to hold that it precluded the university from being deprived of its “liberties or property, unless by a trial by jury in a court of justice, according to the known and established rules of decision, derived from the common law and such acts of the Legislature as are consistent with the Constitution.”³⁵⁷

Therefore, by the time *Foy* was decided in 1805, it was well-established that the meaning of “law” included the classical understanding argued by Justice Chase in *Calder v. Bull*.³⁵⁸ The classical understanding of “law” was reflected in the frequent references to voidness in constitutional decisions of the era,³⁵⁹ and had been expressly invoked not only in *Calder*, but in the majority opinions of two other federal courts, including the U.S. Supreme Court.³⁶⁰ Finally, three state court opinions had used the classical understanding as a premise in rejecting the positivist argument that state legislatures had unrestricted power to alter the “law of the land” by ordinary

³⁵² *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 57, 57 (1805).

³⁵³ *Id.* at 58.

³⁵⁴ *Id.* at 63.

³⁵⁵ *Id.* at 62.

³⁵⁶ *Id.* at 63.

³⁵⁷ *Id.*; *see also id.* (stating that the university’s property was not subject to “the arbitrary will of the Legislature” even though held in trust for the general good).

³⁵⁸ *See supra* text accompanying notes 331–36.

³⁵⁹ *See supra* text accompanying notes 317–23.

³⁶⁰ *See Marbury v. Madison*, 5 U.S. (1 Cranch) 177 (1803); *Vanhome’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857).

enactment.³⁶¹ By contrast, the only judicial authority clearly adopting the positivist construction of “law” argued by Justice Iredell in *Calder* is the opinion reluctantly announced by the court in *State v. —*, and fatally undermined a decade later by *Foy*. On balance, then, the late eighteenth-century legal authorities strongly support the position that the classical natural law of “law” was widely held in the 1790s.

Against the American colonies’ adoption and adaptation of Coke’s higher-law constitutionalism in the pre-Revolutionary era, the drafting and ratification of the 1787 Constitution and the 1791 Due Process Clause of the Fifth Amendment, together with decisions reported during the periods immediately before and immediately after ratification, provide strong evidence that what we now call substantive due process formed part of the original understanding of the Due Process Clause: It imposed judicially enforceable unenumerated substantive rights as limitations on congressional power.

C. Arguments Against an Original Meaning that Includes Substantive Due Process

Of the contemporary commentators who reject substantive due process as part of the original meaning of the Due Process Clause of the Fifth Amendment, only a few have seriously examined the question,³⁶² and of these, only one has engaged the argument that the original meaning of due process included the classical understanding of “law” from the natural law tradition.³⁶³

The counterarguments are based largely on history and linguistic context. Professor Wolfe concluded that a broad substantive understanding of the Due Process Clause was plausible in the late eighteenth century based upon the classical understanding. However, he rejected this understanding in favor of a narrower procedural one because (in his view) the historical evidence supporting the substantive understanding came “well after the founding,” and the Due Process Clause was placed in the midst of procedural guarantees

³⁶¹ See *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805); *Lindsay v. Comm’rs*, 2 S.C.L. (2 Bay) 38 (S.C. Const. Ct. App. 1796) (per Waities, J.); *Zylstra v. Corp. of Charleston*, 1 S.C.L. (1 Bay) 382 (S.C. Ct. Com. Pl. 1794) (per Waities, J., joined by Bay, J.).

³⁶² See BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 8; MEYER, *supra* note 8; Berger, “*Law of the Land*,” *supra* note 8; Harrison, *supra* note 252; Wolfe, *supra* note 8.

³⁶³ Although several commentators mention the classical view, *see, e.g.*, 2 CROSSKEY, *supra* note 8; Wolfe, *supra* note 8, only Professor Harrison gives it more than cursory examination before rejecting it, *see* Harrison, *supra* note 252.

within the text of the Bill of Rights.³⁶⁴ Ms. Meyer contended that the original understanding of the Due Process Clause in the late eighteenth century is identical to the original understanding of Chapter 29 of Magna Carta in the early thirteenth century—both merely guaranteed that a trial be held according to generally applicable procedures prior to judgment and imposition of a criminal penalty.³⁶⁵ She further contended that those who held a broader substantive understanding of the guarantee of due process were misled by Coke’s mistaken reading of Chapter 29.³⁶⁶ Professor Jurow made a similar argument about thirteenth-century meaning, but was more tentative about its relevance to the contemporary understanding of due process.³⁶⁷

Professor Berger gave the most detailed consideration of the relevant judicial precedents, distinguishing or otherwise rejecting the authority of every late eighteenth-century decision that might support a substantive reading of the Clause.³⁶⁸ Finally, Professor Harrison expressly rejected the classical understanding of “law” as wholly implausible, focusing entirely on other usages of “law” in the 1787 constitutional text which are inconsistent with the classical understanding, particularly those in the Contracts, Ex Post Facto, Presentment, and Supremacy Clauses.

³⁶⁴ Wolfe, *supra* note 8, at 227.

