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## The Lost Due Process Doctrines

Paul J. Larkin Jr.

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# The Lost Due Process Doctrines

## **Cover Page Footnote**

Paul J. Larkin, Jr., M.P.P. George Washington University, 2010; J.D. Stanford Law School, 1980; B.A. Washington & Lee University, 1977; Senior Legal Research Fellow, The Heritage Foundation. The views expressed in this article are my own and should not be construed as representing any official position of The Heritage Foundation. I want to thank Rachel Barkow, Paul Cassell, Roger Clegg, Daniel Dew, John Malcolm, Greg Maggs, and Stuart Taylor, Jr., for helpful comments on an earlier draft of this article and Daniel Dew for invaluable research assistance. Any errors are mine.

# THE LOST DUE PROCESS DOCTRINES

*Paul J. Larkin, Jr.*<sup>+</sup>

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## I. INTRODUCTION: THE “LOST BATTALION”

In October 1918, approximately five hundred and fifty soldiers in the U.S. Army’s 477th “Liberty” Division, drawn principally from New York City and

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<sup>+</sup> Paul J. Larkin, Jr., M.P.P. George Washington University, 2010; J.D. Stanford Law School, 1980; B.A. Washington & Lee University, 1977; Senior Legal Research Fellow, The Heritage Foundation. The views expressed in this article are my own and should not be construed as representing any official position of The Heritage Foundation. I want to thank Rachel Barkow, Paul Cassell, Roger Clegg, Daniel Dew, John Malcolm, Greg Maggs, and Stuart Taylor, Jr., for helpful comments on an earlier draft of this article and Daniel Dew for invaluable research assistance. Any errors are mine.

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

The term “Lost Battalion” also could describe several distinct legal doctrines existing today that were birthed by the Due Process Clauses of the Fifth and Fourteenth Amendments. Beginning late in the nineteenth century and continuing to the present, the Supreme Court has often applied the Due Process Clauses to a host of different government actions, many of which, it turns out, were unimaginable when those clauses became law. Generally speaking, the Court has fit those decisions into one of two categories. The first category, known as “procedural due process,” involves efforts to regulate the rules that the government must use to deprive someone of his or her life, liberty, or property. The purpose of procedural due process is to ensure that the government's rules satisfy minimum standards of acceptable fairness and lead to decisions with the degree of accuracy that society demands in different types of cases, with a more rigorous standard in criminal cases than in civil. The other category, labeled “substantive due process,”

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1. See generally ROBERT H. FERRELL, *FIVE DAYS IN OCTOBER: THE LOST BATTALION OF WORLD WAR I* (2005); ALAN D. GAFF, *BLOOD IN THE ARGONNE: THE “LOST BATTALION” OF WORLD WAR I* (2005); JOHN W. NELL, *THE LOST BATTALION* (2001); Charles Whittlesey, *Commander of the Lost Battalion*, DOUGHBOY CTR.: THE STORY OF THE AMERICAN EXPEDITIONARY FORCES, <http://www.worldwar1.com/dbc/whitt.htm> (last visited Oct. 2, 2016); *Charles White Whittlesey (1884–1921) Collection, 1905–1948: Biographical Sketch*, WILLIAMS COLLEGE ARCHIVES & SPECIAL COLLECTIONS (July 8, 2013, 3:50 PM), <http://archives.williams.edu/manuscriptguides/whittlesey/bio.php>. Generally speaking, today a battalion consists of 500 to 600 soldiers; a brigade of three or more battalions; and a division of three brigades. See U.S. ARMY, <http://www.army.mil/info/organization/unitsandcommands/oud/> (last visited Oct. 2, 2016).

contains decisions that limit the government's ability to take or interfere with certain aspects of the life, liberty, or property every person enjoys. Those limitations bar the government from trespassing on one of those interests regardless of the procedural rules that the government uses to make its decision. Given that breakdown, it would seem that every decision of the Supreme Court of the United States interpreting the Due Process Clauses could be placed into one category or the other.

Close scrutiny of those cases, however, discloses a bucketful that does not fit neatly into either niche. Those cases deal with a host of subjects that arise with less frequency today than they did in the twentieth century: the jurisdiction of courts over nonresident defendants; the clarity of the definition of criminal laws; the proof that the government must adduce to convict a defendant of a crime; the ability of state courts, in lieu of state legislatures, to define state criminal law; and the delegation of law-making authority to private parties. The rules that the Supreme Court has adopted in each category are facially dissimilar from the law that the Court has developed in the procedural vs. substantive debate, which the Court has pursued for the last one hundred years. As proof of that conclusion, rarely do the decisions in any of those five lines of cases rely on or cite precedent that clearly fits into the Court's binary due process jurisprudence.

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

That question would not matter if there were unanimity that American constitutional law draws its legitimacy equally from both the text of the Constitution itself and certain original or evolving background principles. Fortunately, or unfortunately, however, there clearly is no such unanimity about the nature of the fundamental law governing American society, nor is there even a consensus about which of those two sources of law is preferable or legitimate. The Court's substantive due process decisions have been battered over the last four decades, but they remain very much alive, albeit now largely relegated to playing only a rear guard role in the Court's twenty-first century constitutional controversies.<sup>2</sup>

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2. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (creating a constitutional right to same-sex marriage); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (creating a constitutional right to intercourse in the home with a partner of the same sex); *Roe v. Wade*, 410 U.S. 113, 163

How did that happen? Compared with the modern-day constitutions of other nations, our eighteenth century charter is quite laconic.<sup>3</sup> The text of the Due Process Clause is deceptively simple. It forbids the federal, state, or local governments from “depriving” a “person” of his “life, liberty or property” without first affording the victim of the government’s action “due process of law.”<sup>4</sup> Those ten words appear quite straightforward.<sup>5</sup> Yet, more than one hundred fifty years of judicial interpretation has proved the contrary. The Supreme Court has prohibited the federal, state, and local governments from undertaking a variety of different types of legislative, executive, and judicial actions that infringe on an interest that the Due Process Clause protects. The Clause has spawned scores of decisions construing terms such as “depriving,” “person,” “liberty,” and “property.” For example, we now know that corporations, like human beings, are “persons”; that realty and personalty are “property,” but so too are public welfare benefits created entirely by statute; that depriving someone of his or her good name does not injure that person’s “liberty” or “property” interest; and that sometimes the government must afford a person a hearing before interfering with his protected interests, but not always.<sup>6</sup> Rarely does a Supreme Court term go by without the Court issuing some opinion further elaborating on the meaning of the terms in the Clause.<sup>7</sup>

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(1973) (creating a constitutional right to abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (creating a constitutional right for married couples to use contraceptive devices).

3. See generally David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (providing a comprehensive analysis of the constitutions adopted by other nations).

4. The text of the two clauses is effectively the same. See U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property without due process of law[.]”); *id.* amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property without due process of law[.]”). For convenience, this Article will use the singular form of that term “Clause” unless the context dictates otherwise.

5. To some Justices, that simplicity is a virtue. See *Kerry v. Din*, 135 S. Ct. 2128, 2132–38 (2015) (plurality opinion). To others, it is a mirage. See *Obergefell*, 135 S. Ct. at 2597–98.

6. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 330–34 (1986) (ruling that an injury caused by the state’s negligence does not “deprive” a person of an interest protected by the Fourteenth Amendment); *Paul v. Davis*, 424 U.S. 693, 700–02 (1976) (ruling that state-caused defamation does not deprive a person of a “liberty” or “property” interest protected by the Fourteenth Amendment); *Morrissey v. Brewer*, 408 U.S. 471, 484–85 (1972) (ruling that release on parole creates a “liberty” interest protected by the Fourteenth Amendment); *Goldberg v. Kelly*, 397 U.S. 254, 261–66 (1970) (ruling that state welfare benefits are “property” protected by the Fourteenth Amendment); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 600 (1950) (ruling that due process does not require a pre-seizure hearing before the Food and Drug Administration may seize misbranded articles); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 409–11 (1886) (ruling that a “corporation” is a “person” for purposes of the Fourteenth Amendment); *cf.* *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2427–28 (2015) (ruling that personalty is “property” for purposes of the Fifth Amendment Takings Clause).

7. See *Obergefell*, 135 S. Ct. at 2604–05 (creating a constitutional right to same-sex marriage); *Johnson v. United States*, 135 S. Ct. 2551, 2560–62 (2015) (applying the due process

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

Part II of this Article will describe the two-fold divide between procedural requirements and substantive limitations that has dominated the discussion of the Due Process Clause. Part III will consider a few categories of due process case law that the Court has not attempted to fit into one or the other of those categories. Part IV will discuss the provenance of Magna Carta, a thirteenth-century charter of liberties that later gave birth to the Due Process Clauses in our Constitution. This Part will also discuss how the colonies incorporated Magna Carta and its underlying principles into their understanding of the unwritten English constitution, and how that understanding was so important to the colonies that it served as a reason why they broke from the Mother Country. Part V will consider whether there is a home in the Constitution for the Court’s Lost Due Process Decisions. In particular, Part V will ask whether the principles underlying Magna Carta provide that home. Part VI will conclude by asking whether the lost doctrines should be discharged or can be returned to service in the ongoing development of constitutional law.

## II. TRENCH WARFARE: THE BATTLE OVER DUE PROCESS

The best way to capture the ongoing legal debate over the meaning of the Due Process Clause is to imagine the following Super Bowl commercial: A man walks into a bar. The bartender asks him for his “poison” and his opinion as to the legitimacy of substantive due process. After asking for the “usual,” the patron answers that there is no persuasive justification for the self-assumed

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“void-for-vagueness doctrine”); *Horne*, 135 S. Ct. at 2427–28 (holding that raisins are “property”); *Kerry*, 135 S. Ct. at 2138 (holding that denial of a person’s visa application does not violate the “liberty” interests of his spouse); *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014) (holding that pretrial forfeiture of funds associated with a crime that could be used for criminal defense attorney’s fees does not violate due process); *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (adverting to the due process void-for-vagueness doctrine); *Daimler AG v. Bauman*, 134 S. Ct. 746, 753–58 (2014) (applying the personal jurisdiction doctrine).

practice of unelected, life-tenured judges holding unconstitutional legislation enacted by a democratically-elected, fairly-apportioned legislative branch, signed into law by a chief executive voted into office by a majority of the electorate in a polity with an extraordinarily impressive rate of voter registration and turnout. The patron adds that what is particularly insulting is a court's decision to hold unconstitutional a statute that does not violate any clear limitation on the governing authority of the political branches based only on a four word phrase—"due process of law"—that is Delphic in the extreme.<sup>8</sup> After handing the patron a beer, the bartender replies that substantive due process is a hallmark of Anglo-American liberty. He notes that the liberty Americans enjoy, purchased with two centuries' worth of the blood of patriots, is freedom from "arbitrary" government, however fairly elected, however popular, in whatever way, shape, or form that government may take, whenever it seeks to restrain the natural rights given to the public by the Almighty or by the long-accepted traditions of the people, not by a potentially ephemeral majority of the state. The bartender also states that, because it is the public that bestows authority on the government, rather than the government granting liberty to the people, there is nothing unusual about restricting the power of any one branch of government, such as the legislature, even if a different branch undertakes that task, such as the judiciary. Then, in a manner reminiscent of the "Tastes great!—Less filling!" advertisements once seen on television commercials during NFL games, the bartender and patron scream invectives at each other and begin wrestling. The altercation continues without resolution until the commercial ends and the game resumes.

That is how contemporary legal debates over the legitimacy of substantive due process have played out for the last half century. Scholars have taken one side or the other in two well-known, deeply-entrenched, diametrically-opposed camps regarding the issue whether the Due Process Clause imposes substantive restraints on legislative power or merely procedural constraints on the executive branch's implementation of the law.<sup>9</sup> Highly respected parties have lined up on

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8. Perhaps, the best and best-known expositors of that position are the late Justice Antonin Scalia and the late Judge Robert H. Bork. *See, e.g., Kerry*, 135 S. Ct. at 2132–36 (plurality opinion); *Lawrence v. Texas*, 539 U.S. 558, 586–605 (2003) (Scalia, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 979–1002 (1992) (Scalia, J., dissenting); ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96–97, 119 (1996); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139–41 (1990); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 11–12 (1971).

9. By "otherwise valid law" I mean a law that does not violate one of the explicit limitations on nonlegislative power, such as the Ex Post Facto Clauses or the First Amendment. *See, e.g., U.S. CONST.* art. I, § 9, cl. 3; *id.* § 10, cl. 1; *id.* amend. I ("Congress shall make no law . . ."). For a discussion of the differences between constitutional provisions that limit actions by legislatures versus ones that apply to executive actions, see, for example, Nicholas Quinn Rosenkrantz, *The*



both sides of that debate. Indeed, it would be difficult to find a professor of constitutional law at one of the nation's law schools not in one camp or the other.

Some scholars believe that judicial reliance on principles of substantive due process as a ground for invalidating legislation is a natural, common law-like development. This development grew out of the principle, accepted by everyone across the legal and political spectrum, that the Due Process Clause is a protection against the arbitrary action of government. Advocates for substantive due process review of legislation view it as a necessary safeguard against a capricious legislature just as it is against an autocratic executive.<sup>10</sup> Others see substantive due process as a plague on the law. In their view, just as Marxism might make sense in theory but not in fact,<sup>11</sup> substantive due process can never be an objective undertaking because too many judges will succumb to external pressure or internal desires to use the lawmaking opportunity it provides to shape the law to fit their own political, social, economic, or personal values. Judges can vigorously and forever disclaim writing their personal preferences into the Constitution; in fact, the judges who willfully devise their own version of constitutional law are likely to be the ones most vociferously disavowing judicial activism. At the end of the day, however, the only rational explanation for finding nontextual rights in the Constitution, such as the right to abortion, resembles the explanation of how the Wailing Wall becomes filled with written prayers: The judiciary does not find them in the Constitution; it puts them there.<sup>12</sup>

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*Objects of the Constitution*, 63 STAN. L. REV. 1005, 1008–27 (2011), and Nicholas Quinn Rosenkrantz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1212–24 (2010).

10. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 140–47 (1978); MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 78–84 (1982); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 207–12 (3d ed. 2000); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 872–73 (1978) [hereinafter Grey, *Origins*]; Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975); Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 1001 (2006).

11. Marxism mistakenly assumes, contrary to human experience, that people will be motivated by “the better angels of our nature.” Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 2 ABRAHAM LINCOLN: COMPLETE WORKS 1–7 (John G. Nicolay & John Hays eds., 1915).

12. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (“[W]e apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”); JONATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 28–34 (2005); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 125; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 590 n.8 (2009) (collecting authorities). For the intriguing argument that the Fifth Amendment Due Process Clause does not contain substantive due process content, while the Fourteenth Amendment version of the clause does, see Ryan C.

Scholars have conducted that debate for quite some time. Neither side has scored a knockout blow, and neither one has cried “uncle.”<sup>13</sup> Given the contentiousness with which this controversy has been conducted, including its spillover into the appointments process for federal judges, the dispute has more closely resembled World War I trench warfare than an Oxford Union debate.

Advocates for substantive due process, however, have prevailed where it most counts: in the Supreme Court. For nearly 100 years—from (at least) *Meyer v.*

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Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 500–09 (2010). For an equally interesting riposte arguing that neither version authorizes substantive review of legislation and that both actually enforce separation of powers principles, see Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1779–90 (2012).

13. The dispute between advocates for and opponents of substantive due process bears a close family relationship to the debate over the proper methodology for interpreting the Constitution, sometimes characterized as a contest between “interpretivism” and “non-interpretivism,” see, e.g., ELY, *supra* note 12, at 1, or between “originalism” and “non-originalism,” see, e.g., *Symposium: Originalism 2.0*, 34 HARV. J.L. & PUB. POL’Y 5 (2011) [hereinafter *Originalism 2.0*]. For the last twenty-five years, members of the academy, profession, and bench have debated, re-debated, and re-re-debated the proper approach to constitutional interpretation, decimating large swaths of forestland in the process. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 56–67 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 383–405 (1998); JACK M. BALKIN, *LIVING ORIGINALISM* 3–20 (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 91–115 (2014); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 9–34 (2004); *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed., 2007) [hereinafter *ORIGINALISM*] (showcasing a collection of writings for and against originalism); DAVID A STRAUSS, *THE LIVING CONSTITUTION* 7–10 (2010); *Originalism 2.0*, *supra* note 13; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); John Harrison, *Forms of Originalism and the Study of History*, 26 HARV. J.L. & PUB. POL’Y 83 (2003). Even Supreme Court justices have entered the fray. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15–21 (2006); *ORIGINALISM*, *supra* note 13, at 70 (speech of Justice William J. Brennan, Jr.); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Of course, the discussion has gone on for quite some time. See, e.g., Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations of Legislatures*, 2 TEX. L. REV. 257 (1924), 2 TEX. L. REV. 387 (1924), 3 TEX. L. REV. 1 (1924) (this is a three-part article spanning three separate issues of the Texas Law Review); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

*Nebraska*<sup>14</sup> in 1923 to *Roe v. Wade*<sup>15</sup> in 1973 to *Obergefell v. Hodges*<sup>16</sup> in 2015—the Court has been willing to invalidate federal and state laws on the ground that they are an illegitimate or arbitrary exercise of lawmaking power. The Court has not gone down that path very often, or very far, for fear of being accused of choosing one debatable social theory over another, a matter ordinarily thought best left to the political process.<sup>17</sup> But the Court has refused to leave several controversial social issues to the warp and woof of politics. On occasion, the Court has invalidated scores of state laws on the ground that they violate substantive due process principles.<sup>18</sup> The Court has intervened—sometimes for

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14. 262 U.S. 390, 402 (1923) (ruling that a state law prohibiting the teaching of German unconstitutionally interferes with parents' right to instruct their children). Some substantive due process decisions predate *Meyer*. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905).

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

15. 410 U.S. 113, 163 (1973) (creating a constitutional right to abortion).

16. 135 S. Ct. 2584, 2604–05 (2015) (creating a constitutional right to same-sex marriage).

17. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 731–32 (1963) (“We refuse to sit as a ‘superlegislature to weigh the wisdom of legislation,’ and we emphatically refuse to go back to the time when courts used the Due Process Clause ‘to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.’ Nor are we able or willing to draw lines by calling a law ‘prohibitory’ or ‘regulatory.’ Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.” (footnotes omitted)); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”); *Lochner*, 198 U.S. at 45, 75 (Holmes, J., dissenting) (“The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.”).

18. For example, the Supreme Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1973) had the effect of invalidating all fifty state abortion laws because none of those laws used the trimester system that Justice Blackmun created. *Id.* at 163–64.

the purpose of flexing its muscles decisively<sup>19</sup>—to saw off certain limbs even while leaving the tree of democracy intact.

For example, late in the nineteenth and early in the twentieth centuries the Court intervened to hold unconstitutional certain pieces of economic regulation, on the theory that the property safeguarded by the Due Process Clause included the freedom to make whatever (supposedly<sup>20</sup>) mutually beneficial economic arrangements that businesses and private parties found in their best interests.<sup>21</sup> That was the time widely derided as the era of *Lochner v. New York*.<sup>22</sup> Few members of the academy today would defend the Supreme Court's case law during that period, although some would.<sup>23</sup> The name of the case has even

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

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

21. It may be the case, however, that some of the Supreme Court's decisions in that period used the language of protecting property rights to avoid having to condemn what it saw or feared was the actual motivation for particular legislation. For example, in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), the Supreme Court held unconstitutional a federal law delegating to private groups the power to establish binding codes of competitive conduct enforceable through the criminal law. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935). On its face the decision appears to be an ordinary challenge to economic regulation. But for an argument that the Court's *Schechter Poultry* decision was heavily influenced by the apparent anti-Semitic and anti-immigrant focus of the relevant New York City ordinance, see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 23–27 (2011).

22. 198 U.S. 45 (1905).

23. In fact, lately a number of contemporary scholars have defended the importance of property rights and economic liberties. Some have urged the Supreme Court to reconsider its New Deal era precedents, including ones upholding occupational licensing restrictions, on the ground that “property” rights are no less important than “liberty” rights. In their opinion, the prevailing view of *Lochner* grossly overstates the adverse effect of that decision. See, e.g., BARNETT, *supra* note 13, at 216–17; BERNSTEIN, *supra* note 21, at 3; JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 103 (2d ed. 1998); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 29 (1985); CLARK M. NEILY III, *TERMS OF ENGAGEMENT: HOW OUR COURTS SHOULD ENFORCE THE CONSTITUTION'S PROMISE OF LIMITED GOVERNMENT* 156–57 (2013); TIMOTHY SANDEFUR, *THE RIGHT TO EARN A LIVING: ECONOMIC FREEDOM AND THE LAW* 110 (2010); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 121 (2d ed. 2005); Roger V. Abbott, Comment, *Is Economic Protectionism a Legitimate Governmental Interest Under Rational Basis Review?*, 62 CATH. U. L. REV. 475 (2013); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003); Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1484 (1967). Even some scholars who would not be seen as classical liberals or libertarian have argued that property rights deserve more respect than they receive today. See Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004

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

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

Throughout its history, the Supreme Court has invalidated numerous federal, state, and local laws on the ground that they violated the Fifth or Fourteenth Amendment Due Process Clauses. There are a handful of separate lines of precedent, however, in which the high Court has invoked the Clause without explaining exactly how each doctrine fits into the substance versus procedure divide that has come to dominate the Court’s recent jurisprudence and the scholarly debate over whether that divide is legitimate.<sup>27</sup> Each of those doctrines has become effectively self-contained. That is, the Court examines each new

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CATO SUP. CT. REV. 9, 10 (“The Constitution—both written and unwritten—protects both economic and non-economic liberty. Both are essential, and each supports the other.”).

24. See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (“Would you ever cite [*Lochner*] in a Supreme Court brief, except to identify it with your opponents’ position? If a judicial nominee avowed support for this case in a Senate confirmation hearing, would that immediately put an end to her chances?”); see also, e.g., ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 150 (1987) (describing *Lochner*, and cases following, as having been “under heavy attack from the day the opinions were delivered”); PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 126–27 (1990) (“For more than thirty years [*Lochner*] served reformers as evidence of the conservative nature of the judiciary and as a striking example of its usurpation of political power.”).

25. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (in-home, same-sex intimate conduct); *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (parental rights over their children vis-à-vis the children’s grandparents); *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977) (regulation of who may live together as a “family”); *Roe v. Wade*, 410 U.S. 113, 166–67 (1973) (abortion); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479, 497–99 (1965) (use of contraceptive devices); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–36 (1925) (compulsory public schooling).

26. See, e.g., *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2082 (2012); *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 319–20 (1993); *supra* note 17 and accompanying text.

27. See discussion *infra* Sections III.B, III.C, III.E.

case in light of the precedents that it has decided in that specific context without explaining whether, and, if so, how and why those precedents should be classified as examples of substantive or procedural due process. As it turns out, those decisions make sense, but not in terms of the substantive-procedural dichotomy that the law has come to know. A different doctrine explains why those decisions are correct, but it requires an examination of the history of the Due Process Clauses. Before describing that history, the following sections identify the Lost Due Process Doctrines.

