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Liberty is Not Loco-Motion: Obergefell and the Originalists' Due Process Fallacy

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Liberty Is Not Loco-motion: *Obergefell* and the Originalists' Due Process Fallacy

ANDREW T. BODOH*

ABSTRACT

In an effort to discredit substantive due process, originalists often misinterpret the federal Due Process Clauses. Justice Clarence Thomas's Obergefell v. Hodges dissent illustrates this. In this dissent, Justice Thomas cites Blackstone's Commentaries to argue that Due Process "liberty" is merely freedom from physical restraint, what Blackstone describes as the power of "loco-motion."

This Article challenges Justice Thomas's narrow view of Due Process liberty from Obergefell v. Hodges on its own terms. It distills from the dissent and its sources five assumptions or premises supporting Justice Thomas's view, and it confronts each of these with contrary evidence from the historical record, especially the 1776 to 1789 American state "law of the land" clauses. Along the way, this Article establishes that Due Process "life, liberty, or property" is best understood as a single term of art describing all interests to be protected by the state under a Lockean social contract. The Article also illustrates the practical effect of this competing view by examining the pre-Fourteenth Amendment "law of the land" case law from North Carolina.

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As used in the Due Process Clauses, “liberty” most likely refers to “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.” That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution’s text and structure.¹

- Justice Clarence Thomas
Obergefell v. Hodges dissent

INTRODUCTION

In the last several years, United States Supreme Court Justice Clarence Thomas and others ascribing to originalism jurisprudence have proffered an excessively narrow view of “liberty” in the federal Due Process Clauses. This view equates Due Process liberty with Sir William Blackstone’s definition of “personal liberty” in the first volume of his *Commentaries on the Law of England*, originally published in 1765.²

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632 (2015) (Thomas, J., dissenting) (citation omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 134 (4th ed. 1770)). *But cf. id.* at 2634–35 (describing, in the alternative, the Lockean view of liberty), *and* *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring) (describing liberty as freedom from arbitrary government action).

2. *E.g., Obergefell*, 135 S. Ct. at 2632 (Thomas, J., dissenting); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2478–79 (2015) (Scalia, J., dissenting) (joined by Justice Thomas); *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (joined by Justice Thomas); *Discussion: Originalism and Unenumerated Constitutional Rights*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 135, 139 (Steven G. Calabresi ed., 2007) (quoting John Harrison, who said, “I think the reference to liberty in the Due Process Clause refers to natural liberty. That is to say to not being physically confined.”); *see also* *Turner v. Rogers*, 564 U.S. 431, 450–55 (2011) (Thomas, J., dissenting) (denying a right to counsel exists under the Fourteenth Amendment Due Process Clause for civil contempt proceedings involving incarceration); *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting) (“[I]t is possible that the Due Process Clause requires only ‘that our Government must proceed according to the ‘law of the land’—that is, according to written constitutional and statutory provisions.” (quoting *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting))).

Blackstone defined “personal liberty” essentially as the absence of physical restraint—the ability to act on one’s “power of loco-motion.”³ Justice Thomas’s dissent in *Obergefell v. Hodges*, in particular, presents the originalists’ Due Process fallacy.⁴

Originalism is supposed to be rooted in history, so one may justly critique originalists for engaging in faulty historical interpretation. The originalists’ Due Process fallacy, equating Due Process liberty exclusively to freedom from physical restraint, and specifically Justice Thomas’s presentation of this argument in his *Obergefell* dissent, misinterprets history. Perhaps Justice Thomas’s final conclusion in *Obergefell* is valid—this Article simply does not engage in that analysis. Instead, this Article criticizes, based on the historical record, Justice Thomas and his compatriots’ views that “liberty” in the federal Due Process Clauses means merely the absence of physical restraint.

For a more targeted criticism, this Article does not dispute Justice Thomas’s method of interpreting the Fourteenth Amendment Due Process Clause through the lens of the Fifth Amendment Due Process Clause. Legal scholars have reasonably suggested the Fourteenth Amendment Due Process Clause has a distinct “original meaning” that may even alter the legal meaning of the Fifth Amendment Due Process Clause.⁵ This Article does not follow this approach. Rather, this Article studies the meaning of due process clauses and their prototypes (i.e., “law of the land” clauses) from the American Revolution to the ratification of the Fourteenth Amendment, as Justice Thomas does in this portion of his *Obergefell* dissent.⁶

Part I of this Article presents Justice Thomas’s view from *Obergefell* that Due Process liberty is the absence of physical restraint. From this dissent and its sources, this Article identifies five arguments and assumptions supporting Justice Thomas’s narrow view of Due Process liberty. The Article then critiques each in turn, building in stages a competing view of the meaning of the constitutional norm. Specifically, this Article argues the Fifth Amendment Due Process Clause was, and in many respects remains, a repository of unformulated or imperfectly

3. 1 BLACKSTONE, *supra* note 1. While freedom from physical restraint certainly “lies ‘at the core of the liberty protected by the Due Process Clause,’” the originalists’ Due Process fallacy is the reduction of Due Process liberty to this core freedom from physical restraint. *Rogers*, 564 U.S. at 445 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

4. See *Obergefell*, 135 S. Ct. at 2632–34 (Thomas, J., dissenting). But see *id.* at 2634–35 (offering an alternative, broader view of liberty).