Professor Wolfe also appeals to the lack of a ratification controversy over the Due Process Clause, which, he contends, would have been “inconceivable” if the Clause had been understood as a “broad guarantee against arbitrary government” whose protections exceeded those of Chapter 29. *Id.* This argument has two serious flaws. First, what matters for an originalist interpretation of the Due Process Clause is not the public meaning of Chapter 29 in thirteenth-century England, but rather its public meaning in the United States in the late eighteenth century. That a Due Process Clause with broad substantive reach would have far exceeded the original understanding of Chapter 29 is thus entirely beside the point. Second, Wolfe ignores that the promise of a Bill of Rights was a Federalist tactic to secure ratification of the original Constitution by placating Anti-Federalist fears of national power. If the Due Process Clause was originally understood to include a general guarantee against substantive deprivations of natural and fundamental customary rights by the national government, then its addition to the Constitution would probably not have provoked controversy among either group. Anti-Federalist fear of national encroachment on natural and customary rights was partially assuaged by the Bill of Rights, while the Federalists thought the Bill of Rights unnecessary and redundant with respect to the protection of such rights. See *supra* text accompanying notes 283–88.

³⁶⁵ MEYER, *supra* note 8, at 128, 149.

³⁶⁶ *Id.* at 137–38.

³⁶⁷ Jurow, *supra* note 8, at 266 (noting that it may not matter to Supreme Court doctrine if Coke’s equation law of the land and due process of law was historically incorrect).

³⁶⁸ See Berger, “*Law of the Land*,” *supra* note 8, at 14–20 (discussing late eighteenth-century precedent on law-of-the-land clauses).

1. Counterarguments from History

a. Thirteenth-Century Meaning

Meyer and Jurow made persuasive cases that the original thirteenth-century understanding of the “due process of law,” if not the “law of the land,” was narrowly procedural, requiring merely that the king follow well-established common law procedures before enforcing feudal or criminal penalties.³⁶⁹ Berger additionally argued that the “law of the land” was originally understood to apply only to the king and his agents—an indisputable proposition, because no Parliament or other such legislative entity was even contemplated in the early thirteenth century. They all blame Coke for this confusion.³⁷⁰

Meyer used her conclusion that the original English understanding of the law of the land was entirely procedural as the premise to an argument that substantive due process is historically unjustified.³⁷¹ Berger used his conclusion that the “law of the land” bound only the executive to dismiss the authority of *Bowman v. Middleton*,³⁷² *Trustees of the University of North Carolina v. Foy*, and other decisions that relied on the classical understanding of “law” to impose unenumerated limits on state legislative authority.³⁷³

Both Meyer and Berger relied on the mistaken premise that the original understanding must also be an accurate historical understanding. But originalism does not require that interpretations of the Constitution be historically correct in some larger sense; it only requires that such interpretations coincide with the general public meaning of the constitutional words being interpreted at the time the Constitution was drafted and ratified. Even if Berger’s and Meyer’s historical analyses are correct—that is, even if the law-of-the-land clause of Chapter 29 was indeed originally understood to protect only certain common law rights to judicial process, and then only against royal encroachment—this determination says almost nothing about

³⁶⁹ See MEYER, *supra* note 8, at 135 (discussing procedural requirements followed by the king in criminal proceedings); JUROW, *supra* note 8, at 265–79; accord Whitten, *supra* note 8, at 742, 743 (concluding that “due process of law” merely referred to the standard common law procedure by which persons were summoned to answer and defend prosecutions and lawsuits that threatened life, liberty, or property).

³⁷⁰ See, e.g., BERGER, GOVERNMENT BY JUDICIARY, *supra* note 6, at 226; MEYER, *supra* note 8, at 137–38, 140; BERGER, “Law of the Land,” *supra* note 8, at 5; JUROW, *supra* note 8, at 271–72, 277–79 (all discussing and rejecting Coke’s interpretation).

³⁷¹ MEYER, *supra* note 8, at 127.

³⁷² 1 S.C.L. (1 Bay) 252 (S.C. Ct. Com. Pl. 1792).

³⁷³ BERGER, “Law of the Land,” *supra* note 8, at 18–20, 24, 30.

how the American public understood “law,” the “law of the land,” and the “due process of law” nearly 600 years later.³⁷⁴

It is clear that Coke equated the law of the land with the due process of law, and that he understood both to have imposed substantive limitations on actions of the king. Revolutionary Americans adopted these propositions wholesale, and carried them into independence and beyond. It is less clear whether Coke really thought that the law of the land bound Parliament, as *Bonham’s Case* seems to have suggested,³⁷⁵ but revolutionary Americans believed that it did, and that is all that matters.³⁷⁶ Whether the law of the land was originally understood to have a procedural dimension that bound the legislature, whether Coke correctly stated the original thirteenth-century meaning of the law of the land and the due process of law, whether late eighteenth-century Americans correctly understood and applied Coke, whether the wholesale adoption of Coke by Americans ultimately led them down a path of historically unwarranted understandings of both phrases—these questions are all irrelevant to how Americans in fact understood the phrase “due process of law” in the late eighteenth century.

b. Belated Judicial Authority

Although Wolfe ultimately rejected any substantive understanding of the Due Process Clause as part of its original meaning,³⁷⁷ he did acknowledge a line of cases that “gave a broader reading to ‘due process of law’” by defining “law” in accordance with the classical view.³⁷⁸ Wolfe mentioned “widespread agreement” that a legislative act had to be generally applicable to be properly within the definition of “law” in early American jurisprudence, and suggested “taking property from A and giving to B” as the paradigmatic example of an act lacking generality and thus the character of “law.”³⁷⁹ He then traced the various incarnations of the classical view in the early nineteenth century, conceding that “there is some historical evidence which could be used to support a broader reading of the due process clause.”³⁸⁰ However, he rejected

³⁷⁴ Cf. Whitten, *supra* note 8, at 741–42 (arguing that whether Coke correctly equated the “law of the land” with the “due process of law” is irrelevant to the original meaning of these clauses among late eighteenth-century Americans who took Coke’s equation for granted).