#### A. *The Geographic Reach of Legal Authority*

The oldest of the doctrines (and therefore perhaps the most lost) involves the power of state courts over the parties to a lawsuit. The seminal case, decided in 1878, is *Pennoyer v. Neff*.<sup>28</sup> *Pennoyer* involved a dispute over the title to land in Multnomah County, Oregon, between an Oregonian and a nonresident.<sup>29</sup> The issue was whether a state court could exercise jurisdiction over an absent defendant, and the Court answered that question in the negative.<sup>30</sup> The Court began its analysis by stating that a state court has jurisdiction only within the state's territorial confines and that a judgment entered by a court without jurisdiction is null and void.<sup>31</sup> A court may not exercise jurisdiction

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28. 95 U.S. 714 (1878).

29. *See id.* at 719–20. Marcus Neff hired John Mitchell, an attorney, to obtain land in Oregon from the federal government under the Donation Land Claim Act of 1850, but did not pay Mitchell for his services. *Id.* at 719–21. Mitchell sued Neff, won by a default judgment after Neff did not appear, and ultimately received title to the property after purchasing it at a public auction run by the local sheriff. *Id.* Perhaps deciding to make a profit quickly, Mitchell sold the land to Sylvester Pennoyer, who was in possession of it when Neff sued him to recover title, alleging that he had not properly been served by Mitchell in the first lawsuit. *Id.*

30. *Id.* at 721, 734.

31. *Id.* at 720 (“The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse.”). Those principles were noncontroversial in the nineteenth century and for some time thereafter. *See, e.g., Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917) (“[T]o assume that a party resident beyond the confines of a State is required to come within its borders and submit his personal controversy to its tribunals upon receiving notice of the suit at the place of his residence is a futile attempt to extend the authority and control of a State beyond its own territory.”); William F. Cahill, *Jurisdiction Over Foreign Corporations and Individuals Who Carry on Business Within the Territory*, 30 HARV. L. REV. 676, 677 (1917) (“The sovereign has jurisdiction of the persons and property within its territory altogether irrespective of the consent of those persons, or the owners of the property. They may be rebels denying the authority of the government or even anarchists. But so long as a government is recognized to be *de jure* by other nations, their governments acknowledge its right to exercise sovereignty over all persons and things rightfully within its borders, and recognize abroad the legality of this exercise.”); Austin W. Scott, *Jurisdiction Over Nonresidents Doing Business Within a State*, 32 HARV. L. REV. 871, 871 (1919) (“A personal judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes.”)

extraterritorially, Justice Stephen Field concluded, because any state's effort to regulate people or conduct in a different jurisdiction would interfere with the co-equal sovereignty of the latter.<sup>32</sup>

The *Pennoyer* rule was a reasonable one for disputes over the title to stationary real estate in an agriculturally-based economy. Over time, however, the flowering of the Industrial Revolution transformed the nation from an agrarian economy to an industrial one—an economy where, due to the emergence of the railroad and telegraph, goods could be shipped from coast to coast.<sup>33</sup> As the economy matured, so too did the law of personal jurisdiction. Beginning in 1945 with the Supreme Court's "canonical opinion"<sup>34</sup> in *International Shoe Co. v. Washington*,<sup>35</sup> it has been settled law that a state court may exercise jurisdiction over a person or property outside its borders if there are certain "minimum contacts" with the forum so as not to offend "traditional notions of fair play and substantial justice."<sup>36</sup> Today, a plaintiff may sue a corporation in contract or tort in the company's "home" state—that is, the state where the company is incorporated or has its principal place of business—or in a state where the corporation conducts the business that gave rise to the claim at issue.<sup>37</sup>

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An attempt to execute it is without justification; a sheriff levying upon property of the defendant is liable for conversion, and a purchaser of the property on execution sale gets no title to it. A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment. No action lies upon it either in the state wherein it is rendered or in any other state. It cannot be set up as a bar in a suit upon the original cause of action."

32. See *Pennoyer*, 95 U.S. at 722–23; see also *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[Under *Pennoyer*,] any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." (alteration in original)); *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("The foundation of jurisdiction is physical power . . .") (Holmes, J.).

33. See, e.g., *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990); A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE NATION FROM COLONIAL TIMES TO THE PRESENT 55, 63, 82–90 (Alfred D. Chandler, Jr. & James W. Cortada eds., 2003); WALTER LICHT, INDUSTRIALIZING AMERICA: THE NINETEENTH CENTURY 126–27 (1995); GLEN PORTER, THE RISE OF BIG BUSINESS, 1860–1920, at 46 (2006) (discussing the interplay between the telegraph and railways in furthering American industrialization).

34. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011).

35. 326 U.S. 310 (1945).

36. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The Court has reaffirmed that rule on numerous occasions. See, e.g., *Goodyear*, 564 U.S. at 923; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011).

37. See, e.g., *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–63 (2014); *Goodyear*, 564 U.S. at 924–25; *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952). See generally Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966) (surveying approaches to establishing personal jurisdiction).

## B. The Substantive Exercise of Legal Authority

### 1. The Rule of Legality

William Blackstone posited that every person enjoys three “absolute,” “principal,” or “primary” rights: namely, “the right of personal security, the right of personal liberty, and the right of private property[.]”<sup>38</sup> The right to liberty entailed the right to freedom of movement “without imprisonment or restraint, unless by due course of law.”<sup>39</sup> Almost by definition, then, the “law” that can deprive someone of life, liberty, or property must already exist. Otherwise, there is little to distinguish “law” from the king’s whim.

The result was the birth of an elementary principle of the criminal law known as the “rule of legality.” Originally known by the Latin phrases “*Nullum crimen sine lege*” (“There is no crime absent a written law”) and “*Nulla poena sine lege*” (“There is no penalty absent a written law”), the rule provides that no conduct can be punished as a crime without a law<sup>40</sup> prohibiting that conduct and affixing a penalty to it, a law that existed before the conduct in question took place.<sup>41</sup> Otherwise, the government could retroactively outlaw and punish undesirable conduct, a practice that is forbidden by the Ex Post Facto Clauses.<sup>42</sup> As Professor Jerome Hall has noted, “[t]he principle of legality is in some ways the most fundamental of all the [criminal law’s] principles.”<sup>43</sup>

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38. 1 WILLIAM BLACKSTONE, COMMENTARIES \*9.

39. *Id.* at \*11.

40. From 1660 to 1860, the English courts claimed the power to outlaw conduct that they deemed *contra bonos mores*, “or which openly outraged public decency.” See Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 179 (1937). In our federal system, however, only Congress can create a crime. See *United States v. Hudson & Goodwin*, 11 U.S. 32 (1812); see also *United States v. Evans*, 333 U.S. 483, 486–87 (1948) (refusing to allow a criminal penalty to be imposed on conduct when Congress had outlawed the conduct, but had not clearly defined what the penalty should be). State courts may have that power under state law, but they cannot exercise it in a manner that unduly expands the reach of the existing criminal code. See *infra* note 56 and accompanying text.

41. See 1 BLACKSTONE, *supra* note 38, at \*11 (“To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison[.]”). The rule of legality does not rest on the fiction that people will read the penal code before acting. Instead, the rule requires that, were someone to make that effort, a criminal statute must be written with sufficient clarity that a reader could understand it. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

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

43. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 25 (2d ed. 1960) (alteration in original); see also, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001); *id.* at 467–68 (Scalia, J., dissenting); Hall, *supra* note 40, at 165.



## 2. The “Void-for-Vagueness” Doctrine

From the rule of legality descended two derivative doctrines. The first one is the “void-for-vagueness” doctrine. Simply put, the doctrine requires the text of a criminal law to be readily understandable by the average person without legal advice.<sup>44</sup> A statute that is unduly vague, one that is so indefinite the average person can only guess at its meaning, cannot qualify as a criminal law. The reason is that vague laws are like ones that are kept secret or ones that, like the laws of Caligula, are published in a location that makes them unreadable,<sup>45</sup> neither of which is much better than having no law at all.<sup>46</sup> Accordingly, as the Supreme Court explained in *Lanzetta v. New Jersey*,<sup>47</sup> “[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.”<sup>48</sup> For that reason, “a statute which either forbids or requires the doing of an act in terms

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44. See, e.g., *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (“Is it sufficient that use of a drug made the victim’s death 50 percent more likely? Fifteen percent? Five? Who knows. Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend.”); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (“[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” (citations omitted)).

45. See 1 BLACKSTONE, *supra* note 38, at \*46 (“[Caligula] wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people”); see also *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula, who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’” (alteration in original)); 5 JEREMY BENTHAM, WORKS 547 (1843) (“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he kept them from the knowledge of.”); *Livingston Hall & Selig J. Seligman, Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 650 n.39 (1940) (“[W]here the law is not available to the community, the principle of ‘nulla poena sine lege’ comes into play.”).

46. For cases upholding void-for-vagueness challenges to statutes, see, for example, *Johnson v. United States*, 135 S. Ct. 2584 (2015) (“risk of violence”); *FCC v. Fox Television Stations*, 132 S. Ct. 2307 (2012) (“indecent”); *Chicago v. Morales*, 527 U.S. 41 (1999) (“criminal street gang”); *Kolender v. Lawson*, 461 U.S. 352 (1983) (“credible and reliable” identification). For cases rejecting void-for-vagueness challenges to legislation, see, for example, *Posters ‘N’ Things v. United States*, 511 U.S. 513 (1994) (items “designed” or “primarily intended for use” with controlled substances); *Chapman v. United States*, 500 U.S. 5453 (1991) (“mixture or substance containing a detectable amount” of a controlled substance); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982) (items, effect, or paraphernalia designed or marketed for use with illegal drugs); *United States v. Mazurie*, 419 U.S. 544 (1975) (“Indian country”); *Roth v. United States*, 354 U.S. 476 (1957) (“obscenity”); *Nash v. United States*, 229 U.S. 373 (1913) (antitrust rule of reason).

47. 306 U.S. 451 (1939).

48. *Id.* at 453 (footnote omitted).

so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”<sup>49</sup>

Although the Supreme Court has applied the void-for-vagueness doctrine for more than a century,<sup>50</sup> the Court has never explained from whence this doctrine comes. In fact, in his separate opinion in *Johnson v. United States*,<sup>51</sup> Justice Clarence Thomas chided his colleagues for never identifying the textual constitutional basis for holding statutes unconstitutionally vague.<sup>52</sup> That shortcoming troubled him, because it left him with the distinct but uncomfortable impression that the void-for-vagueness doctrine was merely another example of the type of substantive due process analysis that the Court has often criticized.<sup>53</sup> The majority, however, did not respond to that criticism,<sup>54</sup> leaving still in doubt the parentage of that doctrine.

### 3. *The Impermissible Judicial Expansion Doctrine*

Another closely related doctrine also grows out of the void-for-vagueness doctrine. It does not have a particular name, but it could be labeled the “impermissible judicial expansion doctrine.” The doctrine protects against judicial decision making in a manner that is similar to how the Ex Post Facto Clauses safeguard individuals against legislative action.<sup>55</sup> Just as a vague statute affords inadequate notice of what is a crime, so too a statute whose text is clear but the courts interpret in an unforeseeable manner can wind up outlawing conduct that no reasonable person would have thought was criminal. The doctrine therefore prohibits courts from construing a criminal statute in a manner that makes an unforeseeable expansion of what a reasonable person would understand to be a crime.<sup>56</sup>

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49. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

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

51. 135 S. Ct. 2551 (2015).

52. *Id.* at 2563–64 (Thomas, J., concurring).

53. *Id.* at 2567–72 (Thomas, J., concurring).

54. *See id.* at 2556–63.

55. *See* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10, cl. 1 (“No State shall . . . pass any ex post facto Law . . .”).

56. *See Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964) (“[A] deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”); *see also, e.g.,* *Metrish v. Lancaster*, 133 S. Ct. 1781, 1787 (2013); *Rogers v. Tennessee*, 532 U.S. 451, 457–62 (2001); *Marks v. United States*, 430 U.S. 188, 192 (1977); *Douglas v. Buder*, 412 U.S. 430, 432 (1973); *Rabe v. Washington*, 405 U.S. 313, 315 (1972).

#### 4. Estoppel

The next doctrine is designed to prevent the executive from affirmatively deceiving the public about what is a crime. The estoppel doctrine prevents the government from convicting someone for conduct that the government had previously and expressly told an individual or the public was lawful.<sup>57</sup> This doctrine could be said to follow directly from the last three because it addresses an aggravated version of the conduct forbidden there. Here, the problem is not that no reasonable person would know what conduct is illegal. Instead, the problem is that the government has expressly identified certain conduct as lawful, but nonetheless attempts to convict someone for engaging in it, a paradigm case of a bait-and-switch.<sup>58</sup>

The classic case is *Cox v. Louisiana*.<sup>59</sup> There, B. Elton Cox wanted to demonstrate on a city street near a courthouse against what he saw as the unjustified arrest of certain protestors. To avoid violating a state law prohibiting demonstrations “near” a courthouse,<sup>60</sup> Cox asked local officials where he could demonstrate, and they identified a specific location as permissible.<sup>61</sup> Once he was there, however, he was arrested for disturbing the peace.<sup>62</sup> Not surprisingly, the Supreme Court was disturbed by that series of events and likened the local officials’ actions to entrapment. “[U]nder all the circumstances of this case, after the public officials acted as they did,” the Court wrote, “to sustain appellant’s later conviction for demonstrating where they told him he could ‘would be to sanction an indefensible sort of entrapment by the State—convicting a citizen

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57. See *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 673–74 (1973); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965); *Raley v. Ohio*, 360 U.S. 423, 438 (1959).

58. See, e.g., cases cited *supra* note 57. The concern with government deception would have been an important one at the early common law, because most criminal laws were unwritten and most of the public was illiterate. In those circumstances, what the king or sheriff declared to be the law was entitled to respect. Ironically, that concern is equally important today even though almost all laws are written and the vast majority of the public is literate. The reason is that the number of laws is so vast that no one could know all of them. See generally Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715 (2013). Government deception therefore is as much of a concern in the twenty-first century as it was a millennium ago.

59. 379 U.S. 559 (1965).

60. *Id.* at 560 (“Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year, or both.” (citing LA. STAT. ANN. § 14:401 (1962))).

61. *Id.* at 571 (“Thus, the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse. In effect, appellant was advised that a demonstration at the place it was held would not be one ‘near’ the courthouse within the terms of the statute.”).

62. See *id.* at 560.

for exercising a privilege which the State had clearly told him was available to him.”<sup>63</sup>

Is *Cox* an example of procedural or substantive due process? The ruling in *Cox* did not criticize the adequacy of the trial proceedings in the case; what troubled the Supreme Court was the state’s decision to charge Cox with a crime after he complied with their directions detailing how he could lawfully demonstrate.<sup>64</sup> *Cox* therefore is not an example of the Supreme Court’s procedural due process jurisprudence. Federal circuit courts and at least one commentator have labeled *Cox* as an example of substantive due process.<sup>65</sup> The Supreme Court, however, did not describe its decision in *Cox* in that manner, and the Court also did not use that label when it relied on *Cox* in 1973 in *United States v. Pennsylvania Industrial Chemical Corp.*,<sup>66</sup> where it ruled that a person can rely on an agency’s regulations as a binding interpretation of a statute.<sup>67</sup> The Court has not revisited the issue since.

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63. *Id.* at 571 (quoting *Raley v. Ohio*, 365 U.S. 423, 426 (1959)). In *Raley*, several witnesses before a state investigative committee were convicted for refusing to testify after the state had misled them into believing that they could refuse to testify on privilege grounds. *Raley*, 365 U.S. at 424. The Supreme Court unanimously reversed the witness’ convictions. *Id.* at 425. Citing its decision in *Sorrells v. United States*, 287 U.S. 435, 442 (1932), the case in which the Supreme Court first recognized the Entrapment Doctrine, the Court in *Raley* reasoned that “to sustain the judgment of the Ohio Supreme Court on such a basis after the Commission had acted as it did would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him.” *Raley*, 365 U.S. at 438. The Court’s comparison of estoppel with entrapment is ironic because entrapment deals with government acts that unreasonably importune someone to *commit* a crime. *See, e.g.*, *Jacobson v. United States*, 503 U.S. 540, 548 (1992) (“Government agents may not originate a criminal design, implant in an innocent person’s mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.”); *Sorrells*, 287 U.S. at 441. Although both doctrines curb excessive ardor by law enforcement officers, technically the two doctrines are mirror images.

64. *See Cox*, 379 U.S. at 569–70.

65. *See, e.g.*, *United States v. Hardridge*, 379 F.3d 1188, 1192 (10th Cir. 2004) (“A claim of entrapment by estoppel is at heart a due process challenge.”); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (“Entrapment by estoppel . . . derives from the Due Process Clause of the Constitution, which prohibits convictions based on misleading actions by government officials.” (citing *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987))); Sean Connelly, *Bad Advice: The Entrapment by Estoppel Doctrine in Criminal Law*, 48 U. MIAMI L. REV. 627, 632 (1994) (arguing that the Supreme Court in *Raley* and *Cox* “employed what today could be labeled ‘substantive due process’ analysis” to produce this defense).

66. 411 U.S. 655 (1973).

67. *Id.* at 674 (“[T]o the extent that the regulations deprived [Pennsylvania Industrial Chemical Corp.] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.” (citations omitted)).

### 5. Proof of Guilt

The four sub-doctrines just discussed dealt with the front end of a criminal process; they require that a criminal law exist and be readily capable of interpretation in order for it to be valid and prevent the government from retroactively applying new criminal laws or new interpretations of old ones.<sup>68</sup> The next line of cases deal with the back end of that process—more specifically, with sufficiency of the government’s proof that a person has committed a crime. The three most important decisions are straightforward.

The first decision, *Thompson v. Louisville*,<sup>69</sup> held that the government cannot convict someone of a crime where there is *no* proof of wrongdoing—or, put simply, the requirement to prove a defendant’s guilt actually requires *proof*.<sup>70</sup> *In re Winship*<sup>71</sup> expanded the decision in *Thompson*, ruling the government must prove a defendant’s guilt beyond a reasonable doubt.<sup>72</sup> Finally, in *Jackson v. Virginia*<sup>73</sup> the Court held that the *Winship* reasonable doubt standard requires not only that the jury reach a state of subjective near-certitude as to a defendant’s guilt, but also that the government introduce evidence sufficient to persuade a reasonable juror of the defendant’s guilt.<sup>74</sup> Like the doctrines implementing the rule of legality, those decisions give practical content to the respect for liberty that Coke and Blackstone discussed.

It could be argued that *Thompson*, *Winship*, and *Jackson* ultimately rest on procedural due process considerations. The argument would be that due process requires adequate notice of the conduct that constitutes a crime, which the government must prove at trial. The problem with that argument, however, is that the reasonable doubt standard did not become law for that reason.<sup>75</sup>

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68. See *supra* Sections III.B.1–4 (discussing the rule of legality, the “void-for-vagueness” doctrine, the impermissible judicial expansion doctrine, and the estoppel doctrine).

69. 362 U.S. 199 (1960).

70. *Id.* at 206 (1960).

71. 397 U.S. 358 (1970).

72. *Id.* at 362. That ruling technically added to the government’s burden, but the reasonable doubt standard had been settled law in federal and state cases for quite some time. See, e.g., *Holland v. United States*, 348 U.S. 121, 138–40 (1954); *Wilson v. United States*, 232 U.S. 563, 570 (1914); *Perovich v. United States*, 205 U.S. 86, 92 (1907); *Dunbar v. United States*, 156 U.S. 185, 199 (1895); *Hopt v. Utah*, 120 U.S. 430, 440–41 (1887); *Miles v. United States*, 103 U.S. 304, 312 (1881); *People v. Strong*, 30 Cal. 151, 155 (1866); *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850). The principal effect of the *Winship* decision, as a result, was to apply the reasonable doubt standard to cases like *Winship* itself, which involved charges of delinquency brought against a juvenile.

73. 443 U.S. 307 (1979).

74. *Id.* at 317–22.

75. See JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 263 (2003) [hereinafter LANGBEIN, *CRIMINAL TRIAL ORIGINS*]; JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 7 (1976).

Ironically, the reasonable doubt standard became law in order to make it easier, not more difficult, to prove a defendant's guilt.<sup>76</sup> At first, the criminal process relied on one or more of three mechanisms to establish guilt or innocence where a defendant was not caught red-handed and refused to confess: the offering of competing oaths by the accuser and the accused; armed combat between them; or the "ordeal," a polite term given to the use of torture to make the accused confess.<sup>77</sup> The common law later abandoned those procedures and adopted presentation of evidence by the prosecution and the defense. Juries were reluctant to convict, however, because of their fear that sending an innocent man to the gallows was tantamount to murder and would cause them to suffer eternal damnation. By the eighteenth century, legal and theological opinions had combined to eliminate that disincentive by directing jurors to convict only if they were convinced to "a moral certainty"—that is, "beyond a reasonable doubt"—of the accused's guilt.<sup>78</sup> Legal and theological theory together gave birth to the reasonable doubt requirement in order to give jurors the confidence they needed that convicting a defendant would not expose them to the risk of an eternity in hell if they were mistaken. Trial courts used the reasonable doubt standard to advise jurors that they would not forfeit their salvation by returning a guilty verdict if they had no reasonable doubt of the defendant's guilt.<sup>79</sup> The common law history of the reasonable doubt standard shows that the standard embodies at least as much of a concern with the morality of a conviction as with its accuracy. The *Thompson*, *Winship*, and *Jackson* decisions therefore cannot easily be slotted into the procedural due process category.

### C. *The Delegation of Lawmaking Authority to Private Parties*

The next category involves how the federal and state lawmaking processes must operate. Beginning early in the twentieth century, the Supreme Court addressed several attempts by a state or the federal government to delegate governmental authority of one type or another to private parties. For example in *Eubank v. City of Richmond*,<sup>80</sup> the municipality passed an ordinance, enforceable by a fine, authorizing parties who owned two-thirds of the property on any street to establish a building line barring further house construction past the line and requiring existing structures to be modified to conform to it.<sup>81</sup> The Supreme Court ruled that the ordinance violated the Due Process Clause because

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76. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 186 (2008).

77. *Id.* at 59–62.

78. *See* *Victor v. Nebraska*, 511 U.S. 1, 12 (1994) (discussing "moral certainty" and "reasonable doubt").

79. *See* WHITMAN, *supra* note 76, at 186–200.

80. 226 U.S. 137 (1912).

81. *Id.* at 141.

it created no standard for the property owners to use, permitting them to act for their self-interest or arbitrarily.<sup>82</sup>

The next case is *Washington ex rel. Seattle Title Trust Co. v. Roberge*.<sup>83</sup> In *Roberge*, a trustee of a home for the elderly poor sought to obtain a permit to enlarge the facility to allow additional parties to reside there.<sup>84</sup> A Seattle zoning ordinance limited buildings in the relevant vicinity to single-family homes, public and certain private schools, churches, parks, and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented.<sup>85</sup> The city building superintendent denied the permit because the adjacent property owners had not consented to the variance, and the trustee sued.<sup>86</sup> Relying on *Eubank*, the Court held that, although zoning ordinances are generally valid, the Seattle ordinance was unconstitutional as applied in those circumstances because it enabled the nearby property owners to deny a variance for their own, capricious reasons.<sup>87</sup>

The last case in the series was *Carter v. Carter Coal Co.*<sup>88</sup> *Carter Coal* involved a delegation challenge to the Bituminous Coal Conservation Act of 1935.<sup>89</sup> The act authorized local coal district boards to adopt a code fixing agreed-upon minimum and maximum prices for coal.<sup>90</sup> The Act also allowed producers of more than two-thirds of the annual tonnage of coal and a majority

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82. *Id.* at 143–44.