5. See, e.g., Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION* 65, 86 (Antonin Scalia ed., 1997).

6. *Obergefell*, 135 S. Ct. at 2633 n.3 (Thomas, J., dissenting).

formulated principles regulating government action in the interests of preserving liberty, broadly understood as freedom from unreasonable or arbitrary government action.⁷

In developing this argument, Part II considers the erroneous assertion that late eighteenth-century American law of the land and due process clauses were all substantially identical. Part III argues “liberty” in these clauses is not a distinctly definable term, as Justice Thomas presumes in *Obergefell*, but rather “life, liberty, or property” is a single term of art. Part IV argues Due Process “liberty” is not Blackstonean “personal liberty”—i.e., freedom from restraint—but rather “life, liberty, or property” refers collectively to a broader Lockean notion of liberty as the opposite of arbitrary government. Part V challenges textual arguments based on the Constitution advanced by Justice Thomas and his *Obergefell* sources. Part VI challenges Justice Thomas’s view that due process liberty was uniformly interpreted as freedom from physical restraint in pre-Fourteenth Amendment case law. In addition to critiquing Justice Thomas’s arguments and those of his sources, Part VI also reviews North Carolina case law of the period to illustrate how one state’s judiciary struggled to define the practical meaning of its law of the land guarantee—a counterpoint to Justice Thomas’s view that such clauses had a simple meaning that was uniformly understood. The Article concludes by proposing factors to help guide contemporary originalist jurists in applying the Fifth Amendment Due Process Clause based on the view presented in this Article.

I. JUSTICE THOMAS’S VIEW OF “LIBERTY”

In *Obergefell v. Hodges*, the Supreme Court’s 2015 decision establishing a constitutional right for same-sex couples to wed, Justice Thomas argues Due Process liberty is merely the absence of physical

7. In various respects, this thesis resembles arguments made by, *inter alia*, Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009) (arguing from the historical record that natural and other rights customarily recognized and enforced at common law are part of the due process protections), John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997) (critiquing possible text-based theories of substantive due process and the possibility that the Due Process Clauses are terms of art), and Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1 (2007) (arguing that the Due Process Clauses were not written in originalist terms but rather mandate courts to use common law reasoning to govern procedural innovations that relate to deprivations of life, liberty, or property).

restraint.⁸ In this section of the dissent, Justice Thomas reviews, in summary form, the history of the due process norm from the Magna Carta of 1215 to the seventeenth century.⁹ His analysis is typical, though abbreviated. He argues that the federal Due Process Clauses derive from chapter 39 of the Magna Carta of 1215, which provided, “No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”¹⁰ Later versions of the Magna Carta modified this clause slightly.¹¹ Justice Thomas notes that Sir Edward Coke in the seventeenth century interpreted “by the law of the land” to mean the same thing as “by due process of the common law” in the second part of his influential *Institutes of the Laws of England*, published in 1642.¹²

Justice Thomas then discusses Blackstone.¹³ Blackstone opens the substance of his first *Commentaries*, originally published in 1765, with a discussion of “the absolute rights of” every Englishman.¹⁴ In this chapter, Blackstone advances his version of a social contract theory, arguing that every person retains three absolute rights in society: the right of personal security, the right of personal liberty, and the right to private property.¹⁵ These roughly equate to the more familiar triad of life, liberty, and property, but Blackstone defines “personal liberty” narrowly as “the power of loco-motion, of changing situation, or removing one’s person to

8. *Obergefell*, 135 S. Ct. at 2632 (Thomas, J., dissenting) (citation omitted) (quoting 1 BLACKSTONE, *supra* note 1) (“‘[L]iberty’ most likely refers to ‘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.’”).

9. *Id.*

10. *Id.*; see also MAGNA CARTA OF 1215 ch. 39, reprinted in A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 385, 388 (1968).

11. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 383, 383–86 (2d. ed. 1914). The most common English-language formulation, used for instance in 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* *45, is from the Magna Carta of 1225 and reads:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.

But cf. MCKECHNIE, *supra*, at 375–76 n.3 (disputing the translation).

12. *Obergefell*, 135 S. Ct. at 2632 (Thomas, J., dissenting); see also COKE, *supra* note 11, at *45, *50.

13. *Obergefell*, 135 S. Ct. at 2632–33 (Thomas, J., dissenting).

14. 1 BLACKSTONE, *supra* note 1, at 121–45.

15. *Id.*

whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."¹⁶ Blackstone describes the Magna Carta as protecting these absolute rights, apparently linking this protection chiefly to the Magna Carta's law of the land clause.¹⁷

Justice Thomas then briefly summarizes the development of the due process constitutional norm between 1765 and 1791:

The Framers drew heavily upon Blackstone's formulation, adopting provisions in early State Constitutions that replicated Magna Carta's language, but were modified to refer specifically to "life, liberty, or property." State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word "liberty" to refer only to freedom from physical restraint. . . .

In enacting the Fifth Amendment's Due Process Clause, the Framers similarly chose to employ the "life, liberty, or property" formulation, though they otherwise deviated substantially from the States' use of Magna Carta's language in the Clause. When read in light of the history of that formulation, it is hard to see how the "liberty" protected by the Clause could be interpreted to include anything broader than freedom from physical restraint. That was the consistent usage of the time when "liberty" was paired with "life" and "property." And that usage avoids rendering superfluous those protections for "life" and "property."¹⁸

Justice Thomas then concludes, "If the Fifth Amendment uses 'liberty' in this narrow sense, then the Fourteenth Amendment likely does as well."¹⁹

Justice Thomas bolsters his argument about the meaning of liberty prior to the Fourteenth Amendment by citing two *Harvard Law Review* articles: an 1890 piece by 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,"* and a 1926 article by Charles Warren, *The New "Liberty" Under the Fourteenth Amendment.*²⁰ These citations invite our review of these sources.

Justice Thomas's interpretation of Due Process liberty largely parallels Shattuck's view. Shattuck seems to argue against early

16. *Id.* at 134.

17. *Id.* at 133–35.

18. *Obergefell*, 135 S. Ct. at 2633 (Thomas, J., dissenting) (footnote omitted) (citations omitted).