³⁷⁵ See text accompanying *supra* note 90.

³⁷⁶ See text accompanying *supra* notes 189–93.

³⁷⁷ Wolfe, *supra* note 8, at 222.

³⁷⁸ *Id.* at 224.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 227.

a broader substantive reading of the Due Process Clause based upon the classical view because, in his view, judicial precedent supporting these broader readings came “well after the founding.”³⁸¹ Harrison made a similar argument.³⁸²

Wolfe and Harrison are simply wrong. While the cases that Wolfe discussed are indeed all from the nineteenth century,³⁸³ he ignored the wealth of earlier precedent from the years preceding and immediately following the 1791 ratification of the Fifth Amendment. *Robin v. Hardaway* (1772), *Butler v. Craig* (1787), *Ham v. McClaws* (1789), *Bowman v. Middleton* (1792), *Vanhorne’s Lessee v. Dorrance* (1792), *Zylstra v. Corp. of Charleston* (1794), *Lindsay v. Commissioners* (1796), *Calder v. Bull* (1798), and *Marbury v. Madison* (1803) all support the conclusion that judges and attorneys during that period understood the meaning of “law” to include a fundamental normative dimension as prescribed by classical natural law theory and higher-law constitutionalism.³⁸⁴ Perhaps Wolfe had these cases in mind when he referred to a broader substantive reading of due process among the “early American courts,” though he did not provide a citation.³⁸⁵ Harrison made the identical error, dismissing the historical support for substantive due process almost entirely on the basis of authorities from the early nineteenth century or later.³⁸⁶ Of course, neither Wolfe’s nor Harrison’s arguments on this point can be credited without their taking the eighteenth-century decisions into account.³⁸⁷

³⁸¹ *Id.*

³⁸² Harrison, *supra* note 252, at 530.

³⁸³ See Wolfe, *supra* note 8, at 222–27 (discussing *Hurtado v. California*, 110 U.S. 516 (1884); *Davidson v. City of New Orleans*, 96 U.S. 97 (1878); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235 (1819); *Wynehamer v. New York*, 13 N.Y. 378 (1856); *Taylor v. Porter & Ford*, 4 Hill 140 (N.Y. Sup. Ct. 1843); *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805)).

³⁸⁴ See *supra* text accompanying notes 178–82, 228–41, 318–35.

³⁸⁵ Wolfe, *supra* note 8, at 224.

³⁸⁶ See Harrison, *supra* note 252, at 530 (mentioning only one eighteenth-century decision, *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.), but not discussing it).

³⁸⁷ See Wolfe, *supra* note 8, at 226–27.

2. Counterarguments from Context

a. Usage in the 1787 Constitutional Text

Harrison gave the classical understanding of “law” the most extended treatment,³⁸⁸ though most of his discussion of the Fifth Amendment Due Process Clause was conceptual rather than historical, and none of it was originalist. He focused virtually all of his discussion on the question whether there exists a contextual basis for believing that the Due Process Clause imposed substantive constraints on the definition or content of “law.”³⁸⁹

Harrison first observed that the classical understanding of “law” is directly contradicted by Article I, which defines as “law” any act of Congress passed by both Houses of Congress and then signed by the President, allowed to become law without his or her signature, or reenacted by a two-thirds margin after a presidential veto.³⁹⁰ He also noted that the term “law” is used in basically its positivist sense in the Ex Post Facto and Supremacy Clauses.³⁹¹ “Nowhere in the 1787 document does the word ‘law’ appear in any context that suggests that it refers to some subset of legally binding commands that is defined by formal or substantive criteria.”³⁹² Harrison conceded that the term “law” might have two senses, one positivist and one normative, but rejected this as confusing and irrational usage that would not have been adopted by “sensible” drafters.³⁹³ He made particular reference to the Supremacy Clause’s use of the term “law of the land” in this regard:

³⁸⁸ See Harrison, *supra* note 252, at 525 (“Maybe the word ‘law’ is the key. If all deprivations of life, liberty, and property must be with due process of law and if some purported source of authority for a deprivation is not law, then it is possible to say that the deprivation was without due process of law.”).

³⁸⁹ *Id.* at 527, 529–30.

Harrison acknowledged the possibility that legislation might not be “law” if it lacks certain formal characteristics, such as “generality, prospectivity, publicity, [or] intelligibility,” but ultimately concluded that it is difficult to squeeze “[m]ost of modern substantive due process” out of a formal concept of law. *Id.* at 525, 527.

³⁹⁰ *Id.* at 530–31.

³⁹¹ *Id.* at 531; accord Hyman, *supra* note 8, at 12–16; see U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.” (emphasis added)); *id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” (emphasis added)).

³⁹² Harrison, *supra* note 252, at 531; accord Hyman, *supra* note 8, at 16.

³⁹³ Harrison, *supra* note 252, at 531–32.