83. 278 U.S. 116 (1928).

84. *Id.* at 117.

85. *Id.* at 117–18 & n.1.

86. *Id.* at 119.

87. *Id.* at 122–23.

88. 298 U.S. 238 (1936). Between *Roberge* and *Carter Coal* came *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935). *Schechter Poultry* involved one of the early and preeminent pieces of New Deal legislation, the National Industrial Recovery Act (NIRA). The NIRA delegated to private parties the authority to define private codes of business conduct. See *A.L.A. Schechter Poultry Co.*, 295 U.S. at 521. The rationale for the legislation was that so-called “cut throat” interfirm competition led to the demise of businesses, which aggravated the already unprecedented levels of unemployment in the national economy. *Id.* at 531–32 n.9. Bucking the contemporary headwinds, the Supreme Court held that the delegation of federal lawmaking power to private parties was unconstitutional. *Id.* at 531–42. The NIRA contained a statement of its purposes, but the Court found it insufficient to limit the discretion of private parties. *Id.* at 537. The NIRA contained a requirement that the President approve an unfair competition code before it could take effect, which ostensibly made the final decision governmental in nature. *Id.* at 537–39. The Court found that requirement of no moment, however, perhaps because it was obvious that President Roosevelt never reviewed the codes. See RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 270 (2014) (“In the eighteen months between August 1933 and February 1935, the frenzied activities of the Roosevelt administration generated some 546 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders.”).

89. *Carter v. Carter Coal Co.*, 298 U.S. 238, 287 (1936).

90. *Id.* at 282–83.

of mine workers to set industry-wide wage and hour agreements.<sup>91</sup> Agreeing with the argument of shareholders of other coal producers, the Supreme Court ruled that the Act vested federal lawmaking power in the hands of a party interested in the outcome of a business transaction.<sup>92</sup> In the Court's opinion, "[t]his is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."<sup>93</sup>

*Eubank*, *Roberge*, and *Carter Coal* stand for the proposition that it is impermissible to vest governmental authority in private parties who are neither legally nor politically accountable to other government officials or to the electorate.<sup>94</sup> That principle is not easily filed into a procedural or substantive box. If anything, those cases prohibit evasion of the constitutional regulation of the lawmaking process by granting government authority to outsiders.<sup>95</sup> Delegating lawmaking authority to private parties is not objectionable because private parties are inherently likely to make inaccurate decisions, whether across the board or in particular instances (although in cases involving self-interested decisionmakers that is true). Nor is the nature of the particular delegated decisions objectionable; the government could have made each one in *Eubank*, *Roberge*, and *Carter Coal*. The problem is that the delegation evades the constitutional restrictions on the lawmaking process established by Articles I, II, and III of the federal Constitution and the comparable provisions in every state

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91. *Id.* at 310–11.

92. *Id.* at 311.

93. *Id.*

94. See also *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 677–78 (1976) (noting and distinguishing the *Eubank* and *Roberge* cases without criticizing them or suggesting that they no longer are good law). The private delegation issue arose again in cases such as *Cusak v. Chicago*, 242 U.S. 526 (1917); *New Motor Vehicle Bd. v. Fox Co.*, 439 U.S. 96 (1978); and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984). The laws at issue in those cases, however, left final decision-making authority in the hands of a state official. In *Cusak*, a Chicago ordinance prohibited the erection of billboards in residential communities without the consent of a majority of the residents on both sides of the relevant street. *Cusak*, 242 U.S. at 527–528. The Court distinguished the case from *Eubank* on the ground that the Richmond ordinance allowed a majority of local residents to impose a restriction, while the Chicago ordinance allowed a majority of local residents to lift an otherwise valid prohibition. *Id.* at 527, 531. *New Motor* rejected a due process delegation challenge to a state law directing a state agency to delay vehicle franchise establishments and locations when an existing dealer objects. *New Motor*, 439 U.S. at 108–09. Relying on *New Motor*, *Midkiff* rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process. *Midkiff*, 467 U.S. at 243 n.6. None of those decisions conflicts with *Eubank* and *Carter Coal*.

95. See generally *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121–22 (1928); *Eubank v. City of Richmond*, 226 U.S. 137, 158 (1912); *Carter v. Carter Coal Co.*, 298 U.S. 238, 291 (1936).



charter. *Eubank*, *Roberge*, and *Carter Coal* therefore cannot readily be characterized as examples of either type of due process doctrine.

#### D. The Incorporation Doctrine

The Federalists proposed the Bill of Rights to assuage the Anti-Federalists' concern that the Constitution would empower the new federal government to deprive the people of certain fundamental liberties they had enjoyed under English law. In 1833, the Supreme Court made clear in *Barron v. Baltimore* what the Framers knew and intended as the reach of the Bill of Rights: namely, that it applied only against the federal government, not the states.<sup>96</sup> The *Barron* decision remained the law for decades.

Just shy of the new century, however, the law began what has become almost a complete about-face. Numerous Bill of Rights guarantees now apply to the states as well as the federal government: the First Amendment's Free Speech,<sup>97</sup> Free Press,<sup>98</sup> Free Assembly,<sup>99</sup> Establishment,<sup>100</sup> and Free Exercise<sup>101</sup> Clauses; the Second Amendment's right to bear arms;<sup>102</sup> the Fourth Amendment's Reasonableness<sup>103</sup> and Warrant Clauses;<sup>104</sup> the Fifth Amendment's Double Jeopardy,<sup>105</sup> Self-Incrimination,<sup>106</sup> and Just Compensation Clauses;<sup>107</sup> the Sixth Amendment's Right to Speedy Trial,<sup>108</sup> Public Trial,<sup>109</sup> Jury Trial,<sup>110</sup> and its Confrontation,<sup>111</sup> Compulsory Process,<sup>112</sup> and Counsel<sup>113</sup> Clauses; the Eighth Amendment's Excessive Bail<sup>114</sup> and Cruel and Unusual Punishments<sup>115</sup> Clauses;

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96. *Barron v. Baltimore*, 32 U.S. 243, 250 (1833).

97. *See Gitlow v. New York*, 68 U.S. 652, 666 (1925).

98. *See Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931) (explaining that free press is a liberty guarded from state action by the Fourteenth Amendment).

99. *See De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (holding that an Oregon statute limiting free assembly conflicted with the Due Process Clause of the Fourteenth Amendment).

100. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 14–16 (1947).

101. *See Cantwell v. Connecticut*, 310 U.S. 296, 303–04 (1940).

102. *See McDonald v. Chicago*, 561 U.S. 742, 778 (2010).

103. *See Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

104. *See Aguilar v. Texas*, 378 U.S. 108, 110, 115–16 (1964).

105. *See Benton v. Maryland*, 395 U.S. 784, 787 (1969).

106. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

107. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

108. *See Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967).

109. *See In re Oliver*, 333 U.S. 257, 271–73 (1948).

110. *See Duncan v. Louisiana*, 391 U.S. 145, 148–49 (1968).

111. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965).

112. *See Washington v. Texas*, 388 U.S. 14, 18–19 (1967).

113. *See Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963).

114. *See Cooper Indus. v. Leatherman Grp.*, 532 U.S. 424, 433–34 (2001); *see also Schlib v. Kuebel*, 404 U.S. 357, 364–65 (1971).

115. *See Robinson v. California*, 370 U.S. 660, 664, 666–67 (1962).

and the Ninth Amendment.<sup>116</sup> Today, there are few such provisions not applicable to the states.<sup>117</sup>

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

### *E. A Backstop Guarantee of Fundamental Fairness*

The best description for the last (and largest) body of cases will be familiar to all baseball fans. It is common to see parties invoke the Due Process Clause as a backstop for challenging a particular government practice or action that they deem fundamentally unfair but cannot fit into a more specific constitutional guarantee.<sup>118</sup> Given that most of the Bill of Rights' provisions have been

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116. *Griswold v. Connecticut*, 381 U.S. 479, 487–99 (1965) (Goldberg, J., concurring). The Supreme Court also has ruled that the Fifth Amendment Due Process Clause incorporates equal protection principles that, textually speaking, apply only against the states—a so-called “reverse incorporation” doctrine. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

117. The only Bill of Rights provisions not incorporated are the Third Amendment’s protection against quartering of soldiers, the Fifth Amendment’s Grand Jury Clause, the Seventh Amendment’s right to a civil jury trial, and the Eighth Amendment’s prohibition on excessive fines. *See McDonald v. Chicago*, 561 U.S. 742, 765 n.13 (2010).

118. This scenario arises most often in the criminal process, although the growth of the administrative state has produced a sizeable body of case law defining what, when, and how an agency may adjudicate issues affecting a person’s liberty or property. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 449 (2012) (holding that incarceration after a civil contempt hearing for nonpayment of child support obligations was a violation of the Due Process Clause); *Connecticut v. Doe*, 501 U.S. 1, 4 (1991) (holding that prejudgment attachment of real estate without notice, opportunity for a hearing, or exigent circumstances violates the Due Process Clause); *Zinermon v. Burch*, 494 U.S. 113, 114–15, 139 (1990) (holding the admission of a patient to state mental health treatment facility on the strength of voluntary admission forms that he signed while heavily medicated, disoriented, and apparently suffering from a psychotic disorder was sufficient grounds to bring a claim for violation of his procedural due process rights); *Loudermill v. Cleveland Bd. of Educ.*, 470 U.S. 532, 535–36, 541 (1985) (holding that due process applies to the termination of a public school teacher); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24, 31–32, 34 (1981) (holding that the Due Process Clause applies to the termination of parental rights on a case by case basis); *Mathews v. Eldridge*, 424 U.S. 319, 323–26, 332 (1976) (explaining that the Due Process Clause applies to the termination of Social Security benefits); *Goldberg v. Kelly*, 397 U.S. 254, 255–57, 261 (1970)

incorporated against the states, the Supreme Court has had numerous occasions to define what those provisions mean. Most often at issue today is the meaning of the explicit textual requirements of the Fifth,<sup>119</sup> Sixth,<sup>120</sup> and Eighth Amendments.<sup>121</sup> But there are still circumstances where the Supreme Court has found that various trial procedures violate the Due Process Clause because they lead to a fundamentally unfair trial outcome or effectively deny a defendant of what American law has come to demand of a “trial.”<sup>122</sup>

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(holding that the Due Process Clause applies to the termination of welfare benefits); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232, 233, 238–39, 247 (1957) (holding that a state’s denial of admission to the bar was a violation of the Due Process Clause); *United States ex rel. Vajtauer v. Comm’r of Immigration*, 273 U.S. 103, 106 (1927) (holding that deportation without an opportunity for a fair hearing is a violation of the Due Process Clause).

119. *See, e.g.*, *Kastigar v. United States*, 406 U.S. 441, 442, 453 (1972) (holding that the Fifth Amendment self-incrimination clause requires “use immunity” in order for the government to compel a person to testify over a self-incrimination claim); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring that a person in custody be advised of his right to remain silent and to speak with an attorney before being questioned in order for any statement to be admissible); *Griffin v. California*, 380 U.S. 609, 612–13 (1965) (holding that the self-incrimination clause prohibits a prosecutor from commenting on the defendant’s decision not to testify at his trial); *Green v. United States*, 355 U.S. 184, 188 (1957) (holding that the Fifth Amendment’s double jeopardy clause bars retrial of an acquitted defendant).

120. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 50–51 (2004) (holding that the Sixth Amendment Confrontation Clause guarantees a defendant the right to be confronted with the witnesses against him and thereby limits the use of out-of-court statements at trial); *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 (2000) (holding that the Sixth Amendment’s Jury Trial Clause guarantees a defendant the right to have the jury make all findings necessary for a sentence to be imposed in excess of the statutory maximum); *Massiah v. United States*, 377 U.S. 201, 204–05 (1964) (holding that the Sixth Amendment’s Counsel Clause prohibits the police from deliberately eliciting incriminating statements from a charged suspect in the absence of counsel or a waiver); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the Sixth Amendment’s Counsel Clause guarantees an indigent defendant charged with a felony the right to the appointment of trial counsel at state expense). *See generally* *Perry v. New Hampshire*, 565 U.S. 228, 232–33 (2012) (discussing the Sixth Amendment’s fair trial guarantees).

121. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (holding that the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibits imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim); *Roper v. Simmons*, 543 U.S. 551, 569–75 (2005) (holding that the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibits imposing the death penalty on minors); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibits imposing the death penalty on mentally retarded defendants); *Harmelin v. Michigan*, 501 U.S. 957, 997–98, 1001 (1991) (Kennedy, J., concurring) (explaining that the Eighth Amendment prohibits only grossly disproportionate terms of imprisonment); *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (rejecting the claim that the death penalty is invariably a cruel and unusual punishment and upholding a capital sentencing scheme that guided the jury’s discretion); *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (upholding a challenge based on the Eighth Amendment’s Cruel and Unusual Punishment Clause to purely discretionary capital sentencing schemes).

122. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 330–31 (2006) (ruling that a state court violated due process by forbidding a defendant from introducing evidence to show that someone

An example of the former is the first decision in this series, *Brown v. Mississippi*.<sup>123</sup> There, the Supreme Court held that the Due Process Clause prohibited the admission at trial of a confession taken from a defendant who, when he was brought into the courtroom, still exhibited the burn marks around his neck from having been hung until he confessed.<sup>124</sup> Another example is the line of decisions evaluating police suspect identification practices, such as a photo display, a lineup, or a “showup” (*viz.*, taking a suspect alone to a witness for identification).<sup>125</sup> The Court has also held that the Due Process Clause

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else committed the crime); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (holding that a state court violated due process by excluding evidence at trial that demonstrated the defendant’s confession was coerced); *United States v. Lovasco*, 431 U.S. 783, 789–90 (1977) (noting that a delay in bringing charges against a defendant can violate due process if the government acted for an improper reason and the defendant was prejudiced by the delay); *Gardner v. Florida*, 430 U.S. 349, 351, 362 (1977) (ruling that due process bars the state from sentencing a defendant to death based on a presentence report not disclosed to the defense); *Estelle v. Williams*, 425 U.S. 501, 504–06 (1976) (stating that a defendant has a right not to be tried in jail garb); *Faretta v. California*, 422 U.S. 806, 807, 818 (1975) (ruling that a defendant has the right to self-representation at trial); *Wardius v. Oregon*, 412 U.S. 470, 471, 478–79 (1973) (holding unconstitutional a nonreciprocal notice-of-alibi discovery obligation placed on a defendant); *Santobello v. New York*, 404 U.S. 257, 257–58, 262, 263 (1991) (holding that due process requires a prosecutor to keep his end of a plea bargain resulting in a guilty plea); *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (limiting a trial judge’s discretion to exclude a defendant from trial due to obstructive conduct); *North Carolina v. Pearce*, 395 U.S. 711, 718–19 (1969) (holding that due process prohibits multiple punishments for the same offense); *Witherspoon v. Illinois*, 391 U.S. 510, 520–22 (1968) (ruling that automatically excluding members of the venire from the jury due to their general opposition to capital punishment violates due process); *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966) (holding that a defendant was denied a fair trial due to massive and prejudicial pretrial publicity); *Estes v. Texas*, 381 U.S. 532, 534–35 (1965) (ruling that live broadcasting of defendant’s trial violated due process); *Turner v. Louisiana*, 379 U.S. 466, 468, 474 (1965) (ruling that due process was violated when deputy sheriffs, who testified at trial, fraternized with jurors during trial and deliberations); *Jackson v. Denno*, 378 U.S. 368, 394 (1964) (ruling that a defendant has a right to have a determination made concerning the voluntariness of his confession outside the presence of the trial jury); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (ruling that defendant had been denied a fair trial due to the broadcasting of the defendant’s interview with the sheriff in which he confessed to the crime); *Ferguson v. Georgia*, 365 U.S. 570, 571–72, 596 (1961) (holding unconstitutional a state law prohibiting a defendant from testifying at trial and limiting him to offering an unsworn statement); *Cole v. Arkansas*, 333 U.S. 196, 197, 201, 202 (1948) (reversing a state supreme court decision that upheld a defendant’s sentence on the ground that he had committed an offense not charged against him); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936) (ruling that the admission of a coerced confession violates the Due Process Clause); *Tumey v. Ohio*, 273 U.S. 510, 514–15, 523 (1927) (holding unconstitutional a state law allocating a trial judge’s compensation based on the number of convictions in his court); *see also, e.g., Hutto v. Davis*, 429 U.S. 28, 30 n.3 (1976) (suggesting that due process forbids the admission at trial of a defendant’s withdrawn guilty plea).

123. 297 U.S. 278 (1936).

124. *Id.* at 280–82.

125. *See Perry v. New Hampshire*, 565 U.S. 228, 232–33 (2012) (“Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array.”); *id.* at 232–33, 236, 248 (upholding the

requires the government to act in a fundamentally fair manner at later stages of the criminal justice process, such as the appellate process<sup>126</sup> and probation or parole revocation proceedings<sup>127</sup>—stages that were unknown at common law.<sup>128</sup>

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admission of an eyewitness identification when the witness spotted the suspect while being questioned); *see also, e.g.*, *Manson v. Braithwaite*, 432 U.S. 98, 106–07, 117 (1977) (ruling that the use of a one-photograph display was admissible as long as there were sufficient indicia of reliability); *Neil v. Biggers*, 409 U.S. 188, 196, 199–200, 201 (1972) (holding that a police station “showup” was admissible as long as there were sufficient indicia of reliability); *Foster v. California*, 394 U.S. 440, 441–42, 443 (1969) (ruling that it violates due process to use the results of a police-staged, unduly suggestive identification procedure, at trial); *Simmons v. United States*, 390 U.S. 377, 382–85 (1968) (ruling that law enforcement’s use of a photographic display is not necessarily unconstitutional by being unduly suggestive); *Stovall v. Denno*, 388 U.S. 293, 295, 296, 301–02 (1967) (ruling that a “showup” is not necessarily so suggestive as to be unconstitutional even though the handcuffed suspect was the only African-American in the room).

126. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 391–92, 393, 396 (1985) (ruling that a state appellate court cannot dismiss an offenders first appeal of right when the failure to comply with appellate procedure is due to the ineffective assistance of counsel); *Douglas v. California*, 372 U.S. 353, 355, 356–58 (1963) (ruling that the Fourteenth Amendment requires the state to provide an indigent offender with counsel on his first appeal as of right); *see also, e.g.*, *Evitts*, 469 U.S. at 393 (citing cases requiring the state to provide an indigent offender with a free trial transcript).

127. *See, e.g.*, *Young v. Harper*, 520 U.S. 143, 146–47 (1997) (ruling that Oklahoma’s “Preparole Conditional Supervision Program” was tantamount to parole and an offender was therefore entitled to the same procedural protections before his release could be revoked); *Superintendent v. Hill*, 472 U.S. 445, 447 (1985) (ruling that there must be “some evidence” of misconduct before a state can revoke earned good time credits); *Black v. Romano*, 471 U.S. 606, 607–08, 610–11, 615, 616 (1985) (ruling that a trial judge need not consider alternatives to incarceration when deciding whether a probationer has violated a condition of his release); *Bearden v. Georgia*, 461 U.S. 660, 661–62, 672 (1983) (ruling that due process and equal protection principles bar a trial judge from sentencing an indigent offender to prison for nonpayment of a fine); *Wolff v. McDonnell*, 418 U.S. 539, 553, 558 (1974) (ruling that due process requires procedural safeguards before an inmate can be deprived of good time credits); *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (ruling that due process prohibits a probation revocation when there is no underlying proof that the probationer violated a condition of his release); *Gagnon v. Scarpelli*, 411 U.S. 778, 781–82, 791 (1973) (ruling that due process requires fundamentally fair procedures to be used when the state revokes a probationer’s release); *Morrissey v. Brewer*, 408 U.S. 471, 472, 482 (1972) (ruling that due process requires fundamentally fair procedures to be used when the state revokes a parolee’s release).

128. At common law, there was no right to appeal a judgment of conviction or the sentence. The Judiciary Act of 1789 also did not establish a right to appeal a conviction in a criminal case. *See* Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81 (1789). Congress did not create a general right to appeal in federal capital cases until 1889. *See* Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656. And Congress did not extend that right to all criminal cases until 1891. *See* Circuit Courts of Appeals (Evarts) Act, ch. 517, § 5, 26 Stat. 827 (1891). In part for that reason, the Supreme Court has repeatedly held that a defendant does not have a constitutional right to challenge his conviction or sentence on appeal, even in a capital case. *See, e.g.*, *Goeke v. Branch*, 514 U.S. 115, 120–21 (1995); *Bergeman v. Backer*, 157 U.S. 655, 659 (1895); *Andrews v. Swartz*, 156 U.S. 272, 275–76 (1895); *McKane v. Durston*, 153 U.S. 684, 687 (1894). Probation and parole also did not exist at common law. *See, e.g.*, *Ex parte United States*, 242 U.S. 27, 42–45 (1916) (holding that common law courts do not have the ability to “temporarily suspend” enforcement of law (i.e., probation));

An example of the second category—actions that effectively deny a defendant a trial as we know it—would be the Supreme Court’s decision in *Moore v. Dempsey*.<sup>129</sup> There, the Court seemed “troubled” (to put it kindly) by the possibility that the state had convicted a defendant and sentenced him to death after a trial that would have made Robespierre blush.<sup>130</sup> Another example in this category would be cases in which the Court prohibited the government from trying a defendant who, because of a mental disease or defect, is incapable of understanding what a trial is (or that he is on trial) or from being able to consult with defense counsel.<sup>131</sup> Two other similar lines of cases might be the Court’s decisions barring the state from using perjured testimony to prove a defendant’s

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Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 307–09 (2013) (explaining how parole became part of the American criminal justice system). Parole came into existence late in the nineteenth and early in the twentieth centuries as a means of granting an early release to prisoners who had become rehabilitated. *Id.* at 307–08. For example, Congress did not pass the first federal parole law until 1910. *See* Federal Parole Act of 1910, ch. 387, 36 Stat. 819, 819–21; Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 161–62, 406–09 (1993); Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J. L. & PUB. POL’Y 1, 7–10 (2013).

129. 261 U.S. 86 (1923).

130. *See id.* at 88–90 (“Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as the petition puts it, they would execute those found guilty in the form of law. . . . [T]he petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The [defense] counsel did not venture to demand delay or a change of venue, to challenge a jurymen or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.”).