19. *Id.*

20. *Id.* (first citing Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 441–45 (1926); then citing 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, 382 (1890)).

proponents of incorporation and substantive due process.²¹ He traces the prototypes of the federal Due Process Clauses from the Magna Carta through the seventeenth century in greater detail than Justice Thomas's dissent.²² Shattuck reviews the various meanings of "liberty" and "liberties" in the legal texts from this period.²³ He admits the broad meaning of these terms but notes these texts did not use "liberty" in conjunction with "life" and "property."²⁴ Due Process liberty, he concludes, therefore *must* have a different meaning.²⁵ He argues the American constitutions use "life, liberty, or property" "each to express a special kind of right."²⁶ He continues, "It is as unreasonable to say that 'liberty,' in th[e Fifth Amendment], includes all civil rights, as it is to say that the term 'life' includes them, or that the term 'property' includes them."²⁷ He argues this would make the Due Process Clause "an absurdity on its face."²⁸ He comes to his point: "The fact is that each of these terms has a peculiar and definite meaning, and it seems clear, on the whole, considering the history of the clause, that the term in question means personal liberty, or freedom of the person from restraint."²⁹

After rejecting the notion that Due Process liberty includes *all* civil rights, Shattuck argues it does not include *any* civil rights beyond freedom from restraint.³⁰ He advances five arguments. First, he asserts that the American due process and law of the land clauses are "mere copies" of the

21. Compare Shattuck, *supra* note 20, at 366 (describing the danger of the "manifest tendency to regard constitutional prohibitions as a panacea for moral and political evils, to look upon courts of law, as distinguished from legislatures, as the only real protectors of individual rights, and to trust to the courts for remedies for evils resulting entirely from a failure to attend to political duties"), with *Davidson v. New Orleans*, 96 U.S. 97, 104 (1878) ("[T]he docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of th[e Due Process Clause] as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.").

22. Shattuck, *supra* note 20, at 369–78.

23. *Id.* at 368–78.

24. *Id.* at 373, 375.

25. *Id.* at 375.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 378.

Magna Carta's law of the land clause and that the Magna Carta did not protect many of the civil rights one might presume Due Process liberty includes.³¹ Second, he cites Blackstone and other writers to argue "liberty" was used with "life" and "property" to mean simply personal liberty rather than these additional civil rights, many of which were recent or subsequent developments.³² He emphasizes Blackstone's narrow view of "personal liberty": freedom from physical restraint.³³ From this, he concludes, "[Liberty] would, therefore, naturally be used by the framers of our constitutions in that sense."³⁴ Third, Shattuck argues other civil rights, such as trial by jury, habeas corpus, and bearing arms, are only instrumental or subordinate rights.³⁵ He distinguishes these from life, liberty, and property, which he presents as substantial or fundamental rights.³⁶ Fourth, he argues these other civil rights are already protected in the federal and state constitutions and that reading Due Process liberty as including them would be redundant.³⁷ Finally, he argues that if Due Process liberty includes these other rights, they can be taken away by due process of law.³⁸ He concludes, therefore, that "liberty" in the Due Process Clauses "means nothing more or less than freedom of the person from restraint," though he acknowledges this view is "repudiated by several [judicial] decisions."³⁹

Warren, arguing against the doctrines of incorporation and substantive due process thirty-five years later,⁴⁰ relies on Shattuck's article to assert that Due Process liberty means only freedom from physical restraint.⁴¹ Warren argues that "[i]t is unquestionable that when the First Congress adopted the Fifth Amendment and inserted the Due Process Clause, they [sic] took it directly from the then existing State Constitutions, and they [sic] took it with the meaning it then bore."⁴² He echoes Shattuck's

31. *Id.* at 376. To be fair, Shattuck elsewhere acknowledges that American constitutional law of the land and due process clauses are not "mere copies" of the Magna Carta, but he construes the addition of "life, liberty, and property" to the traditional language as a "summary" or "supererogation." *Id.* at 375.

32. *Id.* at 368, 377–78.

33. *Id.* at 377.

34. *Id.* at 376.

35. *Id.* at 380.

36. *Id.*

37. *Id.* at 380–82.

38. *Id.* at 381–82.

39. *Id.* at 382.

40. *See* Warren, *supra* note 20, at 431–33.

41. *Id.* at 440 n.22.

42. *Id.* at 440.

objection that reading Due Process liberty as including, for instance, freedom of speech would mean Congress could take away freedom of speech after providing due process.⁴³ Warren then summarizes pre-Fourteenth Amendment parallels for substantive due process case law.⁴⁴ He concludes that some states regarded due process as having no relation to substantive legislation.⁴⁵ Other states, however, interpreted “property” and “liberty” as including a restricted substantive content, though only a few courts actually construed the meaning of “liberty” in this context.⁴⁶ He discusses a case in which “liberty” was interpreted fairly broadly, treating it as an aberration.⁴⁷ Justice Thomas, however, tries to interpret the case as supporting the originalists’ Due Process fallacy.⁴⁸

In summary, then, the originalists’ Due Process fallacy, as portrayed in Justice Thomas’s *Obergefell* dissent, rests on five arguments or assumptions: First, American due process and law of the land clauses are all substantially identical with each other and with their predecessors.⁴⁹ Second, “life,” “liberty,” and “property” in these clauses each have a separate and distinct meaning.⁵⁰ Third, “liberty” in these clauses means “personal liberty,” which in turn means freedom from physical restraint, as stated by Blackstone.⁵¹ Fourth, interpreting Due Process liberty as freedom from physical restraint is the view most consistent with the text of the Constitution.⁵² Finally, this interpretation is also the one most consistent

43. *Id.* at 441.

44. *Id.* at 441–45.

45. *Id.* at 442.

46. *Id.* at 442–44.

47. *Id.* at 444–45 (discussing *Herman v. State*, 8 Ind. 545, 558–63 (1855)).

48. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 (2015) (Thomas, J., dissenting) (citing Warren, *supra* note 20, at 444–45, as support for the proposition that “one case . . . identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint”).