Harrison actually discussed the Fourteenth Amendment Due Process Clause at these pages, but his conceptual and contextual arguments apply equally to the addition of the Fifth Amendment Due Process Clause to the Constitution in 1791. See *id.*

Acts of Congress and treaties, the non-constitutional sources of federal law, are not just the law of the land, but “the supreme Law of the Land.” Deprivations pursuant to them are pursuant to the law of the land. To deny this would be to assert that an entire phrase has different meanings when used in the Supremacy Clause and the Fifth Amendment. No rational person drafting this hypothetical Fifth Amendment, seeking to impose limitations on the legislature, would use words that already appear in the original document and hope to give them a new meaning.³⁹⁴

In sum, concludes Harrison, “law” should be understood in the Due Process Clause in the essentially positivist manner in which it is deployed elsewhere in the Constitution—namely, to signify that which “is legally binding,” and not to refer to any normative criteria.³⁹⁵

Initially, one must note that Harrison’s argument is not originalist, but textualist. He draws conclusions about the meaning of the Due Process Clause from how a disembodied and apparently contemporary reasonable person would understand the word “law” in the Constitution and the Bill of Rights, not how the public in 1791 understood it. There are multiple explanations why the original understanding of “law” in the 1787 Constitution does not exhaust the original understanding of “law” in the 1791 Due Process Clause. First, the drafters of the Fifth Amendment were not intently focused on the how the language of the Due Process Clause would fit with the language of the 1787 Constitution, because they were hardly focused on the Bill of Rights at all. While the participants in the Philadelphia Convention were careful indeed in drafting the 1787 Constitution,³⁹⁶ the members of the First Congress paid little attention to the whole matter of the Bill of Rights. Few members of Congress besides Madison cared about a bill of rights,³⁹⁷ and even he approached the project as a “nauseous” undertaking triggered mostly by the need to neutralize

³⁹⁴ *Id.* at 546–47 (citations omitted); accord Hyman, *supra* note 8, at 18–19.

³⁹⁵ Harrison, *supra* note 252, at 547 n.151; accord MEYER, *supra* note 8, at 146 (arguing that the “law of the land” in the Supremacy Clause “refers to the laws of the entire land, consisting of federal and state laws, and, among them, the United States Constitution, the acts of Congress made in pursuance thereof and the treaties are ‘supreme’ so as to supersede inconsistent laws of the states”); Hyman, *supra* note 8, at 20 (“[T]he convention in Philadelphia in the summer of 1787 . . . decided what shall be a law and what shall be the supreme law of the land. The Due Process Clause is consistent with that functional definition of ‘law’ in the original unamended Constitution.”).

³⁹⁶ FRIEDMAN, *supra* note 203, at 102 (describing the 1787 constitutional text as “marvelously supple, put together with great political skill”).

³⁹⁷ See LEVY, *supra* note 8, at 34; see also *id.* at 37–38 (noting that the House abandoned Madison’s original plan to place each amendment within the body of the existing Constitution because it did not wish to waste time debating such a “trifling” matter).

political support for a second constitutional convention.³⁹⁸ Following the introduction of the proposed amendments in early June 1789,³⁹⁹ the House did nothing with them until late July, when it referred them to committee only after Madison literally begged for their consideration.⁴⁰⁰ The House did not take up the amendments for debate until mid-August, and neither the House nor the Senate spent more than a few days in debate and negotiation of the text before approving the final version that Congress reported to the states in late September.⁴⁰¹ Judge Bork observed that the Bill of Rights “appears to have been a hastily drafted document upon which little thought was expended,”⁴⁰² and Professor Smith has aptly called the final product the “casual” Bill of Rights.⁴⁰³ It is thus unremarkable that “law” as used in the Supremacy and Due Process Clauses might have multiple conflicting meanings.

Second, the inattention to multiple uses of “law” is likely a consequence of the “due process of law” and the “law of the land” having been understood during the revolutionary and early-independence periods as terms of art—that is, general, “catchall” phrases prohibiting arbitrary or otherwise unjust legislation and designed to protect the residuum of liberty exemplified by natural and customary fundamental rights.⁴⁰⁴ There is nothing remarkable about one’s using “law” in its classical natural law sense as part of a term of art like “due process of law,” while also using “law” in its positivist sense as a stand-alone noun. Finally, Madison and the First Congress may well have chosen the “due process of law” formulation for the Fifth Amendment over its “law of the land” equivalent precisely to avoid the confusion of positivism and natural rights that is at the center of Harrison’s argument. Professor Miller

³⁹⁸ *Id.* at 12, 34.

³⁹⁹ *Id.* at 35.

⁴⁰⁰ *Id.* at 37.

⁴⁰¹ See 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 1012–67 (providing a legislative history of the Bill of Rights).

⁴⁰² Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

⁴⁰³ Steven D. Smith, *The Writing on the Constitution and the Writing on the Wall*, 19 HARV. J.L. & PUB. POL’Y 391, 395 (1995); see also *id.* at 397 (describing how the Bill of Rights was adopted “hastily, casually, virtually (it seems) without interest or reflection”).

⁴⁰⁴ See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 304 (2007) (“The term ‘due process of law’ in the Fifth and Fourteenth Amendments is a term of art; it has a specialized legal meaning over and above the concatenation of the words in the phrase.”); Hill, *supra* note 29, at 1271–72 (discussing the interpretation of “due process of law” during the Revolutionary period); *supra* text accompanying note 201.