131. *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (ruling that a defendant has a right not to be tried if he is mentally incompetent and cannot understand the nature of the proceedings or assist in his defense); *Pate v. Robinson*, 383 U.S. 375, 385–86 (1966) (discussing procedures necessary at a hearing held to determine whether a defendant should be psychiatrically examined for his competency to stand trial); *Dusky v. United States*, 362 U.S. 402, 402 (1960) (adopting a standard to determine whether a defendant is competent to stand trial).

guilt,<sup>132</sup> and its decisions holding that certain constitutional errors cannot be harmless under any circumstances.<sup>133</sup>

Perhaps decisions in the first category of cases could be readily described as examples of procedural due process. The second category of decisions, however, does not easily fit that description. At common law, a sheriff and community members that caught a suspect red-handed as part of the “hue and cry” could string the suspect up immediately without even the pretense of a trial. The Constitution forbids that practice today, of course.<sup>134</sup> The reason why,

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132. See, e.g., *Napue v. Illinois*, 360 U.S. 264, 265, 269–70 (1959) (ruling that due process forbids a prosecutor from knowingly allowing a witness’s perjury to go uncorrected at trial); *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942) (ruling that due process forbids a prosecutor from intentionally using perjured testimony to convict a defendant); *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935) (ruling that due process forbids a prosecutor from proving a defendant’s guilt entirely through perjured testimony); cf. *Giglio v. United States*, 405 U.S. 150, 150, 153–155 (1972) (ruling that due process forbids the prosecution from not disclosing to the defense evidence that impeaches the credibility of a prosecution witness); *Brady v. Maryland*, 373 U.S. 83, 86, 87 (1963) (ruling that due process forbids the prosecution from not disclosing to the defense exculpatory evidence on the issues of guilt or innocence). Those decisions, however, could also be classified as fitting into the first category—trial procedures resulting in a fundamentally unfair trial outcome.

133. The current rule is that most constitutional errors that occur before or at trial can be found harmless in a given case. See, e.g., *United States v. Marcus*, 560 U.S. 258, 262–65 (2010) (ruling that a jury instruction allowing a defendant to be convicted for conduct predating enactment of the relevant statute can be harmless); *Rivera v. Illinois*, 556 U.S. 148, 152, 157, 158 (2009) (explaining that the denial of the defense’s right to exercise a preemptory challenge to a potential juror can be a harmless error); *Arizona v. Fulminante*, 499 U.S. 279, 282, 288–89, 295, 302 (1991) (holding that the admission of a coerced confession can be a harmless error). Nonetheless, there are some errors that cannot be harmless. See, e.g., *Sullivan v. Louisiana*, 508 U.S. 275, 279–82 (1993) (holding a constitutionally deficient jury instruction on the “reasonable doubt” standard of proof was more than a harmless error); *id.* at 279 (identifying total deprivation of representation by defense counsel at trial and trial before a biased judge as examples of nonharmless errors); *Gomez v. United States*, 490 U.S. 858, 876 (1989) (holding that a district court’s unauthorized delegation of jury selection to a magistrate was reversible error); *McKaskle v. Wiggins*, 465 U.S. 168, 170, 174, 187–88 (1984) (holding that standby counsel appointed for a *pro se* party did not infringe on the defendant’s right to self-representation at trial); *Vasquez v. Hillery*, 474 U.S. 254, 255–56, 262, 264, 266 (1986) (holding racial discrimination in the selection of grand jurors as a violation of the defendant’s rights); cf. *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (suggesting that the denial of the right to a public trial cannot be harmless). These errors—mistakes that the Court has termed “structural,” see *Washington v. Recuenco*, 548 U.S. 212, 218 (2006)—defy harmless error analysis for one of three reasons: (1) they are so egregious as they render a trial a nullity; (2) they so alter the trial record that appellate review of their effect is impossible; or (3) they would be harmless as a matter of law in every case, making appellate review useless. See, e.g., *Fulminante*, 499 U.S. at 306–12. There is a fourth category of errors where harmless error analysis is unavailable—*viz.*, claims that require a defendant to establish prejudice in order to make out a violation. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 681–82, 693 (1984) (ineffective assistance of counsel). It makes no sense to ask whether an error was harmless if the defendant had to establish prejudice in order to prove his claim of a constitutional violation.

134. See *Chapman v. United States*, 500 U.S. 453, 465 (1991) (“Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until

however, is not that a lynch mob is likely to make a mistake when deciding which defendants to hang—although that is true. The reason is that the Constitution guarantees every defendant, the guilty no less than the innocent, a “trial,” and lynching a defendant before trial deprives the accused of just that. If so, the argument goes, so too does holding a Soviet era “show trial,” one at which the parties read their assigned roles from a script, or using a proceeding so obviously deficient in the features of what we would deem a “trial” that the proceeding is really just a charade. How *that* category of cases should be characterized—as procedural or substantive due process—is not at all obvious.

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

If we rely solely on the Supreme Court’s decisions, we can see that the only Lost Due Process Doctrine that could fairly be treated as an application of procedural due process is the last one: the due-process-as-backstop doctrine. What is also true, however, is that the Court has not explained why this is true.

Start with the rule of legality and its offspring—the void-for-vagueness, unforeseeable-expansion, and proof-of-guilt doctrines. Each body of Supreme Court case law has developed largely without reference to the others. The closest the Supreme Court has come to grounding these doctrines in due process theory or relating these doctrines to each other is by stating that they implement the requirement that the government must offer the public adequate notice of what the law forbids before a person can be held liable for violating a criminal statute.<sup>135</sup> As the Supreme Court explained in *Bouie v. City of Columbia*,<sup>136</sup> “a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.”<sup>137</sup> *Bouie* explains that the unforeseeable-expansion doctrine grew out of the void-for-vagueness doctrine, but the ruling does not fit either doctrine into the procedural or substantive branch of due process.<sup>138</sup> That explanation is informative, but also of limited use. Similarly, the Court’s decision in *Cox* adverted to the void-for-vagueness doctrine, but the Court ultimately rested its decision on the ground that Cox had been entrapped.<sup>139</sup>

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it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.”); *cf.* *United States v. Shipp*, 203 U.S. 563, 571–573, 575 (1906) (holding that those who lynched a defendant who was charged in state court with rape can be held in contempt for violating a federal district court’s order in a habeas corpus proceeding).

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

136. 378 U.S. 347 (1964).

137. *Id.* at 352.

138. *Id.* at 349, 351–53.

139. *Cox v. Louisiana*, 379 U.S. 559, 568–69, 571 (1965).



Perhaps, the Court avoided discussing the pedigree of each line of its precedents with regard to the procedural or substantive due process doctrines, or even mentioning that, given its precedents and logic, each case had to fit within one niche or the other, because the Court was trying to treat its substantive due process decisions as the bastard stepchild that the justices hoped they had become. Consider the provenance of those decisions. As Justice Thomas recently detailed, the void-for-vagueness doctrine superficially bears a strong family resemblance to the Court's now-despised pre-New Deal era precedents—*Lochner* is the principal felon in this gang—striking down the political branches' efforts to rearrange social and economic arrangements through legislation.<sup>140</sup> The Court may have hoped that it had put to rest what it regretted as a sad and unfortunate judicial frolic-and-detour into substantive due process and therefore refused even to acknowledge that such a branch of its jurisprudence had once existed. Due process should be concerned only with the fairness of the procedures that the government used to take away someone's life, liberty, or property for violating one of the rules of the game. The rules themselves, however, are for the political process to adopt.

Grant that premise—which includes the rule of legality—and the rest of the doctrines fall in line. If it is grossly unfair to punish someone for noncompliance with a rule that did not exist, it is not a big step to the ancillary rule that it is also unfair to penalize someone for violating a rule that technically did exist because it was on the statute books, but, due to its use of vague language, was so far beyond the ken of the average person that penalizing someone for noncompliance was more akin to playing “gotcha” than to a fair assessment of how he played the game. If so, it then is unfair regardless of whether the legislature or a court has created the rule. If the government cannot play “gotcha” with the public, then it cannot convict someone of a crime if he does exactly what the government told him he may do. And if all that is true, then it also is unfair to punish someone for violating a known and clearly understandable rule if anything, even just an allegation, constitutes “proof” of a violation. The upshot is that, if even the past existence of substantive due process must be avoided like the plague, the rule of legality and its children might be justified as an aspect of due process as long as we do not have to place it in the substantive or procedural niche. Yet, once we create one exception to the Court's binary doctrine, we must acknowledge that those two categories are not exclusive.

The issue in the personal jurisdiction cases is one of power, not process. The question is not whether the pretrial, trial, and appellate procedures in the forum court satisfy some agreed-upon notion of fundamental fairness and ensure that the civil justice system can accurately find the facts and apply the law in an evenhanded manner. The ultimate issue involves the attempt by a court in *State*

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140. See *Johnson v. United States*, 135 S. Ct. 2563, 2566–73 (2015) (Thomas, J., concurring).

A to enter a judgment enforceable against a defendant in *State B* who has studiously avoided entering *State A* to avoid being subject to the jurisdiction of *its* courts.<sup>141</sup> Avoiding notions of substantive due process is a far more difficult task when the issue has little to do with any reasonable understanding of the fairness of playing a game.

What is particularly interesting about the personal jurisdiction doctrine, therefore, is what the Supreme Court does *not* say. Take the Court's recent decision in *Daimler AG v. Bauman*.<sup>142</sup> The plaintiffs—residents and citizens of Argentina and Chile who have no connection to the United States—initiated a federal court lawsuit in California against a German company, Daimler AG, seeking relief for the allegedly tortious activities of one of its subsidiary corporations, Mercedes-Benz Argentina.<sup>143</sup> The plaintiffs alleged that the subsidiary had collaborated with Argentine security forces during that country's 1976–1983 “Dirty War” to detain, kidnap, torture, and kill Argentine nationals employed by (or related to employees of) Mercedes-Benz Argentina, injuries that occurred entirely within Argentina.<sup>144</sup> The decision canvasses the relevant Supreme Court precedents and offers an exhaustive discussion of the historical development of the case law governing personal jurisdiction. Any first-year law student—or layman for that matter—can readily understand the Court's simple and straightforward explanation of why the plaintiffs, who were complete strangers to California, could not go forward with their lawsuit in that forum. Little if anything could be added to the discussion. Yet, nowhere in the Court's discussion of the personal jurisdiction doctrine does the Court explain *why* the Due Process Clause limits the power of a court to adjudicate a particular dispute. The Court explains in detail the due process limitations on the exercise of personal jurisdiction, and the Court identifies the Due Process Clause as the source of those limitations. What the Court never explains, however, is *why* the Due Process Clause serves that role.

Only one of the two traditional due process concerns—decision-making accuracy and substantive authority—was present in *Daimler AG*, and it is readily apparent which one that was. The Court's opinion makes clear that it was not concerned that the federal district court might enter a judgment on the plaintiffs' claims that would be *inaccurate*. Instead, the Court was troubled by the prospect that any judgment entered in the case would be *illegitimate and therefore void*.<sup>145</sup>

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141. The Full Faith and Credit Clause would require the courts in *State B* to give effect to a judgment entered by a court in *State A*. See U.S. CONST. art. IV, § 1; *Baker v. General Motors Corp.*, 522 U.S. 222, 231–33, 240–41 (1998).

142. 134 S. Ct. 746 (2014).

143. *Id.* at 750–51.

144. *Id.* at 751–52.

145. See Scott, *supra* note 31, at 871 (“A personal judgment against a defendant over whom the court rendering it has no jurisdiction is invalid. It is not merely reversible on writ of error or appeal, but is wholly void for all purposes. An attempt to execute it is without justification; a sheriff

Yet, despite the lengthy discussion of the Court's precedent describing the personal jurisdiction doctrine, the Court said nothing about why the Due Process Clause is the relevant limitation on state authority. Perhaps, the Court found that explanation unnecessary because its decisions have so uniformly relied on the Due Process Clause as the basis for defining limits on personal jurisdiction that the Court saw no justification as necessary. But that rationale ultimately begs the question whether the Court has ever justified its reliance on due process as the ground for limiting state action. Most scholarship on personal jurisdiction also focuses on its substantive doctrinal rules and principles, rather than on its origin.<sup>146</sup> When that question is pursued, it turns out that the Court's attempt in *Daimler AG* to craft a definitive presentation of the personal jurisdiction doctrine is an intriguing example of *Hamlet* without the Prince of Denmark.

Like the personal jurisdiction doctrine, the private delegation doctrine is mute on its source. It is possible to justify the doctrine on the ground that delegating decision making or law making power to private parties is inherently likely to result in a fundamentally unfair outcome whenever the recipients have a personal interest in the outcome.<sup>147</sup> The government cannot base a judge's salary on the number of judgments of conviction he enters and credibly argue that the judge will remain impartial between the prosecution and the defense.<sup>148</sup> For much the same reason, it would be unreasonable to delegate the power to define "unfair methods of competition" to a portion of a particular industry or to allow some industry rivals to set industry-wide wage and maximum-hour agreements while expecting that the recipients would not use that power for their own benefit.<sup>149</sup> But

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levying upon property of the defendant is liable for conversion, and a purchaser of the property on execution sale gets no title to it. A court of equity may, where the remedy at law is inadequate, enjoin the execution of the judgment. No action lies upon it either in the state wherein it is rendered or in any other state. It cannot be set up as a bar in a suit upon the original cause of action." (footnotes omitted).

146. See, e.g., Lea Brilmayer *et al.*, *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 732, 740–41, 750 (1988) (describing the various ways due process governs personal jurisdiction analysis); Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1448 (1988) (discussing how due process guides a determination of dispute-blind vs. dispute-specific jurisdiction); Albert A. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 307–08 (1956) (discussing how natural law, the Full Faith and Credit Clause of the U.S. Constitution, and the Due Process Clause help inform the modern jurisdictional analysis); Geoffrey C. Hazard, Jr., *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 242 n.4, 247 (1965); Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 613, 633 (1988).

147. See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 944–55 (2014).

148. See *Tumey v. Ohio*, 273 U.S. 510, 514–15, 522, 523, 535 (1927).

149. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 281–83 (1936) (holding unconstitutional a provision in the Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991, that, among other things, allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and maximum working hour agreements);

procedural due process principles cannot resolve every private delegation case. Why?: Because the rationale for the doctrine—*viz.*, the government cannot evade structural restrictions on the law-making or law-applying processes by turning them over to private parties—would apply even if Congress gave the same power to a retired Supreme Court Justice, the Pope, or the most recent inductees into Cooperstown.<sup>150</sup> In those cases, there would be no risk that the decision-maker would be partisan, making it impossible to fault the delegation on procedural due process grounds. If the only alternative is to label the delegation as a substantive due process violation, a Court committed to avoiding even the spectre of *Lochner* leaving its grave would simply avoid labeling private delegation as either type of due process flaw.

Turn now to the incorporation doctrine. Characterizing the Court's decisions as examples of procedural due process is not remotely plausible. The First Amendment's Free Speech, Free Press, Free Exercise, and Establishment Clauses; the Second Amendment's Right to Bear Arms; the Fourth Amendment's Reasonableness and Warrant Clauses; the Fifth Amendment's Self-Incrimination, Double Jeopardy, and Takings Clauses; the Eighth Amendment's Cruel and Unusual Punishments and Excessive Fines Clauses—none of those provisions safeguards the accuracy, reliability, or fairness of the criminal, civil, or administrative processes. Each one is a flat or conditional prohibition on a particular type of government conduct that is unrelated to the accuracy of a decision. We could not have boiled Charles Manson or Usama bin Laden in oil even if they received a perfect trial, numerous opportunities for post-trial relief, and the entire nation had voted unanimously for that penalty after hearing whatever evidence of mitigation they offered. Here, too, the Court likely saw silence as preferable to candor as far as the source of incorporation is concerned.

The upshot of the foregoing is this: Several Supreme Court doctrines claim to rest on the Due Process Clause but cannot readily be labeled as procedural or substantive.<sup>151</sup> The Court has never attempted to ground those doctrines in one category or the other, perhaps because it has been afraid to admit that it has been engaging in unreconstructed (but carefully obscured) substantive due process analysis while also decrying that type of judicial review in the context of social and economic legislation. The question, then, is whether those doctrines can be justified without needing to slot them into one of those two cubbyholes. As explained below, that task can be done.

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A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 531–34, 537–38, 541–42 (1935) (holding unconstitutional a provision in the National Industrial Recovery Act of June 16, 1933, ch. 90, 48 Stat. 195, that delegated to trade or industrial groups the authority to define “unfair methods of competition” that later were to be approved by the President.)

150. See Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and Constitutional Regulation of Federal Lawmaking*, 38 HARV. J.L. & PUB. POL'Y 337, 410–23 (2015) [hereinafter Larkin, Jr., *The Dynamic Incorporation*].

151. See *supra* note 23 and accompanying text.

## V. THE SIGNIFICANCE OF MAGNA CARTA

Justice Oliver Wendell Holmes, Jr., once remarked, “a page of history is worth a volume of logic.”<sup>152</sup> His aphorism is particularly germane when the subject has roots in the common law and Magna Carta. To understand where the Great Charter fits into contemporary jurisprudence, one must first examine the events from which Magna Carta came. They illustrate why Magna Carta was created and what purposes it was to serve.

Two of those purposes are particularly important. One is known as “the rule of law,” the proposition that those who govern, like those who are governed, are subject to the law.<sup>153</sup> The other is the principle that long-established traditions can form the constitution of a society, whether or not they are formally adopted by the relevant public or the governing body, as was our Constitution.<sup>154</sup> Both points help explain why America broke from England in 1776 and why Magna Carta still plays an important role in contemporary American jurisprudence.

### A. *The Pre-Magna Carta Evolution of English Law*

The constitutional history of Magna Carta, like that of England itself, has Teutonic roots.<sup>155</sup> Early English “law” reflected the Anglo-Saxon-Jute-Dane customs of the local community and was rudimentary at best, both “rough and crude.”<sup>156</sup> The laws of the folk, the “folk-right,” could vary among ancestors and from community to community.<sup>157</sup>

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152. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

153. See Larkin, Jr., *The Dynamic Incorporation*, *supra* note 150, at 417.

154. See *id.* at 414, 418.

155. See JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* 5–6 (2005) [hereinafter REID, *ANCIENT CONSTITUTION*]; THOMAS PITT TASWELL-LANGMEAD, *ENGLISH CONSTITUTIONAL HISTORY* 1 (2012). What we know begins in the seventh century, *id.* at 1–2, although the next several hundred years are “but partially and fitfully lit.” FREDERICK W. MAITLAND & FRANCIS C. MONTAGUE, *A SKETCH OF ENGLISH LEGAL HISTORY* 16 (1915). Before the seventh century, “the trail stops, the dim twilight becomes darkness” because “we pass from an age in which men seldom write their laws, to one in which they cannot write at all. Beyond lies the realm of guesswork.” *Id.*

156. FREDERICK POLLOCK, *THE EXPANSION OF THE COMMON LAW* 139–40 (1904); see also, e.g., J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 1–2, 8–9 (4th ed. 2007); DANIEL HANNAN, *INVENTING FREEDOM: HOW THE ENGLISH-SPEAKING PEOPLES MADE THE MODERN WORLD* 70–81 (2013); EDWARD JENKS, *A SHORT HISTORY OF ENGLISH LAW* 3 (1912) (“The so-called Anglo-Saxon laws date from a well-recognized age in the evolution of law. They reveal to us a patriarchal folk, living in isolated settlements, and leading lives regulated by immemorial custom.”); Hall & Seligman, *supra* note 45, at 644 (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”).

157. See FREDERICK WILLIAM MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 1–4 (1919).

Unlike today's laws, Anglo-Saxon customs were rarely written.<sup>158</sup> The "men of the folk," especially "the old and wise," knew the law.<sup>159</sup> The "essence" of early English law was its "popular" nature,<sup>160</sup> which reflected the fact that the law was made in meetings of the entire community.<sup>161</sup> Early English law also "represented custom, of which any man with a good memory might be the repository, and local opinion,"<sup>162</sup> a valuable feature given that most people were illiterate. Like today's laws, Anglo-Saxon customs sought to prevent wrongs and to redress grievances.<sup>163</sup> Unlike today's laws, however, Anglo-Saxon traditions operated in the only way possible in a land of multiple, decentralized communities given to tribal loyalty and intertribal disputes and lacking a central government: paying off the kinfolk of the victim to avoid a blood feud.<sup>164</sup> It was years before even a rough criminal code emerged.<sup>165</sup>

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158. See CHRISTOPHER BROOKE, *FROM ALFRED TO HENRY III* 45 (1961) ("The written laws of Anglo-Saxon kings were not comprehensive codes. The main body of law was customary and unwritten. When custom had to be altered, or clarified, or emphasized, it might be put in writing. The result is that the law-books from King Ethelbert of Kent to King Cnut are at once very particular and very precise and very fragmentary."); JENKS, *supra* note 156, at 4 ("Why trouble to record that which every village elder knows?"). At one time there were twelve separate "kingdoms" in England, but there was only one by the tenth century. England was divided into "shires" or counties (supervised by "shire-reeves," today's sheriffs, appointed by the king), which were further subdivided into "hundreds," and then again to "tithings" in the country and "boroughs" in villages. See BAKER, *supra* note 156, at 7–8.

159. MAITLAND & MONTAGUE, *supra* note 155, at 16; see also BROOKE, *supra* note 158, at 68–69 ("The essence of early English law is that it was 'popular' law. The people at large were the repositories of law; they were the judges in the public courts. Law represented custom, of which any man with a good memory might be the repository, and public opinion[.]" (alteration in original)).

160. BROOKE, *supra* note 158, at 68–69.

161. *Id.*; see also TASWELL-LANGMEAD, *supra* note 155, at 5–6.

162. BROOKE, *supra* note 158, at 69.

163. See JENKS, *supra* note 156, at 13. Over time, criminal jurisdiction extended to any breach of the king's "peace," with civil jurisdiction stemming from the king's role as a feudal lord dispensing justice for his tenants. See BAKER, *supra* note 156, at 9.

164. JENKS, *supra* note 156, at 7–8, 10 ("Doubtless the ordinary offence, even the violent offence, was looked upon, primarily, as a wrong to the party specially injured, and his kindred."); see also MAITLAND & MONTAGUE, *supra* note 155, at 15. Originally, there were a dozen separate kingdoms in England, a number that was later whittled to three (Wessex, Mercia, and Northumbria), one of which (Wessex) became the sovereign under Alfred and Edgar. TASWELL-LANGMEAD, *supra* note 155, at 8–11. At the time of the Norman Conquest, the Angles, Saxons, Jutes, and Danes had coalesced into one (albeit loosely defined) nation. *Id.*

165. See JENKS, *supra* note 156, at 8–10. The transition from private vengeance to public justice is never abrupt. See Frederick Pollock, *The King's Peace in the Middle Ages*, 13 HARV. L. REV. 177, 177 (1899) ("All existing civilized communities appear to have gone through a stage in which it was impossible to say where private vengeance for injuries ended and public retribution for offences began, or rather the two notions were hardly distinguished.").