49. *See id.* (“The Framers drew heavily upon Blackstone’s formulation, adopting provisions in early State Constitutions that replicated Magna Carta’s language, but were modified to refer specifically to ‘life, liberty, or property.’”); *see also* Shattuck, *supra* note 20, at 368, 375–76; Warren, *supra* note 20, at 440.

50. *See Obergefell*, 135 S. Ct. at 2632–33 (Thomas, J., dissenting); *see also* Shattuck, *supra* note 20, at 369, 375; Warren, *supra* note 20, at 440–42.

51. *Obergefell*, 135 S. Ct. at 2632–33 (Thomas, J., dissenting); Shattuck, *supra* note 20, at 369, 375–80; Warren, *supra* note 20, at 440.

52. *Obergefell*, 135 S. Ct. at 2632–33 (Thomas, J., dissenting); Shattuck, *supra* note 20, at 369, 375–76, 380–81; Warren, *supra* note 20, at 440–41.

with judicial interpretations prior to the ratification of the Fourteenth Amendment.⁵³ This Article reviews and disputes each of these in turn.

To be completely fair to Justice Thomas, he goes on to present an alternative theory of Due Process liberty in his *Obergefell* dissent that is somewhat more compatible with the thesis of this Article.⁵⁴ He describes the historical view, based on the influential philosophy of John Locke, that liberty is broader than Blackstone envisioned; but, Justice Thomas argues it remains strictly a negative right: freedom from government action, rather than a right to any government entitlement.⁵⁵ In this interpretation, according to Justice Thomas, “The founding-era idea of civil liberty as natural liberty constrained by human law necessarily involved only those freedoms that existed *outside* of government.”⁵⁶ This Article will not analyze this secondary argument in depth. It focuses on Justice Thomas’s primary argument: that Due Process liberty is solely freedom from physical restraint.

II. THE MANY LAW OF THE LAND AND DUE PROCESS CLAUSES

The originalists’ Due Process fallacy presumes eighteenth-century American prototypes of the Fifth Amendment Due Process Clause were substantially identical—“mere copies” of the Magna Carta law of the land clause, as Shattuck puts it.⁵⁷ Justice Thomas acknowledges textual differences among the state clauses, but he still assumes they have substantially identical meanings.⁵⁸ These views are not supported by the historical record. There were, in fact, many different due process and law of the land clauses adopted in America in the fifteen years preceding the Fifth Amendment’s ratification, with substantial differences in both their language and their meaning.

In particular, between 1776 and 1784, eight states and the territory of Vermont adopted “law of the land” clauses in their constitutional texts—i.e., prototype due process clauses derived from chapter 39 of the Magna Carta of 1215 or its progeny and typically employing “law [or laws] of the

53. *Obergefell*, 135 S. Ct. at 2633 (Thomas, J., dissenting); Warren, *supra* note 21. *But cf.* Shattuck, *supra* note 20 (acknowledging his interpretation of liberty has been repudiated by several courts).

54. *Obergefell*, 135 S. Ct. at 2634–35 (Thomas, J., dissenting).

55. *Id.*

56. *Id.* at 2635.

57. Shattuck, *supra* note 20, at 376; Warren, *supra* note 20, at 440.

58. *Obergefell*, 135 S. Ct. at 2632–33 (Thomas, J., dissenting).

land” language.⁵⁹ Two states adopted statutory law of the land clauses: Connecticut in 1784⁶⁰ and Virginia in 1786.⁶¹ The Continental Congress used a law of the land clause in the Northwest Ordinance of 1787.⁶² New York adopted a collection of statutory due process clauses in 1787.⁶³ In 1788, Virginia and North Carolina proposed law of the land clauses for the federal Constitution, and New York’s ratification that year expressly presumed the federal Constitution would afford due process protections.⁶⁴ The text of these sixteen clauses differed in *who* and *what* they protected, in the *protections afforded*, and *when* the protections applied.

To review this history in more detail, Virginia’s June 1776 declaration of rights was the first constitutional document of the period to employ a law of the land clause.⁶⁵ This clause did not use either the traditional Magna Carta language for the interests protected or “life” or “property.”

59. MD. CONST. of 1776, decl. of rights XXI; MASS. CONST. pt. 1, art. XII; N.H. CONST. pt. I, art. XV; N.Y. CONST. of 1777, art. XIII; N.C. CONST. of 1776, decl. of rights XII; PA. CONST. of 1776, decl. of rights IX; S.C. CONST. of 1778, art. XLI; VT. CONST. of 1777, ch. I, art. X; VA. DECL. OF RIGHTS OF 1776, § 8. Vermont’s territory was claimed by New York, but Vermont asserted its independence as a sovereign state in January 1777. THE DECLARATION AND PETITION OF THE INHABITANTS OF THE NEW HAMPSHIRE GRANTS, TO CONGRESS, ANNOUNCING THE DISTRICT TO BE A FREE AND INDEPENDENT STATE (1777), reprinted in VERMONT STATE PAPERS 70, 70–73 (William Slade ed., 1823); 2 ZADOCK THOMPSON, HISTORY OF VERMONT 51 (Stacy & Jameson 1853). This is reflected in the preamble to its constitution of 1777. VT. CONST. of 1777, pmb1.

60. 1 THE PUB. STAT. LAWS OF THE STATE OF CONN. tit. I, § 2 (Hudson & Goodwin 1808) [hereinafter CONN. STAT. OF 1808].

61. An Act Declaring That None Shall Be Condemned Without Trial, and That Justice Shall Not Be Sold or Deferred, REV. BILLS OF 1779 ch. 47, reprinted in 12 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 186 (William Waller Hening ed., 1823) [hereinafter HENING’S STATUTES AT LARGE]; REPORT OF THE COMMITTEE OF REVISORS APPOINTED BY THE GENERAL ASSEMBLY OF VIRGINIA 42 (Dixon & Holt 1784); JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA 13, 64, 69, 72, 133 (Thomas W. White ed., 1827) (Oct. 17, 1785); JOURNAL OF THE SENATE OF THE COMMONWEALTH OF VIRGINIA 31, 34, 37, 39, 62 (Thomas W. White ed., 1827) (Oct. 17, 1785).

62. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, art. II (1787), reprinted in HOWARD W. PRESTON, DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606–1863, at 240, 247 (1886) [hereinafter Northwest Ordinance].

63. An Act Concerning the Rights of the Citizens of this State (1787), reprinted in 1 LAWS OF THE STATE OF NEW-YORK ch. 1, §§ 2–5, at 289–90 (Thomas Greenleaf ed., 1792).

64. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1786–1870, at 192, 268, 379 (Dep’t of State 1894) [hereinafter DOCUMENTARY HISTORY].

65. VA. DECL. OF RIGHTS of 1776, § 8. New Hampshire adopted the first state constitution on January 5, 1776. N.H. CONST. In March 1776, South Carolina followed suit. S.C. CONST. of 1776. Neither constitution contained a law of the land clause.

Instead, it read, “[T]hat no man be *deprived of his liberty*, except by the law of the land or the judgment of his peers.”⁶⁶ Virginia placed this clause in a provision related to criminal procedure, implying it was limited to penal matters.⁶⁷ Pennsylvania (1776) followed Virginia’s lead in its law of the land clause, and Vermont (1777) followed Pennsylvania’s lead.⁶⁸ A decade later, in 1787, the Continental Congress passed the Northwest Ordinance, an act establishing the government of the Northwest Territory (present-day Ohio, Indiana, Illinois, Michigan, Wisconsin, and parts of Minnesota).⁶⁹ It contained a law of the land clause regulating deprivations of “liberty or property,” without reference to “life,” even though the same article of the Ordinance referenced capital punishment.⁷⁰

Maryland took a different course in its 1776 declaration of rights, placing the following language in an independent section: “That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.”⁷¹ This joined “life, liberty, or property” with traditional Magna Carta language describing the interests protected and divorced the provision, at least to some degree, from the context of criminal prosecutions.⁷² Two states adopted this model in their pre-1789 state constitutions,⁷³ as did Virginia and North Carolina in their proposed amendments to the federal Constitution in 1788.⁷⁴ North Carolina’s 1776 constitutional provision, for instance, used Maryland’s formula in an independent section but eliminated the reference to judgment of peers.⁷⁵ Two more states adapted Maryland’s language but kept the clause as part of a larger provision related to criminal matters.⁷⁶ One of these was Massachusetts’s constitution of 1780, which reworked Maryland’s language to eliminate the reference to “liberties” while retaining the term

66. VA. DECL. OF RIGHTS of 1776, § 8 (emphasis added).

67. *Id.*

68. PA. CONST. of 1776, decl. of rights IX; VT. CONST. of 1777, ch. I, art. X. *See also infra* note 94 (discussing the drafting of the early declarations of rights by the various states).

69. Northwest Ordinance, *supra* note 62.

70. *Id.*

71. MD. CONST. of 1776, decl. of rights XXI.

72. *See* discussion in *supra* note 11.

73. N.C. CONST. of 1776, decl. of rights XII; S.C. CONST. of 1778, art. XLI.

74. RESOLUTION OF THE NORTH CAROLINA CONVENTION, *reprinted in* DOCUMENTARY HISTORY, *supra* note 64, at 266, 268; RESOLUTION OF THE VIRGINIA CONVENTION, *reprinted in* DOCUMENTARY HISTORY, *supra* note 64, at 377, 379.

75. N.C. CONST. of 1776, decl. of rights XII.

76. MASS. CONST. pt. 1, art. XII; N.H. CONST. pt. 1, art. XV.

“liberty.”⁷⁷ Massachusetts’s clause also protected only its “subjects,” not all men or freemen.⁷⁸ Moreover, some states also adopted clauses that seem to provide a secondary law of the land guarantee, such as Massachusetts’s provision that read: “Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws.”⁷⁹

Meanwhile, Connecticut adopted a broad statutory law of the land clause in 1784 that appears to have reached well beyond criminal matters, though it employed the phrase “unless clearly warranted by the Laws of this State” instead of “law [or laws] of the land.”⁸⁰ In 1786, Virginia adopted a statutory law of the land clause that paralleled the 1225 Magna Carta provision almost verbatim.⁸¹ This statute provided, in relevant part:

B[e] it enacted by the General Assembly, That no freeman shall be taken or imprisoned, or be disseized of his freehold, or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor shall the commonwealth pass upon him, nor condemn him; but by lawful judgment of his peers, or by the laws of the land. Justice or right shall not be sold, denied, or deferred, to any man.⁸²

New York presents a unique case. New York adopted an untraditional law of the land clause in its 1777 constitution. It provided, “[N]o member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to the subjects of this state, by this constitution, unless by the law of the land, or the judgment of his peers.”⁸³ Read in conjunction with a separate constitutional clause that expressly continues the common law and statutory law of England,⁸⁴ this law of the land clause promises

77. See MASS. CONST. pt. 1, art. XII.

78. *Id.* Notably, the initial draft text of the Massachusetts constitution, prepared substantially by John Adams, had this law of the land clause as an independent section, but the section was merged with one related to criminal prosecutions by a subsequent committee. See MINUTES OF THE CONSTITUTIONAL CONVENTION OF MASSACHUSETTS BAY (Feb. 28, 1780), in JOURNAL OF THE CONVENTION FOR FRAMING A CONSTITUTION OF GOVERNMENT FOR THE STATE OF MASSACHUSETTS BAY 150–51 (Dutton & Wentworth 1832); MASS. CONST. pt. 1, art. XII; see also Harry A. Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts*, 7 STUD. HIST. ECON. & PUB. L. 1, 234–35 (1896).