“Law” is not the only constitutional term to which the framers gave multiple meanings. “Person” is obviously used differently in the Due Process Clause than it is in the Fugitive Slave Clause and the other slavery clauses that euphemistically refer to slaves as “other persons.”

explained that the phrase “law of the land” in the Supremacy Clause places enacted federal law—the Constitution, treaties, and federal statutes—above state constitutions and laws in the hierarchy of American law.⁴⁰⁵ The context for the term “law” in the Supremacy Clause, in other words, strongly suggests positive-law enactments.⁴⁰⁶ “Yet, Magna Carta’s ‘law of the land’ was not restricted to—in fact probably did not even refer to—positive law, but rather meant common law.”⁴⁰⁷ This understanding created its own set of drafting problems because, for the framers, the possibility of federal common law jurisdiction, particularly for crimes, was a controversial and intensely divisive issue in the years immediately after ratification of the 1787 constitutional text.⁴⁰⁸ At the same time, federal criminal trials had to be conducted in accordance with some law.⁴⁰⁹ Accordingly, in Miller’s words, “‘due process of law’ was the most appropriate language to use in the circumstances” to require the conduct of federal trials in accordance with the procedural requirements of due process, without projecting the common law onto the meaning of the “law of the land” in the Supremacy Clause.⁴¹⁰

One can take Miller’s explanation as a premise without accepting his conclusion: One can grant that Madison changed the language from “law of the land” to “due process of law” in the Fifth Amendment to avoid interpretive confusion with the Supremacy Clause, without agreeing that Madison chose the “due process” formulation because he wanted to strictly confine the Due Process Clause to procedural rights. One could equally argue that Madison chose the “due process” formulation precisely to protect, along with procedural rights, unenumerated natural and customary rights that had long been associated with law-of-the-land clauses in state constitutions. It is widely accepted that Americans in the late eighteenth century shared Coke’s equation of the “due process of law” and the “law of the land.”⁴¹¹ There is no evidence

⁴⁰⁵ Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in 18 *NOMOS: DUE PROCESS* 3, 11 (J. Roland Pennock & John W. Chapman eds., 1977) [hereinafter Miller, *Due Process*].

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*; see, e.g., *Henfield’s Case*, 11 F. Cas. 1099, 1106–07 (C.C.D. Pa. 1793) (No. 6360); St. George Tucker, *Of the Unwritten, or Common Law of England; and Its Introduction into, and Authority Within the United American States*, in 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND THE COMMONWEALTH OF VIRGINIA, app. note E, at 378, 407, 411–12 (Philadelphia, Birch & Small 1803) (strenuously opposing federal jurisdiction for common law crimes).

⁴⁰⁹ Miller, *Due Process*, *supra* note 405, at 11.

⁴¹⁰ *Id.*

⁴¹¹ See *supra* note 252 and accompanying text.

that Madison harbored any “plan to fashion new rights or depart from settled norms” in drafting the Due Process Clause or the Bill of Rights generally; indeed, the evidence is that he intended to “formulate a document which reflected a consensus about widely held values.”⁴¹² Madison himself maintained that “[e]very thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided.”⁴¹³

On this basis, then, Madison would not have used “due process of law” in the Fifth Amendment if doing so would have been understood as a significant departure from the reach of the state law-of-the-land clauses; rather, he would have used that formulation to avoid the positivist connotation associated with that phrase in the Supremacy Clause. Because the state clauses were generally understood to protect unwritten natural and customary substantive rights, as well as procedural rights, the Due Process Clause can be assumed to have had the same reach at the time it was drafted and ratified.

b. Placement Among the Procedural Guarantees of the Bill of Rights

Wolfe attached significance to the placement of the Due Process Clause in the middle of what he contended are unambiguously procedural guarantees in the text of the Bill of Rights.⁴¹⁴ He observed that the Fifth Amendment is preceded and followed by amendments guaranteeing protections for the accused in criminal proceedings, such as freedom from unreasonable searches and seizures, and rights to issuance of a search or arrest warrant only upon probable cause, to a speedy and public trial by an impartial jury, to confrontation of witnesses, to compulsory process, and to assistance of

⁴¹² Ely, *Oxymoron Reconsidered*, *supra* note 29, at 325; *accord id.* (“Since the view that ‘due process of law’ and ‘law of the land’ had the same meaning was broadly shared, it seems unlikely that Madison envisioned any departure from the general understanding of this concept.”); Riggs, *supra* note 29, at 992–93 (arguing that there is no reason to believe that the Fifth Amendment’s use of due process, rather than the “law-of-the-land phraseology appearing in every state constitution having such a provision, was intended to change the meaning”); *see also* Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (per Curtis, J.) (speculating that “due process of law” was used to preserve the widely held understanding of “the law of the land” without having to also use the typically conjoined “by the judgment of his peers,” which would have been redundant of the jury-trial guarantees set forth in Article III and what would become the Sixth and Seventh Amendments).

⁴¹³ Ely, *Oxymoron Reconsidered*, *supra* note 29, at 325 (quoting Letter from Madison to Jefferson (May 27, 1789), in 12 PAPERS OF JAMES MADISON 272 (Robert A. Rutland & Charles F. Hobson eds., 1979)); *accord* Graber, *supra* note 269, at 381 (quoting Letter from James Madison to Samuel Johnston (June 21, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 254 (Helen E. Veit et al. eds., 1991)).

⁴¹⁴ Wolfe, *supra* note 8, at 217; *accord* Reeder, *supra* note 8, at 212.

counsel.⁴¹⁵ Within the Fifth Amendment itself, the Due Process Clause is immediately preceded by declarations of rights to indictment by grand jury and freedom from double-jeopardy prosecutions and self-incrimination, and is immediately followed by a declaration of the right to just compensation when one's property is taken by the national government for public use.⁴¹⁶ Wolfe took this context as powerful evidence that the framers did not understand the Due Process Clause to have a broad substantive meaning,⁴¹⁷ concluding rather that the Clause was understood merely to require that a person faced with a deprivation receive the process specified by prevailing law, positive or otherwise.⁴¹⁸ Berger similarly argued that the Due Process Clause must have protected only procedural rights because its state law-of-the-land analogues were generally placed with criminal procedure protections.⁴¹⁹ Both arguments are weak.