English King Ethelbert drafted the first written code in approximately 600 A.D.<sup>166</sup> Consisting of only “ninety brief sentences,”<sup>167</sup> Ethelbert’s code—composed of *dooms* (“decrees”) not *leges* (“laws”), because the concept of “law” was as yet unknown in England<sup>168</sup>—was essentially a tariff,<sup>169</sup> a schedule of fines, payable in money known as the *wergild*, that a wrongdoer was obliged to give to the victim of a crime or his kin, principally for murder, mayhem, other acts of violence, or cattle-thievery.<sup>170</sup> The hoped-for goal was to forestall violent retaliation and intertribal warfare.<sup>171</sup>

English customs survived the Norman Conquest. The Normans brought no written laws with them, and William the Conqueror largely chose to respect indigenous customs, also known as the “customary practice” or “common conviction of the community,” to avoid making his succession feel oppressive, thereby risking a rebellion.<sup>172</sup> No system of law is static, however, and the

166. See BAKER, *supra* note 156, at 2–3; MAITLAND, *supra* note 157, at 1.

167. MAITLAND & MONTAGUE, *supra* note 155, at 6.

168. See POLLOCK, *supra* note 156, at 147. The word “law” did not exist in England until the Danes brought the “*Danelaw*” with them in the eleventh century. MAITLAND & MONTAGUE, *supra* note 155, at 16. The term “common law” did not appear until the reign of Henry II during the twelfth century. See HANNAN, *supra* note 156, at 77.

169. Ethelbert’s “code” was a code only in the loosest sense of the term, because it is unclear to what extent Ethelbert’s dooms were intended to serve as a complete exposition of the Anglo-Saxon customs. See BROOKE, *supra* note 158, at 45; POLLOCK, *supra* note 156, at 148.

170. MAITLAND & MONTAGUE, *supra* note 155, at 6.

171. See *id.* at 19, 193–99 (the Code of Ethelbert); POLLOCK, *supra* note 156, at 148–49, 153. In the case of a homicide, for example, the offender was responsible for paying the victim’s “*wergild*,” the deceased’s worth or price, to the deceased’s family. MAITLAND & MONTAGUE, *supra* note 155, at 19. Because private or clan vengeance did not distinguish between actions done intentionally, negligently, or accidentally, Anglo-Saxon customs also drew no such distinctions. POLLOCK, *supra* note 156, at 153. Parties sought relief at the primary local court, known as the “shire moot,” “hundred moot,” or “hundred.” Supervised by the sheriff (a Crown appointee) or some similar figure, the hundred met once monthly. Each hundred more closely resembled an “ill-managed” open-air town meeting than a modern day judicial proceeding. The payment of tariffs was the only alternative to corporal punishment then available to avoid inter-clan warfare. The refusal to pay rendered an offender an “outlaw,” someone beyond the protection of the law, with the victim’s kin obliged to kill him, burn his house, and waste his land. See BAKER, *supra* note 156, at 7–8; MAITLAND & MONTAGUE, *supra* note 155, at 19–20, 30, 66–69; POLLOCK, *supra* note 156, at 30, 139–40, 150–51. For a concise discussion of the growth of English common law criminal procedure, see, e.g., LANGBEIN, CRIMINAL TRIAL ORIGINS, *supra* note 75; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 424–41 (5th ed. 1956).

172. See BAKER, *supra* note 156, at 14 (“The Norman invaders were warlike, uncultured and illiterate. . . . [T]hey had no refined body of jurisprudence to bring with them.”); RALPH C. DAVIS, THE NORMANS AND THEIR MYTH 122 (1976) (“[T]he paradox of the Normans . . . is that in the long run the conquest of England turned them into Englishmen.”); HANNAN, *supra* note 156, at 77, 105 (“The Normans and their European confederates numbered perhaps eight thousand after the Conquest. They could hardly govern a nation of more than a million people other than through its existing officials, from reeves to parish priests.”); HENRY OF HUNTINGTON, THE HISTORY OF THE ENGLISH PEOPLE xi (Diana Greenway trans. 2002) (1154); JENKS, *supra* note 156, at 17 (“It was

English legal system underwent considerable evolution.<sup>173</sup> The most important development for our purposes was the birth of common law decision-making.<sup>174</sup>

Today, a large number of statutes, regulations, ordinances, judicial or administrative opinions, treatises, law journal articles, and the like will instruct or advise a judge how to interpret a law and apply it to the facts. Late in the twelfth century, however, the cupboard was bare. There was no Parliament, let alone regulatory agencies with lawmaking power, and there were no written sources of law, such as treatises, to which a judge could turn.<sup>175</sup> All that existed were pre- and post-Norman customs, also known as the “customary practice,” the “common conviction of the community,” or the “general custom of

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part of the policy of the Conqueror to persuade his new subjects that he was heir to the kingdom of Edward the Confessor by lawful succession. The fiction must have been almost too gross for belief, even in an unlettered age; but the motive which prompted it led William to promise respect for ‘the law of the land,’ [i.e.,] for the ancient customs of the people.” (alteration in original)); *id.* at 26–27; MAITLAND, *supra* note 157, at 3, 7; MAITLAND & MONTAGUE, *supra* note 155, at 9–13, 26–27. Some revisions were necessary, of course, since customs differed “from place to place and from class to class” with no authoritative collection of what passed for Anglo-Saxon law existing. *See* JENKS, *supra* note 156, at 17. William adopted the “murder fine,” a payment made by the inhabitants of a district where a Norman was murdered if the killer was not found. *See* MAITLAND, *supra* note 157, at 46. He also introduced the notion of “trial by combat” to the criminal process. *See* MAITLAND & MONTAGUE, *supra* note 155, at 27–28, 49–50.

173. *See* JENKS, *supra* note 156, at 39–54; Joseph Biancalana, *For Want of Justice: Legal Reforms of Henry II*, 88 COLUM. L. REV. 433 (1988).

174. Second in line is the progressive centralization of the administration of justice by the Crown. In the days of King Cnut, a person could not seek justice from the King if it was available from one of the Barons. William and his successors did not formally eliminate that system, but Henry I and his grandson Henry II established one alternative, centralized, royal judicial system. The royal system was decidedly superior to the decentralized baronial system. The substantive law and procedure varied from one baronial court to another; the royal courts developed uniform law and rules. Enforcement of baronial court decrees was also not guaranteed; by contrast, “the king’s judgments could not be questioned or ignored.” BAKER, *supra* note 156, at 17. Accordingly, because the royal courts “enjoyed a special position” preserving “uniformity” they eventually became a far more attractive forum for litigants than the baronial versions. *Id.* at 14–15; HANNAN, *supra* note 156, at 69; HENRY OF HUNTINGTON, *supra* note 172, at xi–xii; Biancalana, *supra* note 173, at 433–34.

175. *See* MAITLAND & MONTAGUE, *supra* note 155, at 103 (“The desire for continuous legislation is modern. We have come to think that, year by year, Parliament must meet and pour out statutes; that every statesman must have in mind some programme of new laws; that if his programme once became exhausted he would cease to be a statesman.”); POLLOCK, *supra* note 156, at 49–50 (“One reason why judicial precedents acquired exclusive authority was the absence of any other source of law capable of competing with them. Legislation was still exceptional and occasional, and there was no independent learned class. When the king’s court began to keep its rolls in due course, the rolls themselves were the only evidence of the principles by which the court was guided; and the earliest treatises on the common law were produced by members of the judicial staff, or under their direction.”).



England.”<sup>176</sup> It would be unfair to say that judges came to rely on those customs just as a drunk grasps a light post, not for illumination, but for desperate support. But judges did invoke those customs as the justification for their actions.<sup>177</sup> In turn, those rulings fixed guideposts for later adjudications. “The judgment looks forward as well as backward,” Pollock wrote.<sup>178</sup> “It not only ends the strife of the parties but lays down the law for similar cases in the future.”<sup>179</sup> Over time, judicial opinions and their underlying customs evolved into a body of rules that became the primary source of unwritten law throughout England, the “common law,”<sup>180</sup> the body of rules that were “obligatory because they . . . developed through the common custom of the realm.”<sup>181</sup> The common law was “a law common to the whole land,”<sup>182</sup> a “set of rights and obligations immanent in the country, growing incrementally” that were “passed down as part of the patrimony of each new generation.”<sup>183</sup> As understood in England, law was “the property of all, not a device of the ruler[.]”<sup>184</sup>

But law was not just the property of all; it also was their sovereign. Even the Crown was subject to the law.<sup>185</sup> According to Henry de Bracton,<sup>186</sup> it was

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176. See 1 BLACKSTONE, *supra* note 38, at \*67 (“Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority; and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this Kingdom.”); POLLOCK, *supra* note 156, at 49 (“The law of the thirteenth century was judge-made law in a fuller and more literal sense than the law of any succeeding century has been.”); see also *id.* at 48 (“The King’s judges, and they alone, had power to lay down what the general custom of England, in other words the Common Law, for the terms are synonymous in our books, [and] must be taken to be.”).

177. See POLLOCK, *supra* note 156, at 48–49.

178. *Id.*

179. POLLOCK, *supra* note 156, at 48; see also MAITLAND & MONTAGUE, *supra* note 155, at 87; J.C. HOLT, *THE MAKING OF MAGNA CARTA* 51–52 (1965) [hereinafter HOLT, *MAKING OF MAGNA CARTA*].

180. See MAITLAND, *supra* note 157, at 17; POLLOCK, *supra* note 156, at 48–49.

181. ARTHUR L. GOODHART, “LAW OF THE LAND” 27 (1966).

182. MAITLAND, *supra* note 157, at 13.

183. HANNAN, *supra* note 156, at 65.

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

185. See JOHN PHILLIP REID, *THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 12 (2004) [hereinafter REID, *RULE OF LAW*]; CONRAD RUSSELL, *THE CAUSES OF THE ENGLISH CIVIL WAR* 138 (1990).

186. Bracton was one of the earliest authorities for the doctrine of the “rule of law.” REID, *RULE OF LAW*, *supra* note 185, at 11.

English law that authorized the Crown to rule,<sup>187</sup> with the result being that “the supreme authority in political society was not that of the ruler, but that of the law[.]”<sup>188</sup> The “rule of law” therefore emerged as serving a dual role. It empowered a king to govern a nation, while also limiting the power he could lawfully exercise. The law therefore served as a protection against anarchy and despotism, a formal authorization to protect the realm and an essential safeguard of personal liberty for those being governed. That “broad, indeterminate yet vital doctrine of constitutionalism” came to be as important to the legitimacy of a government as the principle of consent through representation.<sup>189</sup>

Over time the common law achieved canonical status through the works of the scholars who compiled it—Ranulf de Glanville in the twelfth century; Bracton in the thirteenth century; Thomas de Littleton, the fifteenth; Sir Edward Coke, the seventeenth; and William Blackstone, the eighteenth.<sup>190</sup> Yet, it was Magna Carta that, in the thirteenth century, fully elevated the customs and law of England to constitutional status. It achieved that result by providing a written, concrete representation of the principle that the customs and law of England governed not only the subjects of the realm, but the king as well, a principle that has come to be known as “the rule of law.”<sup>191</sup>

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187. GOODHART, *supra* note 181, at 27.

188. A.J. CARLYLE, *POLITICAL LIBERTY: A HISTORY OF THE CONCEPTION IN THE MIDDLE AGES AND MODERN TIMES* 53 (1941).

189. REID, *ANCIENT CONSTITUTION*, *supra* note 155, at 4; *see id.* at 5–6 (“Sometimes called the gothic constitution, the ancient constitution was the putative aboriginal political structure of Anglo-American governance, the origins of which are discernable in the mythology of the forests of prehistoric Germany. It was the supposed norm of government for the Angles, the Saxons, and the Jutes when they were said by ancient constitutionalists to have been free people living under elected kings, vested with limited authority, and confined by the rule of customary law. For lawyers, constitutionalists, and parliamentarians of the sixteenth and seventeenth centuries, the ancient constitution provided a standard with which to argue against the actions, programs, laws, and decrees of contemporary government. The further that a government command deviated from the supposed model of the ancient constitution of liberty, the more it could be opposed as unconstitutional, or, at least, challenged as an act of ‘power’ rather than an act of ‘right.’”).

190. *See* MAITLAND & MONTAGUE, *supra* note 155, at 2.

191. *See id.* at 78–79 (discussing Magna Carta).

### B. The Origin of Magna Carta

Magna Carta, also known as the Great Charter,<sup>192</sup> was an extraordinary legal and political document. Like the Declaration of Independence, Magna Carta was the product of a rebellion.<sup>193</sup> The comparison, however, largely ends there.

Magna Carta was born during a time of great political tumult triggered by John's military failures in expensive overseas wars,<sup>194</sup> his never-ending political intrigue, and his repeated personal cruelties.<sup>195</sup> Angry and rebellious barons, initially supported by the church, renounced their feudal obligations to King John and gathered their forces to oppose his continued, arbitrary reign. Once the city of London—the capital, largest city, and “queen of the whole kingdom”<sup>196</sup>—announced its support for the rebellion, the barons gained the upper hand. They took advantage of their position of strength by immediately demanding that the politically weakened king agree to their numerous petitions for relief, set forth in a document called the Articles of the Barons.<sup>197</sup> Perhaps recognizing that discretion is the better part of valor, King John acceded to the

192. Edward Coke called Magna Carta “the Great Charter” not because of its length, but “in respect of the great importance, and weightiness of the matter.” 2 EDWARD COKE, INSTITUTES ON THE LAWEES OF ENGLAND 4 (1798). In truth, Coke took some poetic license in so describing the agreement. The document did not call itself, or even contain the term “Magna Carta” and did not acquire that name until 1217. Even then, the term “Magna Carta” came into being as “a scribal insertion above a line in the chancery rolls, prompted by the second thought of a drafting clerk,” to distinguish that charter from the contemporaneous, smaller Charter of the Forest. DAVID CARPENTER, MAGNA CARTA 5 (2015). The notion that Magna Carta was normatively “great” did not arise until the cusp of the fourteenth century. See *id.* at 5–6; Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1063 (1947). For classic discussions of Magna Carta, see, e.g., MAGNA CARTA COMMEMORATION ESSAYS (Henry Elliott Malden ed., 1917); A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY (1998) [hereinafter HOWARD, MAGNA CARTA]; THE ROOTS OF LIBERTY: MAGNA CARTA, ANCIENT CONSTITUTION, AND THE ANGLO-AMERICAN TRADITION OF RULE OF LAW (Ellis Sandoz ed., 1993); J.C. HOLT, MAGNA CARTA (2d ed. 1992) [hereinafter HOLT, MAGNA CARTA]; A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA (1968) [hereinafter HOWARD, THE ROAD FROM RUNNYMEDE].

193. See HOLT, MAKING OF MAGNA CARTA, *supra* note 179, at 3.

194. See CARPENTER, *supra* note 192, at 70 (“The financial burdens placed on England to defend and recover the continental empire were the single most important cause of Magna Carta. Had John been content with ruling England and dominating Britain and Ireland, there would have been no charter.”).

195. For a discussion of the events leading up to Magna Carta, see Larkin, Jr., *The Dynamic Incorporation*, *supra* note 150, at 411–13.

196. CARPENTER, *supra* note 192, at 117–18.

197. *Id.* at 117–18, 315–23; R.H. Hemholz, *Magna Carta and the Ius Commune*, 66 U. CHI. L. REV. 297, 298 (1999) (“A distinguished modern historian has described the Charter as a ‘long and disorderly jumble,’ adding that it appears to be more a collection of ‘answers given by many persons to the question, ‘What is being done wrong?’ than it does a constitutional plan.” (quoting SAMUEL E. THORNE, *What Magna Carta Was*, in THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY 3, 4 (1965))).

barons' demands in 1215 "in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June, in the seventeenth year of [his] reign."<sup>198</sup>

Unlike the Declaration of Independence, Magna Carta was neither a declaration of universal human rights nor a lofty statement of principled political justifications for a revolt. Instead, Magna Carta was, at bottom, a peace treaty.<sup>199</sup> Moreover, even in that limited role, Magna Carta was originally thought to be a failure. The civil war resumed almost before the royal wax seal had hardened, transforming the charter from a document marking the end of civil war into one defining its start.<sup>200</sup> Had that conflict continued to a military resolution, the Charter might have become as noteworthy in history as the Kellogg-Briand Pact, but Magna Carta was destined for greater things. King John's unexpected death in 1216 left the throne to his nine-year-old son and successor Henry III, who was far less combative than his father.<sup>201</sup> As a peace offering, Henry III reissued a shortened, revised version of Magna Carta known as the Charter of Liberties of

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198. CARPENTER, *supra* note 192, at 69 (quoting signature section of Magna Carta).

199. Like all such agreements, it hoped to accomplish the very practical result of ending a civil war. GOODHART, *supra* note 181, at 63 ("The whole impression given by the Charter is that it is trying to produce concrete answers for concrete problems."). Neither the barons nor the Crown intended Magna Carta to reflect a shared belief in "the universal brotherhood of man." Aside from the fact that it "certainly did not offer equal protection of the law to all of the king's subjects," Magna Carta "was, in many ways, a selfish document in which the baronial elite looked after its own interests." CARPENTER, *supra* note 192, at vii; *see also id.* at 24 ("The Charter was above all about money. Its overwhelming aim was to restrict the king's ability to take it from his subjects."). Magna Carta's sixty-three articles incorporated and endorsed various features of the common law, yet none of its signatories intended Magna Carta to function as a legal treatise. In return for ending their hostilities, the barons demanded that King John reaffirm the rights that the barons believed they already enjoyed under English law. WILLIAM S. MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION* 121–22 (2d ed. 1914) ("While democratic enthusiasts in France and America have often sought to found their liberties on a lofty but unstable basis of philosophical theory embodied in Declarations of Rights, Englishmen have occupied lower but surer ground, aiming at practical remedies for actual wrongs, rather than enunciating theoretical platitudes with no realities to correspond."); *see id.* at 382 ("The object of the barons was to protect themselves and their friends against the King, not to set forth a scientific system of jurisprudence."). At the same time, "[t]he text resulting from the negotiations at Runnymede was not simply a shopping list of particular grievances without widely applicable principles, but a broad reform programme." RALPH V. TURNER, *MAGNA CARTA* 67 (2003). In essence, the charter was "a grand compromise," MAITLAND & MONTAGUE, *supra* note 155, at 78, containing "nothing whatever of the glamour of romance." William S. McKechnie, *Magna Carta (1205–1915)*, in *MAGNA CARTA COMMEMORATION ESSAYS*, *supra* note 192, at 10.

200. *See* William S. McKechnie, *Magna Carta (1205–1915)*, in *MAGNA CARTA COMMEMORATION ESSAYS* (Henry Elliott Malden ed., 1917).

201. *Id.*

1216. The new charter quelled further conflict, and Henry III remained on the throne.<sup>202</sup>

Time has been good to the Great Charter. It has become a foundational document in Anglo-American legal history, a written guarantee of fundamental liberties. English law came to treat Magna Carta as “the Torah” of English legal traditions<sup>203</sup> or “the Bible of the English Constitution.”<sup>204</sup> Sir Edward Coke considered Magna Carta “declaratory of the principal grounds of the fundamental laws of England,” and as “sacred and unalterable.”<sup>205</sup> The power of Magna Carta lies in the document when considered as a whole, particularly King John’s agreement to what it guaranteed. “The value of the Charter . . . is more than the mere sum of the values of its terms or any or all of its provisions”; that value lies in the fact that the agreement “enunciated a definite body of law, claiming to be above the King’s will and admitted as such by John.”<sup>206</sup> Magna Carta came to stand as proof that a written document could make notable revisions to the law, could fend off tyrannical government officials, could restrain executive power, and could grant rights to the entire community, not merely to specific favored individuals.<sup>207</sup> In all those respects, Magna Carta foreshadowed our Constitution and Bill of Rights.

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202. See DORIS M. STENTON, *AFTER RUNNYMEDE: MAGNA CARTA IN THE MIDDLE AGES* 16–21 (1965); JAMES K. WHEATON, *THE HISTORY OF THE MAGNA CARTA* 8–9, 52–53 (2011).

203. HANNAN, *supra* note 156, at 110.

204. DANNY DANZIGER & JOHN GILLINGHAM, *1215: THE YEAR OF MAGNA CARTA* 277–78 (2003) (“In 1770 William Pitt the Elder called it ‘the Bible of the English Constitution’ . . . . In 1956 the English judge, Lord Denning, described it as ‘the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.’”); see also, e.g., HOLT, *MAGNA CARTA*, *supra* note 192, at 21; HOWARD, *THE ROAD FROM RUNNYMEDE*, *supra* note 192, at 24; WHEATON, *supra* note 202, at 28–32; Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365, 370 (1891) (“It was, according to Lord Coke, confirmed no less than thirty-two times by subsequent monarchs.”). In 1297, King Edward I placed Magna Carta on the Statute Books of England. See HOLT, *MAKING OF MAGNA CARTA*, *supra* note 179, at 55. Though denominated as a statute, Magna Carta was treated as a unique law, more akin to a constitution than a statute. See Radin, *supra* note 192, at 1067–68. In 1368 Parliament effectively bestowed on Magna Carta the status of a constitution by providing that it would nullify the terms of any inconsistent law. See HOWARD, *THE ROAD FROM RUNNYMEDE*, *supra* note 192, at 9 (“[Magna Carta shall be] holden and kept in all points; and if any Statute be made to the contrary that shall be holden for none.” (alteration in original) (quoting 2 Edward III, c. 1 (1368))).

205. Grey, *Origins*, *supra* note 10, at 852.

206. MCKECHNIE, *supra* note 199, at 123.

207. See GOTTFRIED DIETZE, *MAGNA CARTA AND PROPERTY* 6 (1965) (“In tune with its emphasis upon general, freedom, Magna Carta also recognizes the general rule of law. It not only proscribes specific arbitrary abuses of royal power by specific norms but leaves no doubt that these norms are mere manifestations of a general rule of law. The value of Magna Carta thus lies not only in forcing the King to respect certain rules, but in making him obey the rule of law in general. The Charter is not only a document in which a variety of rules define a variety of governmental

Article 39 is the best-known feature of Magna Carta.<sup>208</sup> Article 39 is a concrete guarantee against capricious rule. Seeking to restore the customary rights of Englishmen and prevent the Crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime,<sup>209</sup> a not uncommon occurrence under King John,<sup>210</sup> Article 39 provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go send against him, except by the lawful judgement of his peers or by the law of the land.”<sup>211</sup> Article 39, “a plain, popular statement of the most elementary rights,”<sup>212</sup> what we today call the “rule of law,”<sup>213</sup> was designed to prevent the Crown from acting in an arbitrary, despotic manner. As one scholar put it, Magna Carta required the king to govern “by law and custom, not by the

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limitations, but also one in which the establishment of the rule of law creates limited government.”); HOLT, *MAGNA CARTA*, *supra* note 192, at 18–19; PLUCKNETT, *supra* note 171, at 25–26; TURNER, *supra* note 199, at 58 (“The barons had ample precedents for their call for a charter of liberties to curb King John; Magna Carta’s novelty was its general grant of liberties to all free men of the kingdom, not to a specific community.”).

208. See DANZIGER & GILLINGHAM, *supra* note 204, at 5 (“The eloquence of [Chapter 39 and 40 of Magna Carta], the nobility and idealism they express, has elevated this piece of legislation to eternal iconic status.” (alteration in original)); GOODHART, *supra* note 181, at 14 (“It is very short, but it is doubtful whether any other thirty-seven words have ever given rise to more debate or have had a greater practical effect.”); HOWARD, *MAGNA CARTA*, *supra* note 192, at 14; SOURCES OF OUR LIBERTIES 5 (R. Perry & J. Cooper eds., 1959). Article 39 may have roots in canon law. See Hemholz, *supra* note 197, at 356.