79. MASS. CONST. pt. 1, art. X.

80. CONN. STAT. OF 1808, *supra* note 60.

81. See An Act Declaring That None Shall Be Condemned Without Trial, and That Justice Shall Not Be Sold or Deferred, *supra* note 61; see also discussion in *supra* note 11.

82. An Act Declaring That None Shall Be Condemned Without Trial, and That Justice Shall Not Be Sold or Deferred, *supra* note 61.

83. N.Y. CONST. of 1777, art. XIII.

84. *Id.* art. XXXV.

broad protections. Then, New York adopted a statutory bill of rights in 1787 that included the following provisions:

Second, That no citizen of this state shall be taken or imprisoned, or be disseised of his or her freehold, or liberties, or free customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful judgment of his or her peers, or by due process of law.

Third, That no citizen of this state shall be taken or imprisoned for any offence, upon petition or suggestion, unless it be by indictment or presentment of good and lawful men of the same neighbourhood where such deeds be done, in due manner, or by due process of law.

Fourth, That no person shall be put to answer without presentment before justices, or matter of record, or due process of law, according to the law of the land; and if any thing be done to the contrary, it shall be void in law, and holden for error.

Fifth, That no person, of what estate or condition soever, shall be taken, or imprisoned, or disinherited, or put to death, without being brought to answer by due process of law; and that no person shall be put out of his or her franchise or freehold, or lose his or her life or limb, or goods and chattels, unless he or she be duly brought to answer, and be fore-judged of the same, by due course of law; and if any thing be done contrary to the same, it shall be void in law, and holden for none.⁸⁵

These provisions from New York's statute were the first proper American due process clauses—the first time in the American legal texts that “due process” appears in place of “law of the land.” These clauses are drawn chiefly from Coke's interpretation of the Magna Carta, rather than Blackstone's.⁸⁶ Coke's *Institutes* famously links due process to the Magna Carta language that appears in the second section of this New York statute.⁸⁷ Coke's *Institutes* also employs language used in the third and fourth sections of this statute.⁸⁸ The language of the fifth section is likewise derived in part from Coke's *Institutes*.⁸⁹ New York later ratified

85. An Act Concerning the Rights of the Citizens of this State, *supra* note 63; see also Robert Emery, *New York's Statutory Bill of Rights: A Constitutional Coelacanth*, 19 TOURO L. REV. 363, 369 (2003).

86. See COKE, *supra* note 11, at *46, *50.

87. *Id.*

88. *Id.*

89. *Id.* at *50. There were also more proximate sources for some (but not all) of the language of these due process clauses, including THE CHARTER OF LIBERTIES AND PRIVILEGES GRANTED BY HIS ROYALL HIGHNESSE TO THE INHABITANTS OF NEW YORKE AND ITS DEPENDENCIES paras. 15, 17 (1683), reprinted in 1 THE COLONIAL LAWS OF NEW YORK FROM 1664 TO THE REVOLUTION 111, 113 (James B. Lyon 1896), AN ACT DECLARING WHAT ARE THE RIGHTS AND PRIVILEGES OF THEIR MAJESTIES SUBJECTS INHABITING WITHIN THEIR PROVINCE OF NEW YORK (1691), reprinted in 1 THE COLONIAL LAWS OF NEW YORK

the United States Constitution on the express presumption that the federal government would respect the right to “due process.”⁹⁰

The Due Process Clause of the Fifth Amendment, ratified in 1791 but identical to the text James Madison proposed to Congress in 1789,⁹¹ is an original formulation of the constitutional norm. It is not a direct copy of *any* of the prior state texts. Only New York used “due process” language, in its statutory clauses and its ratification text. None of the states used “life, liberty, and property” language alone to describe the interests protected, at least in each state’s primary due process or law of the land clause.

Thus, the historical record demonstrates the early American law of the land and due process clauses were not “mere copies” of the Magna Carta provision. Moreover, the textual differences among these clauses support substantially different interpretations. New York’s protection of “the rights or privileges secured to the subjects of this State, by this constitution,”⁹² for instance, is very different from the law of the land protections afforded by Virginia, Pennsylvania, Vermont, Massachusetts, and other states, where the primary law of the land clauses appear limited to the criminal context.⁹³ The state conventions and legislatures formulating these constitutions and statutes generally had the prior state constitutions (or drafts) available.⁹⁴

FROM 1664 TO THE REVOLUTION, *supra*, at 244, 246, and the so-called 1628 PETITION OF RIGHTS ¶ IV (1627), *reprinted in* 3 THE STATUTES AT LARGE, FROM THE FIRST YEAR OF KING JAMES THE FIRST TO THE TENTH YEAR OF THE REIGN OF KING WILLIAM THE THIRD 123 (Mark Basket 1763).

90. RESOLUTION OF THE NEW YORK CONVENTION, *reprinted in* DOCUMENTARY HISTORY, *supra* note 64, at 190, 192.

91. *Compare* U.S. CONST. amend. V (Due Process Clause), *with* 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 433–36 (Joseph Gales ed., 1834).

92. N.Y. CONST. of 1777, art. XIII.

93. *See supra* text accompanying notes 64–67, 76, 83–85.