First, it is unlikely that textual placement had interpretive significance in late eighteenth-century rights declarations. For example, the declarations of both Pennsylvania and North Carolina placed their law-of-the-land clauses in the midst of criminal procedure guarantees,⁴²⁰ yet this placement did not bar judicial constructions of those clauses that incorporated substantive-rights guarantees based upon the classical understanding of "law."⁴²¹ Indeed, the

⁴¹⁵ Wolfe, *supra* note 8, at 217–18.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* at 218.

⁴¹⁸ *Id.* at 218–19.

For support of this argument, Wolfe also drew on Blackstone's placement of common law "process" in the midst of a discussion on criminal law, which appears to identify "process" as the common law procedures by which a defendant is brought before the court. *Id.* at 220–21. Wolfe himself observed, however, that Blackstone's *Commentaries* had only just been published at the time of the Revolution, and that Coke remained the more influential commentator in the United States even when the Bill of Rights was drafted and ratified a generation later. *Id.* at 221; *see also* Riggs, *supra* note 29, at 973 (arguing that Blackstone never equated "process" with "due process," and that "other commentators, notably Coke, whose works were also current in colonial and revolutionary America, appeared to equate 'due process' with 'law of the land'").

⁴¹⁹ BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 6, at 223.

⁴²⁰ Pennsylvania's law-of-the-land clause comes at the end of a section listing criminal procedure rights, and the section itself immediately follows a section dealing with unlawful searches and seizures, and immediately precedes a section listing rights against indictment by information and double-jeopardy trials. *See* PA. CONST. art. IX, §§ 8–10 (1790), *reprinted in* 2 POORE, *supra* note 214, at 1554–55. North Carolina's law-of-the-land clause is set by itself in its own section, but is immediately preceded by numerous recitations of criminal procedure rights, and immediately followed by two sections listing rights to trial by jury and speedy review of lawfulness when one's liberty has been restrained. N.C. CONST., *Declaration of Rights*, arts. VII–XIV, *reprinted in* 2 POORE, *supra* note 214, at 1409–10.

⁴²¹ *Vanhome's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58 (1805); *see also* *Dist. of Columbia v. Heller*, 128 S. Ct. 2783, 2804 (2008) (rejecting interpretive significance of textual proximity to other constitutional provisions).

very distinction between “procedural” and “substantive” rights had no eighteenth-century resonance,⁴²² and there is no evidence that Madison attempted to separate the rights enumerated in the Bill of Rights into “substantive” and “procedural” groupings.

Second, one cannot draw firm conclusions from the order and placement of rights enumerated in the Bill of Rights because Madison’s original plan was to interlineate the proposed amendments into the text of the 1787 Constitution; it was only later that Congress decided to group them together as a set of stand-alone texts. Thus, the order in which rights appear in the Bill of Rights was not dictated by the content of the rights themselves, but rather by the order in which they were originally proposed to be inserted into the 1787 constitutional text. For example, the first two amendments on Madison’s initial list were an addition to the preamble that would have expressly stated that the purpose of government is to protect the natural rights of the people,⁴²³ and a provision that would have defined the maximum number of people that a member of the House could represent,⁴²⁴ neither of which was ever ratified. With particular respect to the Fifth Amendment, Wolfe’s argument about the “procedural context” of the Due Process Clause is blunted by the fact that most of the rights in the current Bill of Rights were proposed to be inserted between two enumerations of substantive rights in Article I, Section 9 of the 1787 constitutional text: the prohibition on bills of attainder and *ex post facto* laws in Clause 3, and the prohibition on direct taxes in Clause 4.⁴²⁵

Finally, even if one assumes that the particular placement of the Due Process Clause in the larger text of the Fifth Amendment and the Bill of Rights has interpretive significance, this placement would support the substantive reading as much as the procedural one. Noting the Takings Clause’s direct prohibition on the government’s taking of property except for “public use” and upon payment of a “just compensation,” Wolfe conceded that this Clause

might be read to deal not with procedure but with the substance of law as it affects property rights, since it would preclude a legislative act authorizing the taking of private property for public purposes

⁴²² See McCormack, *Economic Substantive Due Process*, *supra* note 190, at 399, 404 (observing that due process originated in American constitutional law as a “unitary concept,” and that the distinction between “substantive” and “procedural” due process did not emerge until after the New Deal, “to describe what the [Supreme] Court believed that it was no longer doing”); *see also id.* at 406 (noting that the phrase “substantive due process” did not appear in a Supreme Court majority opinion until 1954, or in any opinion until 1948).

⁴²³ 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* note 226, at 1026.

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 1026–27.

without just compensation (and also, presumably a law authorizing the taking of private property for private purposes).⁴²⁶

He acknowledged that the substantive focus of the Takings Clause suggests “a less rigorously procedural context for the foregoing due process clause.”⁴²⁷ He nonetheless insisted that the context for the Due Process Clause is procedural by noting that a semicolon separates it from the immediately following (and substantive) Takings Clause, while only a comma separates it from the immediately preceding (and procedural) Self-Incrimination Clause, thereby implying that the text associates the Due Process Clause more closely with the former procedural right than the latter substantive one.⁴²⁸

The weight of Wolfe’s argument for a strictly procedural Due Process Clause is a bit much for a single comma to carry,⁴²⁹ especially given the loose syntax of the founding era even among highly educated persons.⁴³⁰ Certainly, it is insufficient in the face of the multiple judicial opinions and arguments of counsel that imply or expressly invoke the classical understanding of “law” and the substantive reading of due process.⁴³¹ Believing that the textual placement of the Due Process Clause has interpretive significance presupposes the kind of conceptual organization and meticulous drafting that simply did not occur in the introduction and ratification of the Bill of Rights. In the end, the textual-placement argument simply cannot do the interpretive work that is asked of it.

c. *Redundancy*

Harrison argued that the original meaning of the Due Process Clause is redundant if it is understood to include unenumerated natural and customary rights as limits on congressional acts. If such rights were thought to have had

⁴²⁶ Wolfe, *supra* note 8, at 225; *accord* Reeder, *supra* note 8, at 212.