209. STENTON, *supra* note 202, at 15 (“[Article 39 was] certainly inspired by immediately remembered and fiercely resented acts of violence on the part of the Crown committed during the troubled years after 1208.” (alteration in original)). The barons tried to use Magna Carta to improve the royal system of justice. See HOLT, *MAKING OF MAGNA CARTA*, *supra* note 179, at 50. As part of their reform, the barons demanded that the Crown dispense justice, not simply to its friends, supporters, and allies, but to them as well. “From this stemmed one of the fundamental cries of 1215: the demand for justice and principle, laid down in chapter 39 of the Charter, that judgment should precede execution.” *Id.* at 53–54.

210. See DIETZE, *supra* note 207, at 24 (“The rule of law, which had been confirmed by the Coronation Charter and subsequent documents but had gradually faded away under John’s predecessors, was now virtually replaced by the rule of one man [viz., John].” (alteration in original) (footnote omitted)); MCKECHNIE, *supra* note 199, at 96 (“The power of the Norman kings might almost be described as irresponsible despotism, tempered by fear of rebellion.”); TASWELL-LANGMEAD, *supra* note 155, at 111 (“In disposition and character John was an oriental despot, a tyrant of the worst order. . . . [John] was guilty of acts of cruelty rivaling those of Nero.” (footnote omitted)); TURNER, *supra* note 199, at 33.

211. HOLT, *MAGNA CARTA*, *supra* note 192, at 461.

212. Shattuck, *supra* note 204, at 373; see 1 BLACKSTONE, *supra* note 38, at \*129–30 (“[T]he great charter of liberties . . . contained very few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England.”); MAITLAND & MONTAGUE, *supra* note 155, at 79 (“[E]ven in the Great Charter there is not much new law; indeed, its own theory of itself (if we may use such a phrase) is that the old law, which a lawless king has set at naught, is to be restored, defined, covenanted, and written.”).

213. See REID, *RULE OF LAW*, *supra* note 185.

caprices of his evil heart.”<sup>214</sup> The guarantee that the Crown could administer punishment only in accordance with “the law of the land” meant, according to Coke, that “no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the Common Law, Statute Law, or Custome of England,”<sup>215</sup> a concept familiar to the barons at Runnymede. Blackstone saw Article 39 as protecting the “absolute rights of every [Englishman],” *viz.*, the right to life, personal security, personal liberty, and private property.<sup>216</sup>

Expressed in today’s language, Article 39 protected “life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, not all individual rights), and property.”<sup>217</sup> As one scholar has noted, “the main point in this [document], the chief grievance to be redressed, was the King’s practice of attacking the barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his curia.”<sup>218</sup> Article 39 sought to end that state of affairs by forcing on the king the same laws that governed everyone else in England.<sup>219</sup>

Magna Carta has come to represent several tenets in Anglo-American law. First, law, particularly a fundamental or constitutional law, is the best hope to prevent despotism and secure liberty by restraining the power of the sovereign.<sup>220</sup> Second, the law serves two complementary functions: it grants government officials the legitimacy to exercise the powers of their office and, in so doing, to restrict the freedom of individuals, while also reining in the power government officials may exercise in the performance of their duties.<sup>221</sup> And

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214. MCKECHNIE, *supra* note 199, at 125.

215. 2 COKE, *supra* note 192, at 45; *see* Corwin, *supra* note 13, 368–69.

216. 1 BLACKSTONE, *supra* note 38, at \*9 (alteration in original). Blackstone defined “the right of personal liberty” as “the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct; without imprisonment or restraint, unless by due course of law.” *Id.* at \*11.

217. Shattuck, *supra* note 204, at 373 (footnote omitted).

218. *See* C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 41 (1914) [hereinafter McIlwain, *Due Process of Law in Magna Carta*].

219. *See* ROBERT BARTLETT, *ENGLAND UNDER THE NORMAN AND ANGEVIN KINGS*, 65 (2000).

220. *See* CHARLES MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 67 (rev. ed. 1947) [hereinafter MCILWAIN, *CONSTITUTIONALISM*]; JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 56 (1988) [hereinafter REID, *THE CONCEPT OF LIBERTY*].

221. *See* 1 BLACKSTONE, *supra* note 38, at \*12 (“[T]he law is in England the supreme arbiter of every man’s life, liberty, and property . . . .”); *see also* GOODHART, *supra* note 181, at 62 (“[T]he chief lesson of chapter 39 of Magna Carta was there need be no unlimited powers of government.”); 1 FREDERICK POLLOCK & FREDERICK W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 152 (2d ed. 1909) (“[I]t means this, that the king is and shall be below the law.”).

third, every person is entitled to enjoy certain “inalienable rights”—fundamental legal guarantees that no government official, high or low, may take away.<sup>222</sup>

The Crown and Parliament have reaffirmed the core guarantees of Magna Carta on more than forty occasions since 1215.<sup>223</sup> In the fourteenth century, Parliament revised Magna Carta in two ways; one was important, the other was not. Parliament declared that the guarantees contained in Magna Carta were promised to the English people for all time and any statute that infringed on those guarantees was declared to be null and void.<sup>224</sup> In so doing, Parliament effectively elevated Magna Carta to the level of a constitution, or at least rendered it superior to any act of the Crown.<sup>225</sup> In addition, Parliament changed the phrase “*per legem terrae*” or “the law of the land” to “due process of law.”<sup>226</sup> That revision, however, did not alter its meaning, effect, or significance.<sup>227</sup>

222. See HOLT, MAKING OF MAGNA CARTA, *supra* note 179, at 46–48 (“[M]en were demanding for the community of the realm what they had sought hitherto only for local communities. In so doing, they were moving beyond the concept of individual privilege to the idea of public right, for many of the privileges stated in the Charter could only be held by the community as a whole. . . . The progression from individual or local liberties to general liberties carried deep implications. Local or individual privileges could be viewed as exceptions which proved the rule, as acts of grace which did not infringe the general superiority of the Crown. Liberties granted to the community as a whole could not be so regarded. . . . This involved a permanent and general definition of the power of the Crown. This was why the issue of the Great Charter could only be resolved by war.” (footnote omitted)).

223. See, e.g., TURNER, *supra* note 199, at 3; Radin, *supra* note 192, at 1063–68. Over time, some articles were deleted. Article 39 survived, but was renumbered as Article 29. See DIETZE, *supra* note 207, at 58–59.

224. Radin, *supra* note 192, at 1075.

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

226. 28 Edw. III, c. 3 (1354), reprinted in THE STATUTES OF THE REALM 345 (Dawsons of Pall Mall 1963) (1810); MCILWAIN, CONSTITUTIONALISM, *supra* note 220, at 49 (“The men of 1368 were not far wrong in calling it [*viz.*, “the law of the land”] *l’auncien leye de la terre*, and the Parliament of 1350 do not depart from the ancient meaning of *per legem terrae* when they paraphrase it *par voie de la lei*, nor the Parliament of 1354 in making it ‘par due process de lei,’ whence it has come, no doubt, largely through the influence of Coke’s writings, into our federal and state constitutions as ‘due process of law.’” (alteration in original) (footnotes omitted)).

227. See, e.g., Walker v. Sauvinet, 92 U.S. 90, 93 (1875) (“Due process of law is process due according to the law of the land.”); HOWARD, MAGNA CARTA, *supra* note 192, at 15 (“[A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century ‘due process of law’ and ‘law of the land’ were interchangeable.”); *id.* at 14–15 (“In Magna Carta’s ‘law of the land’ we can find the early origins of the concept of ‘due process of law,’ one of the cornerstones of our jurisprudence.”); Shattuck, *supra* note 204, at



This summary of the history of English constitutionalism leaves us with two points: First, by 1215, England had adopted an unwritten constitution based on the long-accumulated customs of the nation, traditions reaching back at least six hundred years. That constitution was committed to advancing liberty by corralling the power of the Crown. The means used was the law, then seen as English traditions going back centuries.<sup>228</sup> Second, Magna Carta was a signal achievement of English constitutionalism. Given its embodiment in a written charter containing King John's express guarantee that he, his successors, and his agents would be governed by law now and forever, Magna Carta was the first Anglo-American guarantee of government by and under written law. The English people also held in great esteem other landmark guarantees of civil liberties,<sup>229</sup> but Magna Carta was *primus inter pares*.

That is where English law stood not only when the colonists began their journeys to America and when, one hundred and fifty years later, Americans began to redefine their relationship to their Mother Country.

### C. The American Adoption of Magna Carta

Along with food, clothes, and other supplies, the American colonists carried with them the English common law,<sup>230</sup> “those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature.”<sup>231</sup> The colonists saw the English common law as a hard-won protection against arbitrary rule that they hoped would serve the same function in the New World,<sup>232</sup> no less important to this nation's early settlers

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369 (“[I]t is well settled that ‘due process of law’ and ‘law of the land’ are identical in meaning . . .” (footnote omitted)).

228. See JENKS, *supra* note 156, at 3.

229. See, e.g., Petition of Right 1628, 3 Car. 1, c. 1; Habeas Corpus Act 1640, 16 Car. 2, c. 10; Habeas Corpus Act 1679, 31 Car. 2, c. 2 (Eng.); The Triennial Act of 1641, 12 Cha. 1, c. 12; An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown 1689, 1 W. & M. c. 2 (Eng.).

230. See, e.g., *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (“The colonists brought the principles of Magna Carta with them to the New World[.]”); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907); *Hurtado v. California*, 110 U.S. 516, 530 (1884) (“The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history[.]”); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30–31 (1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 299–300 (1998).

231. 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 471 (2010); see also, e.g., *Kansas*, 206 U.S. at 94 (“[T]he accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes.”).

232. See JACK P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 4–5 (2011); EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763–89* 6–7 (4th ed. 2013);

than it was to those who remained in the Mother Country.<sup>233</sup> Early American legal history shows the importance to our nation of the constitutional protection of liberty.<sup>234</sup> In order to persuade people to settle in America, the organizers of the colonies “not only had to offer them property in land but also property in rights by which English people had traditionally secured their real and material possessions.”<sup>235</sup> The colonial charters, therefore, granted colonists the rights of Englishmen.<sup>236</sup>

Magna Carta was to play a critical role in American constitutional law.<sup>237</sup> The colonists believed that law traced its legitimacy to the unwritten customs of the

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H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 6 (1917).

233. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE 180* (1965) (“One principle upon which all Englishmen then agreed was the rule of law. When in the late eighteenth century, they spoke of the ‘liberties of free-born Englishmen,’ the rule of law was in the back of their minds: resistance to Charles I in the name of law, vindication of law against James II. Colonial leaders were familiar with the works of Algernon Sydney, [James] Harrington, and [John] Locke, who urged every Englishman to resist every grasp for power; to stand firm on ancient principles of liberty, whether embalmed in acts of Parliament or adumbrated in the ‘Law of Nature.’”); *see also, e.g.*, WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 13 (1994) (“One of the most intense concerns of Americans in the prerevolutionary period was to render individuals secure in their lives, liberties, and properties from abuses of governmental power.”). Indeed, “the systems of law and liberty that, contemporary English and many foreign observers seemed to agree, distinguished English people from all other peoples on the face of the globe” was more important to them than England’s combined military and commercial power. GREENE, *supra* note 232, at 6 (footnote omitted).

234. *See* NELSON, *supra* note 233, at 141–42 (“[T]he restraint of governmental power and the security of individuals in their lives, liberties, and property were among the most intense concerns of free colonial British Americans of all social classes and that in Massachusetts they managed, to an extraordinary degree, to construct a polity that thoroughly reflected these concerns.”); JOHN PHILIP REID, *IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION* (1981) [hereinafter REID, *IN A DEFIANT STANCE*].

235. NELSON, *supra* note 233, at 9.

236. *See* Hazeltine, *supra* note 232, at 6–8. The colonists saw royal charters as a direct compact with the King. *Id.* at 8.

237. *See, e.g., id.* at 1–33.

English people.<sup>238</sup> Familiar with Coke,<sup>239</sup> the colonists saw Article 39 of Magna Carta as an example of “the broader concept of higher-law constitutionalism,”

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238. See HANNAN, *supra* note 156, at 107 (“English exceptionalism was defined with reference, not to racial characteristics, military prowess, or island geography, but to law, liberty, and representative institutions.”); GREENE, *supra* note 232, at 141 (“For Britons on either side of the Atlantic during the pre-Revolutionary crisis . . . the law did not always mean command or will, and legal theorists, judges, and lawyers did not necessarily associate law with sovereignty. Rather, in the context of British and British-American legal traditions, law in the 1760s and 1770s was still thought of as being as much custom and community consensus as sovereign command. As a result, eighteenth-century law throughout the British world was considerably less coercive and considerably more dependent for its enforcement upon community support than most earlier historians have recognized.”) (footnote omitted); *id.* at 180–81 (“In English jurisprudence, as [Professor] Reid explains, custom obtained the force of law through a combination of time and precedent. Whatever had been done from time immemorial in a community was legal; whatever had been abstained from was illegal. Historical fact was the source of constitutional custom, and, according to contemporary English practice well into the late eighteenth century, rights established by custom and proven by time were legal rights that, as [Professor Thomas] Grey notes, were judicially enforceable, even against the highest legislative and executive organs of government.”) (footnote and internal punctuation omitted)); see also REID, IN A DEFIANT STANCE, *supra* note 234; Grey, *Origins*, *supra* note 10.

239. See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (“Edward Coke[’s] . . . Institutes ‘were read in the American Colonies by virtually every student of law[.]’” (quoting *Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967))); DANZIGER & GILLINGHAM, *supra* note 204, at 272; HOWARD, MAGNA CARTA, *supra* note 192, at 22–23; WOOD, *supra* note 230, at 162–63; see Gedicks, *supra* note 12, at 614 (“Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke’s career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law. A large number of seventeenth-century American lawyers studied law in England, where Coke’s Reports and Institutes were a staple of legal education, just as they were in the American colonies until the publication of Blackstone’s Commentaries in 1765.”). Coke had extolled the virtues of Magna Carta in his *Institutes of the Lawes of England*, a highly influential four-volume common law treatise published between 1628 and 1644. See DANZIGER & GILLINGHAM, *supra* note 204, at 272; PLUCKNETT, *supra* note 171, at 25 (“The great commentary on [Magna Carta] by Sir Edward Coke in the beginning of his Second Institute became the classical statement of constitutional principles in the seventeenth century, and was immensely influential in England, America and, later still, in many other countries as well.”) (footnote omitted); HOWARD, MAGNA CARTA, *supra* note 192, at 28 (“eulogizing Magna Carta”).

Blackstone published his *Commentaries* more than a century after Coke’s *Institutes* and almost a century after the Glorious Revolution. Unlike Coke, Blackstone believed in Parliamentary Supremacy, and the Framers were quite familiar with his work too. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999); *Schick v. United States*, 195 U.S. 65, 69 (1904). Nonetheless, the colonists continued to rely on Coke’s theories of constitutional law. See Gedicks, *supra* note 12, at 614 (“Even after Blackstone, Coke’s higher-law constitutionalism remained the more influential school of thought before and during the Revolution, when the arguments of Locke and the Whigs of the Glorious Revolution dominated legal and political thought in the colonies.”) (footnotes omitted); *id.* at 632 (“Coke may not actually have held the position that the law of the land or the due process of law limited Parliament, but late eighteenth-century Americans believed that he did, and this belief was a cornerstone of their constitutional argument against British control of the colonies.”) (footnote omitted); WOOD, *supra* note 230, at 162–63.

which bound the Crown and Parliament alike to follow the “natural and customary rights recognized at common law.”<sup>240</sup> The Framers’ generation used the phrase “the law of the land” or “due process of law” in numerous important political statements—such as the Virginia Resolutions of 1769 and the Declaration and Resolves of the First Continental Congress of 1774<sup>241</sup>—and in contemporary legal documents, such as statutes passed by colonial assemblies, resolutions enacted by the Continental Congress, the Declaration of Independence, later-enacted state constitutions,<sup>242</sup> and ultimately in the Fifth Amendment.<sup>243</sup> Like its ancestor term in Magna Carta, “the law of the land,” the concept of “due process of law” has bound the government to act according to law.<sup>244</sup>

Yet, there was an important distinction between the “the rule of law” as known to the British and as understood by the colonists. In the sixteenth century, the English understood the common law as the unwritten embodiment of the historic customs and folkways, a form of fundamental or constitutional law that both empowered and restricted the authority of the Crown and guaranteed certain

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240. Gedicks, *supra* note 12, at 614.

241. See, e.g., Hazeltine, *supra* note 232, at 22.

242. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2633 & n.3 (2015) (Thomas, J., dissenting); HOWARD, THE ROAD FROM RUNNYMEDE, *supra* note 192, at xi, 15–16, 211–15, 19, app. B at 397 (listing charters); Gedicks, *supra* note 12, at 622–23 (“The Declaration [of Independence] follows its natural law introduction with a long list of common law rights and liberties which George III was alleged to have either violated, neglected, or failed to secure against parliamentary encroachment. The Declaration even accused the King of conspiring with Parliament to subject the colonies ‘to a jurisdiction foreign to our constitution and unacknowledged by our laws,’ employing the term ‘constitution’ in the same manner as the English Whigs did to refer to fundamental laws that limited government . . . .” (footnotes omitted)); *id.* at 627 (“[E]ight of the original thirteen states, plus Vermont, enacted ‘law of the land’ clauses—paraphrases of Chapter 29, which generally declared or guaranteed that citizens could not be deprived of life, liberty, property, or privilege, except by the ‘lawful judgment of their peers or the law of the land.’”); Hazeltine, *supra* note 232 at 25; A. E. Dick Howard, *Magna Carta’s American Journey*, in *MAGNA CARTA: MUSE AND MENTOR* 103–17 (Randy J. Holland ed., 2014).

243. See, e.g., *Kerry*, 135 S. Ct. at 2133; *Den ex rel. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 547 (4th ed. 1873).

244. See REID, RULE OF LAW, *supra* note 185 at 93 (“Rule-of-law belonged to the seventeenth and eighteenth centuries. It was the cornerstone of the jurisprudence of liberty when liberty was struggling to survive.”); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) (“In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process.” (footnote omitted)); MCLWAIN, CONSTITUTIONALISM, *supra* note 220, at 30.

liberties to all Englishmen.<sup>245</sup> The English treated certain written charters such as Magna Carta as written guarantees of England's fundamental law, not as examples of Parliament's sovereign lawmaking power. The events that occurred in English political history between 1640 and 1688—the English Civil War, the Interregnum, the Restoration, and the Glorious Revolution—fundamentally altered the English understanding of the concept of “sovereignty.”<sup>246</sup> Parliament was now the sovereign power in England.<sup>247</sup> Even the Crown accepted that political reality, to the point that, in their coronation oaths, William and Mary agreed to govern according to the laws of Parliament,<sup>248</sup> a concession that, given the events preceding it, immediately established Parliamentary supremacy over the Crown.<sup>249</sup>

Over time, law no longer stood as merely the longstanding customs of the English people; it became the dictate of the sovereign, which had clearly become Parliament.<sup>250</sup> Law also was no longer a restriction on the power of Parliament; it was whatever legislation Parliament passed. The consequence was to fundamentally alter the longstanding British understanding of English constitutionalism. Now, Parliament could not only supplement or modify the common law, but could also define the supreme law of the land.<sup>251</sup> Accordingly,

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245. See, e.g., GREENE, *supra* note 232, at 141; CHARLES HOWARD MCILWAIN, THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION 2–3, 9–11, 16–17 (1923) [hereinafter MCILWAIN, THE AMERICAN REVOLUTION].

246. For discussions of the significance of that period, see, for example, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1982); HANNAN, *supra* note 156; CHRISTOPHER HILL, THE CENTURY OF REVOLUTION, 1603–1714 (1982); THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II (1979); STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION (2011).

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

248. See MCILWAIN, THE AMERICAN REVOLUTION, *supra* note 245 at 3, 43.

249. See GOODHART, *supra* note 181, at 50; MORGAN, *supra* note 232, at 8; 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 55 (1987) [hereinafter REID, AUTHORITY OF LAW]; REID, RULE OF LAW, *supra* note 185, at 75.

250. See BURKE, *supra* note 246, at 7; HANNAN, *supra* note 156, at 80–81; HILL, *supra* note 246, at 127; MACAULAY, *supra* note 246, at 105; PINCUS, *supra* note 246, at 89.

251. See GOODHART, *supra* note 181, at 75–76 (“The Glorious Revolution had established the principle of parliamentary supremacy over the [C]rown. Once Parliament began to transform

the seventeenth century witnessed the success of Hobbes' theory of sovereignty—*viz.*, the proposition that in every state there must be a sovereign uncontrolled by law. As far as Parliament was concerned, Hobbes was correct—and *it* was that sovereign.<sup>252</sup>

By contrast, Americans still held the seventeenth century English understanding of the common law as the unwritten embodiment of the historic customs and folkways, a form of fundamental or constitutional law that both empowered and restricted the authority of the Crown and guaranteed certain liberties to all Englishmen.<sup>253</sup> Even after the Glorious Revolution the colonists continued to honor the seventeenth century belief that fundamental English law, including all of its protections of liberty, was sovereign, regardless of the allocation of power between the Crown and Parliament (and the colonies, for that matter).<sup>254</sup> One reason was that the change in custom and philosophy in England was not obvious in the colonies.<sup>255</sup> Another reason was that, before 1763, the Crown rarely interfered in the colonists' business, leaving them with the belief that they were masters of their own fates.<sup>256</sup> These longstanding

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'supremacy' into 'sovereignty' and exercise supremacy over the law, as well as over the Crown, the English—or the Cokeian-American—theory of rule-of-law could not survive in the British constitutional world. The fact that the concept of rule-of-law, for so long a barrier constraining the power of the Crown on behalf of liberty, could not, in the same way, restrain Parliamentary power, not only explains much of the American Revolution's constitutional controversy but sums up why the controversy had to be resolved by war. Legal theory in Britain was being forced apart from legal theory in the colonies, not only over the issue of constitutional restraint on legislative authority but over the immutability of rule-of-law.'"). The members of Parliament felt the need to maintain the supremacy of that institution even after 1688 in order to fend off advances by the Crown to regain the upper hand. See REID, *RULE OF LAW*, *supra* note 185, at 100.

252. See GOODHART, *supra* note 181, at 60; HANNAN, *supra* note 156, at 201; Hazeltine, *supra* note 232, at 30–31.

253. See, e.g., GREENE, *supra* note 232, at 141; HANNAN, *supra* note 156, at 201; MCILWAIN, *CONSTITUTIONALISM*, *supra* note 220, at 2–3, 9–11, 16–17.