94. For instance, newspapers quickly circulated the draft of Virginia’s declaration of rights, and it made its way to Pennsylvania. *A Declaration of Rights*, VA. GAZETTE, Jun. 1, 1776, at 2; FIRST DRAFT OF THE VIRGINIA DECLARATION OF RIGHTS (1776), *reprinted in* 1 THE PAPERS OF GEORGE MASON 1725–1792, at 276–82 (Robert A. Rutland ed., 1970); Brent Tarter, *The Virginia Bill of Rights*, in TO SECURE THE BLESSINGS OF LIBERTY 37, 47–48 (Josephine F. Pacheco ed., 1993) (tracing the broad distribution of the draft). A draft of Pennsylvania’s declaration draws heavily from this text. AN ESSAY OF A DECLARATION OF RIGHTS (1776), *reprinted in* *Revisions of the Pennsylvania Declaration of Rights, [Between 29 July 1776 and 15 August 1776]*, FOUNDERS ONLINE (Nov. 26, 2017), <https://perma.cc/VZ2Q-QMC3>. Maryland’s declaration of rights draws from both Pennsylvania’s and Virginia’s declarations, with many additions and alterations. *Compare, e.g.*, MD. CONST. of 1776, decl. of rights II, VI–VII, *with* PA. CONST. of 1776, art. III, *and* VA. DECL. OF RIGHTS OF 1776, §§ 5, 7. Delaware’s declaration of rights is almost entirely derivative of Maryland’s draft declaration, though a few provisions draw from

They could have adopted substantially identical language, but often they chose to describe the protections afforded differently than their sister states.

One would imagine the American law of the land and due process clauses from 1776 to 1789 would be the chief sources for understanding the Fifth Amendment Due Process Clause, but Justice Thomas, Shattuck, and Warren do not discuss these clauses in any depth, much less the extant drafts and discussions of these texts. The differences among these provisions would certainly complicate the originalists' simple narrative of the original understanding of Due Process liberty.

III. "LIFE, LIBERTY, OR PROPERTY": A UNIFIED TERM OF ART

Next, the originalists' Due Process fallacy portrays "life, liberty, or property" as three separate terms, each with a distinct meaning.⁹⁵ This interpretation is not unreasonable if one ignores the eighteenth-century American texts discussed above. Blackstone's *Commentaries* treat personal security, personal liberty, and private property as distinct,⁹⁶ as does the Magna Carta formulation of the interests protected by the law of the land clause.⁹⁷ But looking at the American texts sheds a different light on the matter.

Virginia and Pennsylvania were the first states to adopt law of the land clauses during this period.⁹⁸ Their clauses stated in relevant part, respectively, "no man be deprived of his liberty"⁹⁹ and "nor can any man be

Pennsylvania's declaration instead. Compare DEL. DECL. OF RIGHTS, reprinted in SOURCES OF OUR LIBERTIES 338–40 (Richard L. Perry ed., 1959), with THE DECL. AND CHARTER OF RIGHTS (1776), <https://perma.cc/3NAV-Z7HG>, and MD. CONST. OF 1776, and PA. CONST. OF 1776, decl. of rights II–III, VIII–IX. North Carolina's delegate in the Continental Congress sent the state legislature "the plans of Govt of several States," which likely included some of the states' declarations of rights, in October 1776. Letter from William Hooper, Delegate from N.C. to the Cont'l Cong., to the Congress at Halifax (Oct. 26, 1776), in 10 THE COLONIAL RECORDS OF NORTH CAROLINA 862–70 (William L. Saunders ed., Josephus Daniels 1890). Vermont's convention used Pennsylvania's constitution as a model because of the influence of Philadelphia citizen Dr. Thomas Young. 2 THOMPSON, *supra* note 59, at 51, 105–07. Dr. Young published a letter to the inhabitants of Vermont in April 1777 encouraging them in their opposition to New York's territorial claims and recommending that they form a state constitution. *Id.* He specifically recommended the constitution of Pennsylvania as a model. *Id.*

95. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631–33 (2015) (Thomas, J., dissenting); Shattuck, *supra* note 20, at 369, 375; Warren, *supra* note 20, at 440.

96. 1 BLACKSTONE, *supra* note 1, at 123–36.

97. MCKECHNIE, *supra* note 11, at 382–86.

98. PA. CONST. OF 1776, decl. of rights IX; VA. DECL. OF RIGHTS OF 1776, § 8.

99. VA. DECL. OF RIGHTS OF 1776, § 8.

justly deprived of his liberty.”¹⁰⁰ The terms “life” and “property” were absent. These clauses were each part of a section dedicated to the rights of the criminally accused. To read “liberty” in these clauses as mere freedom from physical restraint would mean Virginia and Pennsylvania greatly narrowed the protections afforded in the Magna Carta law of the land clause, which expressly regulated seizures of property and deprivations of other legal privileges and rights in addition to physical restraints.¹⁰¹ It is unlikely the freedom-loving patriots of 1776 in Virginia and Pennsylvania would discard traditional rights preserved in the Magna Carta as they drafted their declarations of rights. Instead, “liberty” in the context of Virginia’s and Pennsylvania’s 1776 law of the land clauses was likely intended as a single-word summary for all the particular interests protected by the law of the land. It was likely intended to include at least all of the interests protected in the Magna Carta, not simply freedom from physical restraint.¹⁰²

Maryland was the next state to act. As noted, Maryland brought together traditional language—“no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed”—and added “or deprived

100. PA. CONST. of 1776, decl. of rights IX.

101. *See supra* notes 10–12 and accompanying text. To be fair, the legal interpretation of this formulation was underdeveloped in Virginia and Pennsylvania case law prior to the ratification of the Fourteenth Amendment. The Pennsylvania Constitution of 1790 added “life” and “property” to the state’s law of the land clause before state courts really construed the meaning of “liberty” standing alone. PA. CONST. of 1790, art. IX, § 9. Virginia courts could, and at times did, rely on the state’s statutory law of the land clause or directly on the Magna Carta. *See, e.g.,* *Martin v. Snowden*, 59 Va. (18 Gratt.) 100, 139–40 (1868) (discussing whether the forfeiture of property in satisfaction of delinquent tax was made under sufficient due process of law); *Warwick & Barksdale v. Mayo*, 56 Va. (15 Gratt.) 528, 538 (1860) (arguing that the law of the land clause prevents justices of the peace from deciding title to land by summary judgment); *Kinney v. Beverley*, 12 Va. (2 Hen. & M.) 318, 336 (1808) (stating that the “principle of moral justice, recognized by *Magna Charta* in *England*, and by the statute of [Virginia]” requires that “no citizen shall be disseized of his freehold, or be condemned, but by lawful judgment of his peers, or by the laws of the land”). The parallel “liberty” language in Vermont’s declaration of rights was read narrowly at times, but not so narrowly as to be absolutely limited to freedom from physical restraint. *See, e.g.,* *Lincoln v. Smith*, 27 Vt. 328, 361 (1855); *In re Powers*, 25 Vt. 261, 266–71 (1853).