⁴²⁷ Wolfe, *supra* note 8, at 225. Wolfe speculated that the Takings Clause might even have been placed directly after the Due Process Clause to prevent reading the substantive limitations of the Due Process Clause as “a barrier to the power of eminent domain.” *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Cf.* Riggs, *supra* note 29, at 998 (“At this point structure flounders as a guide to interpretation. Has the due process clause a greater affinity with the procedural rules that precede it, or with the substantive limitations on takings that follow? Logically it could partake of both, which is the way the clause is currently interpreted.”).

⁴³⁰ See generally Edward Finegan, *English in North America*, in *A HISTORY OF THE ENGLISH LANGUAGE* § 8.2.1, at 392–93 (Richard Hogg & David Denison eds., 2006) (summarizing Webster’s project of regularizing American syntax and spelling in the early nineteenth century).

⁴³¹ See *supra* Parts II.C.3, III.B.2.

constitutional status even though unenumerated,⁴³² Harrison argued, then neither the federal Due Process Clause nor the state law-of-the-land clauses added any constitutional rights not already protected as natural or customary law:

If there is an unwritten constitution, then it is part of the law of the land, just like the written constitution. If there is no unwritten constitution, then the written constitution contains all of the law of the land that is of constitutional status. In any event, the outcome under a law of the land clause is entirely determined by the answer to the prior question whether there is an unwritten constitution. The clause adds nothing.⁴³³

Once again, Harrison makes a textualist rather than an originalist argument. Moreover, redundancy is a weak (and ironic) interpretive argument in any legal context. As Professor Curtis has aptly observed, “Lawyers say everything at least twice.”⁴³⁴ More importantly, the historical context that generated the Due Process Clause compels rejection of any interpretive argument based on redundancy. First, the Federalists had expressly argued that the entire Bill of Rights was redundant. The Anti-Federalists disagreed, believing that the Bill of Rights would make otherwise unenumerated natural and customary rights more secure—a position to which even Madison was eventually persuaded. Both positions presuppose the existence and force of natural and customary rights independent of any textual enumeration. That the Federalists were ultimately willing to promise a bill of rights that they believed was unnecessary in order to obtain ratification of the Constitution does not show that anyone understood the Due Process Clause to protect only rights to criminal procedure.

Second, Harrison’s redundancy argument proves too much. It leads to exceedingly strange conclusions about the procedural rights that the Due Process Clause is purportedly limited to protecting. For example, Article III guarantees trial by jury in criminal cases, and the Seventh Amendment guarantees it in civil cases. Harrison’s redundancy argument would thus require the conclusion that the Due Process Clause cannot be read to protect the right to a jury trial—the very exemplar of procedural due process in Anglo-American jurisprudence—because protection of that right by the Due Process

⁴³² Harrison, *supra* note 252, at 548–49.

⁴³³ *Id.* at 549–50 (citation omitted).

⁴³⁴ MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 183 (1986).

Clause would be redundant of the right's protection elsewhere in the Constitution.⁴³⁵ Acceptance of Harrison's redundancy argument, therefore, would exclude from the original understanding of the Due Process Clause a right that was originally understood to be at the conceptual core of due process.

CONCLUSION

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

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

The classical definition of law and the substantive reading of the due process of law that it underwrites are evident in legal dictionaries of the era and implicit (and occasionally explicit) in judicial opinions discussing the nullity and voidness of "unconstitutional" legislation. They are also evident in majority and *seriatim* judicial opinions in the years immediately before and immediately after the ratification of the Due Process Clause as part of the Bill

⁴³⁵ Justice Curtis, however, apparently held precisely this view of the reach of the Due Process Clause. See *supra* note 412.

of Rights in 1791. Finally, there is little authority that contradicts either the classical definition or a substantive reading of the federal Due Process Clause.

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

A shift in the burden of proof, of course, is not itself proof. There remain crucial additional questions that must be answered before one might venture the conclusion that substantive due process is plausibly within the original understanding of the Fourteenth Amendment as well as that of the Fifth. These questions include whether the list of unenumerated natural and customary rights protected by the Fifth Amendment Due Process Clause was thought to be expandable by progressive common law development, or whether it instead was confined to those particular unenumerated rights recognized or contemplated in 1791;⁴³⁶ whether the ubiquitous and unwritten “general constitutional law” of the antebellum state courts interacted with *Swift v. Tyson*⁴³⁷ and other antebellum understandings of federal jurisdiction to create conditions for an expansion of substantive due process through the Fourteenth Amendment Due Process Clause;⁴³⁸ and how these and other questions might

⁴³⁶ See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (holding that the jurisdictional grant of the federal Alien Tort Claims Act of 1790 included causes of action that were not recognized when the Act was passed, but that were added by post-enactment elaboration and development of the law of nations); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 64 (1985) (posing the “vexing question . . . whether the framers, in adopting common law precepts in the Bill of Rights, intended to federalize an evolving body of common law or simply to freeze an existing body of common law”).