254. See ANDREW CUNNINGHAM MCLAUGHLIN, *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* viii (1932).

255. See, e.g., Hazeltine, *supra* note 232, at 3.

256. See GREENE, *supra* note 232, at 179–80; MORGAN, *supra* note 232, at 9 ("For Americans, the great thing about this empire, apart from the sheer pride of belonging to it, was that it let you alone. The average colonist might go through the year, might even go through a lifetime, without seeing an officer of the empire."); Grey, *Origins*, *supra* note 10, at 867 ("In the colonies, actual governing power was divided; governors and colonial legislatures contested for local power with the theoretically supreme English Parliament exercising only an incomplete and sporadic control that, in Bernard Bailyn's words, 'touched only the outer fringes of colonial life.'" (quoting BAILYN, *supra* note 230, at 203)). From the formation of the Virginia Colony to 1763, neither the Crown nor Parliament had focused on the constitutional question of the division of authority between England and the colonies. At a macro level, Parliament regulated the colonies' external affairs, such as the mercantile system of trade, and otherwise left the colonies discretion to govern themselves as they saw fit. At a micro level, there were no organized police forces in the colonies, and no divisions of soldiers were garrisoned in the cities. The only local royal officials were

practices lead Americans to believe that each colony was largely an independent polity within the British Empire, capable of and entitled to self-governance.<sup>257</sup>

Parliament's hands-off policy of colonial governance changed in 1763. With the successful close of what Americans call the French and Indian War and what the English label the Seven Years' War, the English government's debt had

governors, customs officers, and judges. Each group, however, suffered from a severe handicap. The governors relied on the state assemblies for the revenue necessary to perform any royal business, which left them more paper tigers than powerful stand-ins for the King. Royal customs officers held potentially muscular offices, but suffered from an equally disabling flaw, this one to their character—they were “a venal lot,” easily bribed, and did little to restrain the colonists. MORGAN, *supra* note 232, at 9. In truth, though, the customs officers may have had no other choice. Had they tried to vigorously enforce the customs laws in a manner that the colonists did not support, they faced not only organized local resistance, but also common law actions for damages before a jury that could decide the facts and the law, a power that rendered judges largely feeble. Even when a judge ruled against a local citizen, the sheriffs and constables responsible for enforcing the judgment were powerless to carry out that duty in the face of organized local opposition. To be sure, in theory, the King could direct the Crown's business in America. But that theory and the reality were far apart. Before 1763, the multiple layers of bureaucracy between the Crown and the colonists meant that the latter were free from any English interference in their lives.

256. See GREENE, *supra* note 232, at 63–66, 140, 142; MORGAN, *supra* note 232, at 9, 11 (“The government of Great Britain had not been designed to cover half the globe, and when Englishmen were not busy extending their possessions still farther, they were apt to regard the problem of turnpikes in Yorkshire as vastly more important than the enforcement of the Navigation Acts in New York. Administration of the colonies was left to the King, who turned it over to his Secretary of State for the Southern Department (whose principal business was England's relations with southern Europe). The Secretary left it pretty much to the Board of Trade and Plantations, a sort of Chamber of Commerce with purely advisory power. The Board of Trade told the Secretary what to do; he told the royal governors; the royal governors told the colonists; and the colonists did what they pleased.”). Beginning in 1763, however, all that started to change.

257. America was subject to Parliamentary regulation of the colonies' external affairs, such as trade, but was free from Parliamentary interference in local colonial governance, such as taxation. The widespread nature of that understanding was significant given the weight afforded to settled customary norms under the English constitution. To the colonists, the unwritten practice governing the relationship between England and America was entitled to the same legal authority as the unwritten customs of pre-Magna Carta common law in England. See GREENE, *supra* note 232, at 141–48. That tradition, along with the formal, informal, and sometimes-extralegal actions of the community—*viz.*, the colonial version of the 1950s “massive resistance” in many southern states, *see id.* at 144–47 (describing the “public uprisings” and actions of “patriot committees” to frustrate the operation of English officials) Grey, *Origins*, *supra* note 10, at 876—rendered English law subordinate to the law expressed in colonial assemblies and on American streets. The colonists' opposition to Parliament's equally-strongly-held belief in its own sovereignty over the colonies was not grounded in a petulant desire for anarchy. Instead, it represented the colonists' practical application to their own circumstances of the principle of English political philosophy that a widespread, longstanding practice could become accepted as part of an evolving, unwritten constitution and the belief that the colonists could establish their own governing traditions. See Grey, *Origins*, *supra* note 10, at 849–50; Hazeltine, *supra* note 232, at 5 (““So far as [the English Common Law] protected them from the English government and from royal officials they looked upon it as their birth-right; so far as it interfered with their development it was to be disregarded.” (footnote omitted)).

increased from £72 million in 1755 to £130 million in 1763.<sup>258</sup> Plus, when England acquired new territories in North America from France, it was forced to garrison royal soldiers in the colonies to protect them, and English taxpayers were paying fifty times as much as the colonists for defense in America.<sup>259</sup> Parliament, not unreasonably, concluded that the colonies ought to pay a share of the cost of their own security. To raise revenue to pay for that new expense, Parliament for the first time sought to tax the internal operation of the colonies. The Stamp Act of 1765 was the first of a series of Parliament's efforts to establish its prerogative over colonial government,<sup>260</sup> all of which the colonists resisted.<sup>261</sup>

By the time of the American Revolution, the colonists distrusted and feared the power of the English government, regardless of who exercised it.<sup>262</sup> The colonists shared the "common assumption" that "men and especially men in power are prone to corruption" and therefore believed that Parliament could be as arbitrary as the King.<sup>263</sup> "The danger to liberty was what it had always been: departure from the rule of customary law" in favor of "a rule of arbitrary command."<sup>264</sup> "The difference," as Professor John Phillip Reid argues, "was

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258. See HANNAN, *supra* note 156, at 217.

259. See *id.*

260. Parliament believed that it was the sovereign and could enact whatever legislation it saw fit for the colonies. Members of Parliament also believed in the theory of "virtual representation." Not everyone in England had the franchise, but they benefitted from the virtual representation of others in Parliament. The colonists were in the same position, the theory went. The colonists disagreed and pointed to the established custom of self-government as a defense to what they deemed Parliament's aggrandizement of power in America. See GREENE, *supra* note 232, at 69–70. In fact, the colonists relied heavily on custom as defining fundamental law. See Grey, *Origins*, *supra* note 10, at 871.

261. The colonists vehemently opposed Parliament's taxes. Pointing to the settled English political theory and longstanding practice that government could tax only those members of the public who were represented in the legislature, which the colonists were not, the colonists argued that Parliament lacked the authority to tax the internal affairs of the colonies. See MCILWAIN, *THE AMERICAN REVOLUTION*, *supra* note 245, at 185. Americans also believed that Parliament sought to interfere in matters that the colonial charters and more than a century of tradition had left them to resolve in their own assemblies. The colonists treated with the same contempt Parliament's subsequent efforts to impose other taxes, such as the Tea Act of 1765 (the infamous tax on imported tea that led to the Boston Tea Party), the Townsend Acts of 1767, and the Intolerable Acts of 1774. In each case Parliament sought to establish its plenary authority over the external and internal affairs of the colonies, and each effort only fueled the colonists' ire. Ultimately, the colonists came to believe that Parliament lacked the authority to legislate in any manner for the colonies, whether the law was a tax or some other form of regulation. See GREENE, *supra* note 232, at 69–77; MORGAN, *supra* note 232, at 14–15.

262. See REID, *THE CONCEPT OF LIBERTY*, *supra* note 220, at 100; REID, *AUTHORITY OF LAW*, *supra* note 249, at 3–5, 69–72.

263. See MORGAN, *supra* note 232, at 7.

264. See REID, *THE CONCEPT OF LIBERTY*, *supra* note 220, at 85 ("American Whigs were not ambiguous about what they believed was the most general threat to liberty. It was arbitrary



that now a House of Parliament, not just the Crown, had to be watched.”<sup>265</sup> The colonists distrusted Parliament no less than they distrusted King George III and believed that Parliament must be equally subject to the same “ancient constitution” that kept the Crown at bay.<sup>266</sup>

To Americans, the rule of law should govern Parliament no less than it governed King George III.<sup>267</sup> As Thomas Jefferson later put it, referring to Virginia’s assembly, because “[o]ne hundred and seventy-three despots” can be “as oppressive as one,” an “elective despotism is not the government we fought for.”<sup>268</sup> The colonists believed that the colonial assemblies held a political and legal status equal to Parliament’s as far as domestic legislation was concerned. “The fundamental principle of the American Revolution was that the colonists were coordinate members with each other and Great Britain of an empire united by a common sovereign,” James Madison stated, “and that legislative power was maintained to be as complete in each American parliament as in the British Parliament.”<sup>269</sup> The American colonial governments were to be polities, as

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power.”); Paul J. Larkin, Jr., *A New Approach to the Texas v. United States Immigration Case: Discretion, Dispensation, Suspension, and Pardon—The Four Horsemen of Article II*, THE HERITAGE FOUND. (Apr. 15, 2016), <http://www.heritage.org/research/reports/2016/04/a-new-approach-to-the-texas-v-united-states-immigration-case-discretion-dispensation-suspension-and-pardon-the-four-horsemen-of-article-ii> [hereinafter Larkin, Jr., *A New Approach to Texas v. United States*].

265. See REID, *THE CONCEPT OF LIBERTY*, *supra* note 220, at 29; Larkin, Jr., *A New Approach to Texas v. United States*.

266. DIETZE, *supra* note 207, at 71 (“In the Old World the English had fought against the old world or arbitrary monarchy, attempting to secure their liberties through representative government. In the new World, Americans rejected the new world of arbitrary democracy, attempting to secure freedom by restricting the representatives of the people.”); see GREENE, *supra* note 232, at 59–60.

267. MCLAUGHLIN, *supra* note 254, at 107–08 (footnote omitted) (“If there is any central principle in the American constitutional system it is that governments are not omnipotent; they are, or are supposed to be of only limited authority. This principle of limited authority is sometimes spoken of as the reign of law. Liberty has been defined as the right or privilege of not being under restraint or obligation to obey anything but the law. The struggle for freedom in English history was largely directed against arbitrary government, against a system or a ruler with power to act capriciously and with no responsibility to the governed. The long course of history during which men cherished the hope, often only a hope, of living under legally limited government is an impressive story. It is for us especially impressive, because the American people, a century and a half ago, succeeded in establishing that principle as an institutional fact[.]”); see also, e.g., *Hurtado v. California*, 110 U.S. 516, 531–32 (1884) (“In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of *Magna Charta* were incorporated into bills of rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.”); Hazeltine, *supra* note 232, at 32–33.

268. 2 THE WRITINGS OF THOMAS JEFFERSON 163 (1903).

269. HANNAN, *supra* note 156, at 223.

described by John Locke, voluntarily formed by a compact among free individuals to establish a government to protect the liberty of all.<sup>270</sup>

At the end of the day, the colonists believed that they had no option but revolution. An appeal to Parliament or King George III would have been futile. The colonists also could not go to court to seek relief against Parliament because judicial review as we know it today<sup>271</sup> was not yet an available option.<sup>272</sup> With

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270. See MCLAUGHLIN, *supra* note 254, at 72–73, 107.

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

272. There was no judicial mechanism for enforcing against Parliament the colonists’ understanding of the unwritten English constitution or the liberty it guaranteed. See GREENE, *supra* note 232, at 132–33, 183. Magna Carta neither established a judicial enforcement mechanism nor referred to any specific common law writ. Instead, Article 61 of the Charter contemplated that enforcement would be done by a committee of twenty-five barons who could review the Crown’s conduct and obtain relief for any royal violation of the Charter by seizing the king’s castles and lands. Yet, after John’s death, when his son and successor Edward II ascended to the throne, Edward III reissued the Charter without Article 61. No subsequent reissuance of Magna Carta contained that provision. See BARTLETT, *supra* note 219, at 66; BROOKE, *supra* note 158, at 223; GOODHART, *supra* note 181, at 30–31; William S. McKechnie, *Magna Carta (1205–1915)*, in MALDEN, *supra* note 192, at 15–16; MCKECHNIE, *supra* note 199, at 131, 160–61. Gradually, the writ of habeas corpus became the vehicle for enforcing the promise of Magna Carta Article 39. See 1 BLACKSTONE, *supra* note 38, at \*135; Habeas Corpus Act 1679, 31 Cha. II, c. 2; see also DANIEL JOHN MEADOR, *HABEAS CORPUS AND MAGNA CARTA: DUALISM OF POWER AND LIBERTY* (1966); 3 STORY, *supra* note 243, § 1341, at 207 (“[The writ ran] into all parts of the king’s dominions; for it is said, that the king is entitled, at all times, to have an account, why the liberty of any of his subjects is restrained.” (alteration in original)). Habeas corpus, however, was a remedy for unlawful imprisonment by the Crown; it was not yet a vehicle for challenging an act of Parliament. Atop that, at the time of the Revolution, it was uncertain under English law whether “the law of the land” guaranteed more than indictment or presentment by a grand jury in a criminal case or suit by a common law writ in civil actions. There also was no agreement that English courts could invoke the unwritten British constitution to nullify acts of Parliament. See Corwin, *supra* note 13, at 368–70. Coke had once written that an act of Parliament would be void if it were unreasonable and inconsistent with the common law. *Dr. Bonham’s Case*, 8 Co. Rep. 114a, 77 Eng. Rep. 646, 647 (C.P. 1610). But his dictum was hardly a widely-accepted proposition. See Corwin, *supra* note 13, at 369–70. Although a Virginia county court held the Stamp Act unconstitutional, MCLAUGHLIN, *supra* note 254, at 126 n.24, the principle that the courts could hold a legislative act unconstitutional did not become clear until *Marbury v. Madison*, 5 U.S. 177 (1803) resolved that question three decades in the future. The result was that the only recourse available to the colonists to remedy arbitrary conduct by Parliament was rebellion.

no peaceful opportunity to resolve the colonists' fundamental constitutional disagreement with Parliament over limitations on its sovereignty, armed conflict became inevitable.<sup>273</sup> In fact, it could be argued that the American Revolution was fought over the principle that the Crown and Parliament were equally subject to the unwritten British Constitution as much as over the specific claims that the Declaration of Independence had lodged against King George III.<sup>274</sup> "Thus a theory of law that had cost Charles I his head and James II his throne was about to cost Great Britain its American colonies."<sup>275</sup>

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273. As Professor Andrew Cunningham McLaughlin once wrote, "the central principle of the American Revolution" was that "rebellion against an unlawful act was not rebellion but the maintenance of law. This philosophy gave character to the Revolution." MCLAUGHLIN, *supra* note 254, at 123–24; *see also, e.g.*, GREENE, *supra* note 232, at 59–66; HANNAN, *supra* note 156, at 210 ("Although the fighting [in the American Revolution] led one part of the Anglosphere declaring itself independent from the other, it is anachronistic to think of it as a war between Americans and Britons. It was understood and described by contemporaries as a settlement by force of the Tory-Whig dispute, which by then had exhausted all attempts at peaceful resolution." (alteration in original)); MORISON, *supra* note 233, at 180 ("There was no American nationalism or separatist feeling in the colonies prior to 1775. . . . Americans were not only content but also proud to be part of the British imperium. But they did feel very strongly that they were entitled to all constitutional rights that Englishmen possessed in England."); *id.* at 182 ("Make no mistake; the American Revolution was not fought to *obtain* freedom, but to *preserve* the liberties that Americans already had as colonials. Independence was no conscious goal, secretly nurtured in cellar or jungle by bearded conspirators, but a reluctant last resort, to preserve 'life, liberty, and the pursuit of happiness.'"); REID, *RULE OF LAW*, *supra* note 185, at 75 ("If seen from the point of view of Bracton, Coke, Pym, Charles I, Sydney, and Hale, it is no exaggeration to say that the American Revolution was the greatest triumph for rule-of-law."); *see also id.* at 26–29, 77–79; REID, *AUTHORITY OF LAW*, *supra* note 249, at 3–5.

274. *See, e.g.*, GREENE, *supra* note 232 at 132–33, 160–64; MCILWAIN, *THE AMERICAN REVOLUTION*, *supra* note 245, at 5; MCLAUGHLIN, *supra* note 254, at 133 ("The colonists were demanding a constitutionally checked government; they claimed it was already theirs; and in course of time they proceeded not only to fight, but to create governments of exactly that character."); Gedicks, *supra* note 12, at 615–16 ("The Revolution took place against this backdrop of constitutional polarity in Britain and the American colonies. The higher-law constitutionalism of Coke and seventeenth-century common lawyers was receding, while the constitutionalism of parliamentary supremacy and sovereign command was ascendant. George III and the Tory majority in Parliament acted in accordance with the new constitutional understanding, under which enactment of a statute by Parliament was, by definition, consistent with the English constitution. They saw nothing constitutionally problematic in Parliament's imposition of revenue-raising and internal regulatory measures on the colonies. The colonists and the Whig minority, on the other hand, continued to understand the colonies' relationship to the king and Parliament in terms of seventeenth-century higher-law constitutionalism. They accordingly reacted to parliamentary taxation and internal regulation of the colonies by invoking Magna Carta, due process, and fundamental common law rights. Ultimately, of course, this conflict was resolved by revolution and independence." (footnotes omitted)); Hazeltine, *supra* note 232, at 22–23.

275. GOODHART, *supra* note 181, at 60. Due process could be read as a protection only against unauthorized executive action, which is how Justice Thomas Jackson read it when he juxtaposed the Article II Take Care Clause with the Fifth Amendment Due Process Clause. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("One gives a

The period of the American Revolution teaches us the following. First, the colonists were convinced that they possessed all of the rights enjoyed by the countrymen they left behind. Second, the colonists believed that those rights included the liberties guaranteed by the common law and unwritten English constitution, of which Magna Carta was an important part, and adopted a written constitution in order to better protect those liberties. Third, the colonists' countrymen had lived through the period from the Civil Wars through the Glorious Revolution, which taught the English that Parliament could save them from the arbitrary actions of the Crown. By contrast, the Colonists feared that Parliament could be as autocratic as King George III. Fourth, the colonists saw no difference between the guarantee in Magna Carta of treatment according to "the law of the land" and the guarantee of "due process of law" found in a later act of Parliament and in the Fifth Amendment Due Process Clause.

The question, then, is this: Does the English and American constitutional history leading up to 1791 help us interpret the concept of "due process of law" and supply a home for the Lost Due Process Doctrines? In fact, it does.

## VI. RESCUING THE LOST DOCTRINES

Each doctrine is better explained as a guarantee of "the law of the land" than as a matter of "fundamental fairness" or some other similar approach. Shifting the relevant analysis to a limitation imposed by "the law of the land" also would not alter the outcome of those decisions. The result is that tying the Due Process Clause to its roots rationally explains the principle underlying each doctrine without requiring reconsideration of the Supreme Court's precedents.

### A. *The Geographic Reach of Legal Authority*

Start with the personal jurisdiction doctrine. The purpose of the doctrine is to limit the geographic reach of state power when exercised through its courts. From *Pennoyer v. Neff*<sup>276</sup> through *Daimler AG v. Bauman*<sup>277</sup> the Supreme Court has distinguished between residents of a particular forum and foreigners or strangers to that jurisdiction. Using the Due Process Clause as the vehicle for limiting state power, the Court has held that a state court may enter judgment against a resident defendant, such as an individual who seeks relief through the state judicial system or a company that is incorporated within the state or uses

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governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther."); see also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 272 (1985) ("[C]onsiderable historical evidence supports the proposition that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law."); Corwin, *supra* note 13, at 372.

276. 95 U.S. 714 (1878).

277. 134 S. Ct. 746 (2014).

that forum as its principal place of business, for any claim, while also prohibiting the state courts' from entering judgment against a nonresident defendant that lacks sufficient "minimum contacts" with the jurisdiction, even for a tort or contract breach that occurs within the forum.<sup>278</sup>

The rule finds its antecedent principles in the law governing the jurisdiction of courts at common law. Before Henry II centralized the judicial system, each baron would appoint judges to resolve disputes within his own barony. Once Henry II's new judicial system displaced the barons' courts, judges had the authority to resolve disputes throughout England or within any territory over which the Crown's courts could exercise jurisdiction and enforce their judgments.<sup>279</sup> The law that those judges applied—"the law of the land" or the common law—was the settled customs of England and nowhere else; even William largely left the settled Danish customs in place when he conquered England in 1066.<sup>280</sup> The consequences of that state of affairs were these: First, the common courts lacked jurisdiction over matters that occurred in any jurisdiction where the king's writ did not run—which meant that no English court had authority over any dispute that occurred in any other kingdom.<sup>281</sup> Second, because it was the settled customs of England that became the law applied by the king's courts, the "land" whose "law" governed was also England—which explains why the common law did not apply beyond England's shores.<sup>282</sup>

The contemporary personal jurisdiction doctrine is fully explicable in terms of a construction of the Due Process Clause limiting the reach of each state's legal authority to disputes or injuries occurring within its borders.<sup>283</sup> The Framers established a central government responsible for managing the affairs of the nation or refereeing disputes among the states, but left to the states the

278. *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

279. See MICHAEL HIRST, JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW 5 (2003).

280. See *id.* at 30.

281. See, e.g., *id.* at 4–5. Practical considerations entered into that matter too. Judges sat at Westminster or "rode circuit" to hear cases across England, but crimes were tried in the district where they were alleged to have occurred. "Jurors" were also drawn from that district whether they served as witnesses or fact-finders. Together, those facts made it impossible, practically speaking, for any crime committed beyond England's shores to be tried in England. See *id.* at 29–30.

282. "*Lex terrae*, in 1215, means what Matthew Paris called 'the pious and just laws of King Edward.' It is the ancient custom of the realm, 'the law of the land' in a real sense." McIlwain, *Due Process of Law in Magna Carta*, *supra* note 218, at 49 (footnote omitted); see *id.* at 50–51; see also *Regina v. Paty*, (1704) 92 Eng. Rep. 232, 234 (QB) (the *lex terrae* "takes in all the other laws, which are in force in this realm").

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

power to regulate whatever people, businesses, or events that occur within their borders. New York courts have no more authority to resolve disputes or remedy injuries that relate entirely to California than California has with respect to the same type of issues for New York. In every such case, state courts cannot enter a judgment that seeks to affect the life, liberty, or property interests that fall within another state's jurisdiction and also cannot attempt to impose a forum's law on a different state. Our federalist system—a collection of different, equally sovereign polities—entitles each state to govern its own people, businesses, and affairs as long as they do not affect their counterparts in a different state. In any case where one state seeks to do just that, the relevant question is not whether it is fundamentally fair to allow one state to supervise the internal affairs of another—an issue that can be answered only by making a subjective comparison of the rules that would be applied in each jurisdiction, an inquiry that not only lacks a clear answer, but also impugns the sovereignty of each state—but by properly and objectively determining which one may claim that it is the only “land” that may lay claim to jurisdiction over the dispute. Of course, there is no guarantee that different state courts will agree on the same answer to that inquiry. Different state courts could well prefer their own forum and laws to those of other states, and those preferences could well affect their analyses of personal jurisdiction issues. Even Supreme Court justices can disagree over the resolution of a particular jurisdictional dispute. Nonetheless, a “law of the land” approach to this matter, accordingly, better explains how personal jurisdiction issues should be resolved than a test requiring a court to decide whether it is fundamentally fair to subject a defendant to suit in one state or another because it focuses on the location of the specific event giving rise to the controversy.<sup>284</sup>

### *B. The Substantive Exercise of Legal Authority*

A “law of the land” approach makes perhaps even greater sense when the issue involves the next Lost Due Process Doctrine. The origins of the Due Process Clauses readily explain why the rule of legality, the void-for-vagueness doctrine,

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284. That conclusion is consistent with a long line of Supreme Court decisions making the point that a state cannot exercise sovereign power extraterritorially. *See* *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.”); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”). The Court continues to treat that principle as “good law.” *See* *Bigelow v. Virginia*, 421 U.S. 809, 822–23 (1975) (“The Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State.”). Generally, jurisdiction exists when every element of the crime occurs within the boundaries of the state. In rare cases a state can prosecute someone for out-of-state conduct with an in-state effect, but that would only occur where, for instance, a person in one state defrauds or shoots someone in another state or conspires elsewhere to commit a crime there. *See* *Ford v. United States*, 273 U.S. 593, 620–24 (1927); *Strassheim v. Daily*, 221 U.S. 280, 284–85 (1911); WAYNE R. LAFAVE, *CRIMINAL LAW* § 4.4, at 223–24 (5th ed. 2010).

the unforeseeable judicial expansion of criminal liability doctrine, and the proof-of-guilt requirement are essential guarantees of “the law of the land.”