⁴³⁷ 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴³⁸ See generally *Davidson v. City of New Orleans*, 96 U.S. 97 (1877) (observing that it is inappropriate for federal courts to rely on the general constitutional law except in diversity); Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1263 (2000) (documenting the relationship between *Swift*’s authorization of federal court development of a body of federal common law from the “general constitutional law” in diversity cases and the rise of substantive due process in the late nineteenth century); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92

affect our understanding of the debates surrounding the report and ratification of that Clause.⁴³⁹

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

MINN. L. REV. 1, 59–67 (2007) (documenting how the Bill of Rights influenced the development of a body of “general constitutional law” in the state courts).

⁴³⁹ See generally CURTIS, *supra* note 434 (arguing that the Fourteenth Amendment was intended to apply the Bill of Rights to the states).

APPENDIX

CERTAIN ATTRIBUTES OF THE CONSTITUTIONS OF THE
REVOLUTIONARY STATES (1776–1801)⁴⁴⁰

State (years in force) (name of document)	Rights Protected (other than Chapter 29 analogue)	Declaration or Bill of Rights Separate from Frame of Government (Names, where applicable)	Chapter 29 Analogue (Citation)
Connecticut (1776–1818) ("Constitution")	Equal justice, bail—under affirmation	No; affirmation of colonial charter	Yes (Constitution ¶2)
Delaware (1776–1792) ("Constitution, or system of government")	Common law, anti-slavery, anti-establishment	No	No
Delaware (1792–1831) ("Constitution")	Extensive enumeration	Yes	Yes (art. I, § 7)
Georgia (1777–1789) ("Constitution")	Free exercise, excessive fines & bail, habeas corpus, press, jury trial	No	No
Georgia (1789–1798) ("Constitution")	Press, jury trial, habeas corpus, free exercise, no entailment of estates	No	No
Georgia (1798–1861) ("Constitution")	Press, jury trial, no ex post facto laws, no imprisonment for debt, habeas corpus, free exercise, anti-establishment	No	No
Maryland (1776–1851) ("A Declaration of Rights, and the Constitution and Form of Government")	Extensive enumeration	Yes ("A Declaration of Rights"; "Constitution, or Form of Government, &c.")	Yes (Declaration of Rights art. XXI)

⁴⁴⁰ Information is from both volumes of POORE, *supra* note 214.

State (years in force) (name of document)	Rights Protected (other than Chapter 29 analogue)	Declaration or Bill of Rights Separate from Frame of Government (Names, where applicable)	Chapter 29 Analogue (Citation)
Massachusetts (1780–Present) ("Constitution")	Extensive enumeration	Yes ("A Declaration of Rights"; "The Frame of Government")	Yes (Declaration of Rights art. XII)
New Hampshire (1776–1784) ("Constitution")	Protestant free exercise— under colonial charter	No; affirmation of colonial charter	No
New Hampshire (1784–1792) ("Constitution")	Extensive enumeration	Yes ("The Bill of Rights"; "The Form of Government")	Yes (Bill of Rights art. XV)
New Hampshire (1792–Present) ("Constitution")	Extensive enumeration	Yes ("Bill of Rights" "Form of Government")	Yes (Bill of Rights art. 15)
New Jersey (1776–1844) ("Constitution")	Free exercise, anti- establishment, common law, jury trial	No	No
New York (1777–1821) ("Constitution")	Free exercise, jury trial, common law, attainder	No	Yes (art. XIII)
North Carolina (1776–1861) ("Constitution")	Extensive enumeration	Yes ("A Declaration of Rights, &c."; "The Constitution, or Form of Government")	Yes (Declaration of Rights art. XII)
Pennsylvania (1776–1790) ("Constitution")	Extensive enumeration	Yes ("A Declaration of Rights"; "Plan or Frame of Government")	Yes (Declaration of Rights art. IX)
Pennsylvania (1790–1838) ("Constitution")	Extensive enumeration	Yes (last article of Constitution)	Yes (Declaration of Rights art. IX, § 9)
Rhode Island (until 1842)	Free exercise—under colonial charter	No action; continued under colonial charter	No

State (years in force) (name of document)	Rights Protected (other than Chapter 29 analogue)	Declaration or Bill of Rights Separate from Frame of Government (Names, where applicable)	Chapter 29 Analogue (Citation)
South Carolina (1778–1790) ("Constitution")	Free exercise, press	No	Yes (art. XLI)
South Carolina (1790–1861) ("Constitution")	Free exercise, no bills of attainder or ex post facto laws, no impairments of contracts, no excessive bail, no cruel or unusual punishments, jury trial, press	No	Yes (art. IX, § 2)
Vermont (1777–1786) ⁴⁴¹	Extensive enumeration	Yes ("Declaration of Rights"; "Plan or Frame of Government")	Yes (ch. I, art. X)
Vermont (1786–1793)	Extensive enumeration	Yes ("Declaration of Rights"; "Plan or Frame of Government")	Yes (ch. I, art. XI)
Virginia (1776–1830) ("Bill of Rights"; "Constitution")	Extensive enumeration	Yes ("Bill of Rights"; "Constitution")	Yes (Bill of Rights § 8)

⁴⁴¹ Vermont was not formally admitted as a state until 1791, after Massachusetts, New Hampshire, and New York formally renounced their respective claims to its territory. It had, however, organized its own government and functioned as a separate, independent colony since the early 1770s, and consequently adopted its own constitution in 1777 in the wake of the others' declarations of independence in 1776. *See supra* note 215.