Before Parliament came to monopolize the lawmaking process and to use written statutes to define prohibited conduct, English law had a more informal nature. The law existed in the form of unwritten English customs, royal decrees such as the Dooms of Ethelred, and the common law decisions of the courts at Westminster or on the “circuit.” Those forms of law did not share the requirement that a rule must be written for it to be deemed a “law,” a requirement that would have made little sense in an era when few were literate. But they did share one simple feature: the rule had to exist. The original laws, such as the ones forbidding homicide, rape, theft, and burglary, grew out of then-contemporary mores, including religious doctrine, and they were known throughout England. That history gave rise to the principle today known as the rule of legality, which in turn gave birth to the next three. The void-for-vagueness doctrine stands for the proposition that when a statute is so vague that the average person cannot readily understand its meaning, the legislation is void because it is tantamount to having no law at all. The unforeseeable judicial expansion of criminal liability doctrine extends that principle from legislative rules to judicial decisions. It forbids the courts from expanding the scope of a criminal law to reach conduct that no reasonable person could have foreseen being a crime. Otherwise, legislatures could direct the courts to expand the criminal law in ways that no one could anticipate. The estoppel doctrine stems from the other propositions. Before Parliament became sovereign and whenever the common law courts had not addressed an issue, the king served the role of lawgiver and interpreter. If he delegated that authority to one of his subordinates, that party’s interpretation of the law governed until it was overruled or changed by Parliament or the courts. That new rule or application, however, could not be applied retroactively. Doing so would have amounted to the retroactive application of a new criminal law, which neither a legislature nor a court could undertake. The Crown was no more entitled to engage in retroactive criminal lawmaking than the other two sources of English law.

Finally, the requirement that a person be proven to have committed a crime, like the other three doctrines, is readily explained by English constitutional history. Article 39 of Magna Carta sought to prevent King John from arbitrarily punishing his subjects except in accordance with “the law of the land.” Throwing someone in jail who had not committed a crime but had earned the Crown’s disfavor would be an archetypical example of precisely what Article 39 sought to outlaw. The requirement that the government, today’s successor to the Crown, prove a violation of law is an essential safeguard against arbitrary punishment. After all, it makes little sense to have the first three requirements—that is, to require that a law exist, that it be readily understandable by the average person, and that the courts not retroactively expand its reach—if the government may punish someone whether or not that person broke the law. Accordingly, each of those Lost Due Process Doctrines is better explained as an element of

“the law of the land” than as fitting into a substantive or procedural niche for the Due Process Clause.

*C. The Delegation of Lawmaking Authority to Private Parties*

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

The barons forced Article 39 on King John to prevent him from taking away their lives, liberty, and property except as permitted by English law.<sup>285</sup> Their concern was to protect their interests by preventing the Crown from acting capriciously. The only mechanism available to them was the common law. Parliament did not yet exist, and the king appointed the men who sat on the bench.<sup>286</sup> The barons could have agreed to replace King John with a ruler of their choosing, but that protection might last only for the lifetime of the new king, since one of the new king’s heirs could turn out to be as vicious, cruel, and arbitrary as John. The barons could have entered into a covenant to oppose any such new tyrant, but they would have known (long before the term “free rider” was coined) that each one would have been glad to let the others do the fighting and also that no one could be certain what his own heirs might be like. Forcing King John to comply with the common law did not offer the barons a new and independent party to serve as England’s leader, but it did give them a known, independent intermediary between the Crown and them,<sup>287</sup> as well as a standard—“the law of the land”—by which King John and all his successors could be measured.<sup>288</sup>

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285. See BARTLETT, *supra* note 219, at 65.

286. *Id.* at 63.

287. McIlwain, *Due Process of Law in Magna Carta*, *supra* note 218, at 41. McIlwain explains that, given all of the parties’ relevant statements leading up to Magna Carta—such as King John’s oath, the barons’ demands, John’s counteroffer, and the like— “[i]t is clear that all these expressions refer not to abuses of judicial process, but to the King’s practice of attacking his barons by armed force without any process whatsoever.” *Id.* at 43; see also MCKECHNIE, *supra* note 199, at 381 (“Whatever may have been the exact grievances that bulked most largely in the barons’ minds in 1215, their main contention was obvious: the deliberate judgment of a competent court of law must precede any punitive measures to be taken by the King against freemen of his realm.”).

288. “The law of the land’ is one of the great watchwords of Magna Carta, standing in opposition to the king’s mere will. Yet, in a paradox that is perhaps only superficial, the rebels of 1215 did not want less royal justice but more. While the clauses dealing with the king’s feudal rights seek to place clear limits on their exercise, the provisions regarding royal justice do not seek to limit it but to make it more regular, equitable, and accessible. The legal changes that had taken place under Henry II . . . were irreversible. Royal justice was now the favored first resort. All that was required was that it should obey its own rules.” BARTLETT, *supra* note 219, at 65.



If so, it makes utterly no sense to believe that the barons would have allowed King John or a successor to delegate royal power to an advisor of the king's choosing as a means of avoiding the Article 39 requirement of governance according to law. A rule prohibiting sham transactions—such as a sham delegation of government power designed to avoid a limitation expressly placed on a superior officer by law—certainly would be a feature of every mature legal system, and there is no reason to assume that the barons were less sophisticated than we are today in this respect. They were aware of King John's wiles and stratagems, as well as his direct abuses of power. It is impossible to believe that they would have readily acquiesced in a royal scheme to nullify Article 39 either by placing a puppet on the throne or by vesting an apparatchik with the Crown's authority, someone who would unhesitatingly carry out John's orders regardless of their compliance with the common law. Article 39 sought to eliminate the royal abuse of power, not simply to transfer it to someone else chosen by the king who could be as equally capricious and would be free from the safeguards of that chapter.

The same principle is applicable when the government seeks to transfer governmental power to private parties.<sup>289</sup> The Framers sought to limit the powers of the new central government, and Articles I, II, and III accomplish that goal in several ways: they create a limited number of federal elected or appointed offices; they restrict how private parties may come to hold and exercise the powers of those offices; and they provided express and implied remedies for cases in which officeholders abuse their delegated authority.<sup>290</sup> The Due Process

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289. See Larkin, Jr., *The Dynamic Incorporation*, *supra* note 150, at 403.

290. Article I establishes a Congress of the United States. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). The election and term limit provisions imposed by Articles I and II, along with the Twelfth and Seventeenth Amendments, create procedures for the periodic election to the offices of Representatives, Senators, and Presidents. See U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); *id.* art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President). Under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, Congress may preempt state laws governing the time, place, and manner of holding federal elections, but not the qualifications for voting in them. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2258 (2013); THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 52, at 323, 326 (James Madison) (Clinton Rossiter ed., 1961). The Bicameralism and Presentment requirements of Article I, Section 7, regulate how those officeholders may make “Law.” See U.S. CONST. art. I, § 7, cls. 2 & 3; *INS v. Chadha*, 462 U.S. 919 (1983); *cf.* *Clinton v. City of New York*, 524 U.S. 417 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law); see also U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”). The legislative powers granted to Congress in the next section, Article I, Section 8, identify the particular subjects that those laws may govern. See U.S. CONST. art. I, § 8 (listing the powers that Congress may use law to regulate). Article I also expressly contemplates that Congress may

Clause protects the public against the federal government's attempt to shed those rules by delegating power to private parties, whether individuals or corporations.<sup>291</sup> Reading the Due Process Clause as a requirement that government officers exercise their lawmaking authority only pursuant to "the law of the land" accomplishes that result by forbidding the government from authorizing private parties, who are unencumbered by constitutional and statutory restrictions on their exercise of government power, to fill in as erstwhile federal officials. Permitting federal officials to delegate power in that manner leaves the recipient able to act without being subject to the safeguards that protect the public against government abuse. It makes little sense to read the Constitution as permitting its restrictions to be so easily evaded. To be sure, Congress may grant private parties the opportunity to challenge the action of government officials, but that leaves the final decision in the hands of government officials—the courts.<sup>292</sup> What Congress may not do is discard the constitutional restraints on its lawmaking powers "by handing over the so-called 'levers of government' to private individuals" who are not subject to

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select certain officers. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse their Speaker and other Officers"); *id.* § 3, cl. 4 ("The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided."); *id.* § 3, cl. 5 ("The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States."). The Necessary and Proper Clause implicitly empowers Congress to hire staff. *See id.* § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). And those provisions establish a mechanism—impeachment—to remove an officeholder who abuses the powers of his office. *See id.* art. I, § 2, cl. 5; *id.* § 3, cls. 6 & 7.

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

Article III creates the Supreme Court of the United States and grants Congress the power to establish additional, lower courts. *See* U.S. CONST. art. III, § 1. The Article III Judicial Power Clause grants the Supreme Court and lower federal courts the power "to say what the law is." *See* U.S. CONST. art. III, cl. 1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Read together, Articles I, II, and III define the "Republican Form of Government" that the Framers created for the nation and that Article IV guarantees each state. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").

291. A corporation can be a "person" under American law. *See Santa Clara Cty. v. So. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (ruling that a "corporation" is a "person" for purposes of the Fourteenth Amendment).

292. 5 U.S.C. § 702 (2012).

constitutional restraints.<sup>293</sup> “Vesting in private parties governmental authority over a matter otherwise designated as a subject fit only for governmental responsibility eliminates the protections that the rule of law offers everyone as part of the political and social compact that the Framers offered to the nation in 1787.”<sup>294</sup>

#### D. The Incorporation Doctrine

Now we come to a lost doctrine that might remain lost. A “law of the land” approach may not readily explain the incorporation doctrine. Part of the reason is textual. The Bill of Rights identifies various guarantees in addition to the ones provided by the Due Process Clause, which makes it difficult to construe the latter as a guarantee of all of the former. Of course, there is no flat rule against redundancy even in the Constitution—after all, the Sixth Amendment Jury Trial Clause guarantees the same type of jury trial in criminal cases that Article III already provided<sup>295</sup>—so a court might be able to stretch “the law of the land” to include the other guarantees. But that would certainly be a stretch. In any event,

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293. With the Exception of the Thirteenth Amendment, the Constitution does not limit the power of private parties. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 624 (2000); Larkin, Jr., *The Dynamic Incorporation*, *supra* note 150, at 418; *see also id.* at 419–20 (“Granting a private party power that the Constitution vests only in parties who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind. If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive and prosper. At a micro level, it would be to leave to the King’s delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The ‘plan of the Convention’ was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the public against the government’s choice of either option. Using private parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers’ signal accomplishment of establishing a government under law.”).

294. *Id.* at 418.

295. *Compare* U.S. CONST. art. III, § 2, cl. 3 (“Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”), *with id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .”).

the First Congress drafted the Bill of Rights and submitted it to the states for ratification rather than leave the matter to implication. That makes it difficult to treat the incorporation doctrine as an example of a modern-day embodiment of unwritten background principles.

There is, however, a better argument. The Fourteenth Amendment Privileges or Immunities Clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.]”<sup>296</sup> In its first decision construing the Fourteenth Amendment, the Supreme Court gave the clause an extremely narrow interpretation. In the *Slaughterhouse Cases*,<sup>297</sup> the Court ruled that the clause applies only to the rights of national citizenship, such as the right to interstate travel, despite the fact that the Bill of Rights contained numerous provisions that had been guarantees of national citizenship since it was adopted in 1791.<sup>298</sup> To date the Court has been unwilling to reconsider the *Slaughterhouse Cases*’ interpretation of the Privileges or Immunities Clause.<sup>299</sup> Numerous scholars, however, have persuasively argued that the clause was designed to incorporate the Bill of Rights guarantees against the states.<sup>300</sup> If the Supreme Court ultimately were willing to

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296. See *id.* amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

297. 83 U.S. 36 (1873).

298. *Id.* at 80–83.

299. Since the *Slaughterhouse* decision, the Supreme Court has relied on the Privileges or Immunities Clause to hold a statute unconstitutional only once, in *Saenz v. Roe*, 526 U.S. 489 (1999), which held invalid a California state law limiting the welfare payments a recipient could receive during the first year of residency. *Saenz* did not reconsider *Slaughterhouse*’s narrow interpretation of the Privileges or Immunities Clause, but the Court later declined to rule out such reconsideration in an appropriate case. See *McDonald v. Chicago*, 561 U.S. 742, 758 (2010). Justice Thomas has expressed his willingness to reconsider and overrule the *Slaughterhouse* decision. For example, he would have squarely relied on the Privileges or Immunities Clause to hold unconstitutional a Chicago ordinance prohibiting the private possession of firearms. See *id.* at 850 (Thomas, J., concurring).

300. The literature debating the proper interpretation of the Privileges or Immunities Clause is extensive. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); BALKIN, *supra* note 13, at 199–201; BARNETT, *supra* note 13, at 60–68, 194–206; RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1089–95* (1953); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 154–96* (1986); ELY, *supra* note 12, at 22–29; KURT LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57 (1993); William W. Crosskey, *Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority*, 22 *U. CHI. L. REV.* 1 (1945); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 *STAN. L. REV.* 5, 138 (1949); Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 *CONST. COMMENT.* 235 (1984); Philip Hamburger, *Privileges or Immunities*, 105 *NW. U. L. REV.* 61, 61–66 (2011); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *YALE L.J.* 1385,

reconsider the *Slaughterhouse Cases* and endorse the academy's view of the Privileges or Immunities Clause, the Due Process Clause would drop out of the incorporation debate.

*E. A Backstop Guarantee of Fundamental Fairness*

Resolving the incorporation doctrine debate by reconsidering the *Slaughterhouse Cases* would also go a long way toward answering the issue of whether due process as “the law of the land” can serve as an all-purpose backstop for measuring the fairness of federal and state trial procedures. The Sixth Amendment guarantees a criminal defendant the right to a “trial” before an “impartial” decision maker, so it is not a big step to read that provision as requiring that any trial be “fair” and also that the specific guarantees the Court has created be seen as different aspects of what is necessary for a trial to have that feature. The result again would be that a “law of the land” approach would not require the Supreme Court to overturn its criminal procedure precedents. Were the Court to decide that the Privileges or Immunities Clause incorporates the Bill of Rights, this entire line of cases would find a home in the Sixth Amendment. The Due Process Clause would still be relevant, but only as a guarantee that every person must receive the benefit of whatever law and procedure a state has in place. That guarantee, of course, would be far more limited than the role that due process currently plays as a guarantee of fundamental fairness. But it would be far more faithful to the role that the Framers intended the Due Process Clause to play in our system.<sup>301</sup>

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1391–96 (1992); Philip B. Kurland, *The Privileges or Immunities Clause: “Its Hour Come Round At Last?”*, 1972 WASH. U. L.Q. 405 (1972); Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1122–1127 (2009); Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 357–58 (1997); Note, *Congress’s Power to Define the Privileges and Immunities of Citizenship*, 128 HARV. L. REV. 1206, 1206–08 (2015). For an article on this issue by someone whose opinion will count for more than most others, see Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989).

301. In any event, the Court has begun to walk away from its due-process-as-backstop line of precedents. The Court first put the brakes on this approach in *Graham v. Connor*, 490 U.S. 386 (1989), a case involving a claim of police brutality during an arrest. Reasoning that the Fourth Amendment Reasonableness Clause directly applies to arrests as “seizures,” the Court declined to provide an additional layer of review under the Due Process Clause. *Id.* at 395 (“[We] hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard, rather than under a ‘substantive due process’ approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.” (alteration in original) (emphasis in original)). Since then, the Court has consistently ruled that the Due Process Clause does not serve as an all-purpose backstop that can be invoked when another

## VII. DISCHARGE OR REASSIGNMENT?

The final question is: Where do we go from here? In particular, if the Due Process Clause is read as an expression of the Magna Carta requirement that the government comply with “the law of the land” as fleshed out by history and tradition, should the Supreme Court replace the procedure versus substance dichotomy with an inquiry that asks only whether the government has significantly strayed from Anglo-American customs? If the latter inquiry is more faithful to the origin of the Due Process Clause, should the answers that this inquiry elicits supply the exclusive interpretation of due process requirements?

A powerful argument could be made for an affirmative answer to each of the last two questions. Magna Carta was adopted to force the king to abide by the rule of law, to govern according to the customs and traditions of England that went back as far as history revealed. Those sources defined the “law” that authorized him to act and bound him to obey.<sup>302</sup> Allowing the Crown to make up new substantive rules, procedures, and justifications for taking someone’s life, liberty, or property would have been precisely the opposite of what the barons intended to accomplish at Runnymede. Magna Carta was designed to prevent arbitrary and capricious governance, not to authorize it. The Crown could always afford the public greater protections than history required, but what history required was the minimum that the king was obliged to provide everyone. That is why, the argument concludes, several Supreme Court decisions state quite clearly that history should be the guide for interpreting the Due Process Clause.<sup>303</sup>

Yet, it is unlikely that the Supreme Court would refocus the Due Process Clause to rely exclusively on history. It is true that the Court has often said that

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constitutional provision that specifically addresses the government’s conduct does not reach as far as a private party would like. *See, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (noting that due process analysis is inappropriate if a party’s claim is “covered by” a more specific constitutional provision); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (“Where a particular Amendment ‘provides an explicit textual source of constitutional protection’ against a particular sort of government behavior, ‘that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.’”); *id.* at 273–74 (declining to interpret the Due Process Clause to impose a requirement on the states similar to what the Fifth Amendment Indictment Clause would demand). Whenever a specific constitutional provision addresses a certain type of police or judicial conduct, that provision should serve as the prism through which the courts view a constitutional challenge.

302. *See* BARTLETT, *supra* note 219, at 65.

303. *See, e.g.*, *Kerry v. Din*, 135 S. Ct. 2128, 2132–33 (2015) (plurality opinion); *Washington v. Glucksberg*, 502 U.S. 702, 720–21 (1997); *Medina v. California*, 505 U.S. 437, 446 (1992); *Cruzan v. Dir. Mo. Dep’t of Health*, 497 U.S. 261, 304–05 (1990); *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting); *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 127–28 (1934).

history should guide the analysis. Yet, the Court has struck down under the Due Process Clause various procedures used in the criminal, civil, and administrative process that had antecedents in the common law, where history supported the state law, or that dealt with subjects unknown at common law but where history would not condemn the state law.<sup>304</sup> To shift due process analysis over to one based entirely on history would require the Court to inter a large number of its decisions over the last fifty years. The Court would be likely to find that result going a bridge too far.

In any event, the Court expressly refused to let history be the exclusive tool for construing the Due Process Clause two years ago in *Obergefell v. Hodges*.<sup>305</sup> *Obergefell* involved the question whether same-sex couples were entitled to the same benefits of marriage that the states had traditionally afforded heterosexuals.<sup>306</sup> The Court acknowledged that Anglo-American history did not support the creation of a constitutional right to same-sex marriage.<sup>307</sup> But the Court refused to end its analysis with that conclusion. History is relevant, the Court wrote, but not controlling because the meaning of due process can evolve.<sup>308</sup> The meaning of due process is not a prisoner of its past.<sup>309</sup> The Court did not define a new approach to give content to due process; the Court did not explain what factors are relevant, necessary, or sufficient to that analysis; and the Court did not identify how much weight any potential relevant factors should receive or what their ordinal ranking should be. But the one point that does come through clearly is that the lower courts should not reject a due process claim simply because it is unsupported by history. The result is that, given its 2015 decision in *Obergefell*, the Court is not likely to embrace history as the exclusive or controlling guide to interpreting the Due Process Clause.

At the same time, the Court may be willing to adopt a law-of-the-land approach grounded in history as a supplement to whatever new approach that

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304. See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (holding a state court’s award of punitive damages unconstitutionally excessive); *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (holding unconstitutional state administrative procedures to determine whether welfare recipients were still eligible for relief); *Ferguson v. Georgia*, 365 U.S. 570, 770 (1961) (holding unconstitutional a state law prohibiting a defendant from testifying at trial and limiting him to offering an unsworn statement).

305. 135 S. Ct. 2584, 2602 (2015).

306. *Id.* at 2593.

307. *Id.* at 2594.

308. *Id.* at 2598.

309. *Id.* (“History and tradition guide and discipline this inquiry but do not set its outer boundaries. . . . That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.” (citation omitted)).

the Supreme Court must develop after *Obergefell*. The reason is that an historical approach may help the Court define exactly the boundaries of the “law” that is “the *law* of the land” and that satisfies the requirement of “due process of *law*.”

As explained above, the Lost Due Process Doctrines can be seen as an effort to require various types of government actions to comply with “the rule of law.” Those doctrines reveal that not everything characterized as a “law” in fact enjoys that status. A dictate that exceeds the jurisdiction of a polity; a vague, unanticipated, or “gotcha” rule; proof of a violation of a law that does not actually require proof; handing over the reins of government to private parties unrestrained by any law—all those scenarios are instances in which the government seeks to label as “law” an ukase by whoever is in power. The government makes that effort because the rule of law has come to be an indispensable part of our legal and political culture. The public therefore expects that the government will comply with its dictates. What the government does in those cases is to fake compliance with that principle by using the forms of law without any of its substance. If nothing else, it gives proof to the maxim that hypocrisy is the tribute that vice pays to virtue. But that something else is a principle that for a statement to be a “law” it must satisfy the requirements discussed in this Article.

#### VIII. CONCLUSION

Americans today live under the freedoms purchased by the blood of patriots. Magna Carta identified many of those liberties eight centuries ago and forced the king to concede that they were a living part of England’s unwritten constitution. By forcing King John to agree that sovereignty exists by virtue of and under law, Magna Carta gave us “the rule of law” that allows those liberties to flourish.

The principles underlying Magna Carta as “the law of the land” also supply a home for several different due process doctrines that are vibrant today, but do not fit into either option in the strict “substance vs. procedure” due process divide that the Supreme Court has adopted. Rather than try to fit one of those square pegs into either of those round holes, the Court should step back from the Due Process Clause and consider the history of its direct lineal ancestor, Magna Carta. That history demonstrates how those doctrines should be classified today and how the Court’s “Lost Due Process Doctrines” can be squared with the Clause that gave them birth. That result reveals why the Great Charter is still vibrant and necessary today, and it gives us yet another reason to revere the place of Magna Carta in Anglo-American legal history.