102. *Cf.* EDMUND RANDOLPH, HISTORY OF VIRGINIA 251–55 (Arthur H. Shaffer ed., 1970) (stating section 8 of Virginia’s declaration of rights “reenacts in substance modes of defense for accused persons similar to those under the English law”); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 329 (Pa. 1788) (recording William Findley’s views as to the traditional protections afforded by Pennsylvania’s law of the land clause in a legislative debate concerning the Pennsylvania Supreme Court’s issuance of a writ of attachment for contempt of court).

of his life, liberty, or property.”¹⁰³ To read “life, liberty, or property” in this context as separate and distinct terms, with “liberty” equating to freedom from physical restraint, must make the attentive reader curious. Why would the likes of Charles Carroll of Carrollton and Samuel Chase (both members of the committee drafting the text)¹⁰⁴ say both “no freeman ought to be taken, or imprisoned” *and* “no freeman ought to be . . . deprived of his . . . liberty”? Similarly, how is being “disseized of [one’s] freehold” not subsumed within the meaning of being “deprived of . . . property”? There is, no doubt, substantial overlap between the traditional and the new language in Maryland’s formulation with respect to the substance of rights protected, but treating “life, liberty, or property” as terms that each have a discrete legal meaning would make this additional, new language a useless redundancy. There is better interpretation available. Namely, Maryland’s formula suggests “life, liberty, or property” does not function as three distinct terms so much as a single term of art—a phrase labeling all of those interests, discernable by reason, that are preserved by the people under a Lockean social contract, interests the government must not arbitrarily infringe.

John Locke (1632–1704) is the intellectual father of the political philosophy prevalent in America during the era of the Revolution: the social contract in which reason—not custom or royal prerogative—dictated the just constitutional limits and duties of the government and the obligations and rights of the governed.¹⁰⁵ In the second of his *Two Treatises of Government*, published anonymously in 1689,¹⁰⁶ Locke argues the purpose of government is to preserve each member’s “Property,” a term he uses to describe a broad collection of interests that includes life, limb, health, material goods and possessions, and another complex interest he calls “Liberty.”¹⁰⁷ Liberty, for Locke, is not license but rather is the right of the person to act in society subject to the strictures of reason.¹⁰⁸ For Locke, “Liberty” is a category of “Property.”¹⁰⁹ Locke summarizes these

103. MD. CONST. of 1776, decl. of rights XXI; *see supra* note 11 and accompanying text.

104. DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION* 5 n.4 (G. Alan Tarr ed., Oxford Univ. Press 2011); *PROCEEDINGS OF THE CONVENTIONS OF THE PROVINCE OF MARYLAND, HELD AT THE CITY OF ANNAPOLIS IN 1774, 1775, & 1776*, at 184 (James Lucas & E.K. Deaver eds., Jonas Green 1836).

105. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 1–2, 16 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1988) (1689); *see also* *THE CAMBRIDGE COMPANION TO LOCKE* 226–51 (Vere Chappell ed., 1994).

106. LOCKE, *supra* note 105, at 7–8.

107. *Id.* at 271, 329–30, 350.

108. *Id.* at 270–71, 277–78, 283–84, 309.

109. *Id.* at 271, 350.

“Property” interests in various ways in his text, but the most influential formula he uses as a summary is “Life, Liberty, and Estate.”¹¹⁰ This triad is, in fact, a summary—three terms that collectively represent the larger whole that Locke calls “Property.”¹¹¹ Since the government’s purpose is to preserve its members’ “Property,” it is rationally prohibited from arbitrary actions that infringe these interests.¹¹²

Locke’s successors often followed his methodology and adopted his insights but altered his language. Blackstone, for instance, developed a social contract theory in which he referenced Locke,¹¹³ but Blackstone preferred to categorize the personal interests at the core of this theory as personal security, personal liberty, and private property—a collection he called “liberties” or “absolute rights” instead of “Property.”¹¹⁴ The Declaration of Independence, by comparison, uses “Life, Liberty, and the pursuit of Happiness” to describe the core interests, which it identifies collectively as “unalienable Rights.”¹¹⁵

Within this tradition, in which all personal interests protected under the social contract were typically summarized into a few categories, which were then often collectively identified by a single term, it is easy to understand that Virginia and Pennsylvania used the single term “liberty” in their law of the land clauses to describe succinctly all of the interests protected by the clause—much as Locke uses the term “Property” and Blackstone uses the term “liberties” to describe these interests.¹¹⁶ Likewise, while Blackstone defines each term in his triad discretely, “life, liberty, or property” can collectively represent the pantheon of personal rights under the social contract, even those rights not easily reducible to life, or to liberty, or to property.¹¹⁷

Read in this way, Maryland brought together both the traditional, formalistic language of the Magna Carta and parallel philosophic language derived from John Locke to ensure a broad, though somewhat imprecise, scope of protected interests. The use of “life, liberty, or property” was not *mere* redundancy but an effort to capture *all* of the interests protected by the social contract. If something was protected in the Magna Carta law of the land clause, it was protected through the traditional language; if

110. *Id.* at 350.

111. *Id.*

112. *Id.* at 307–09, 330–31, 350–63.

113. 1 BLACKSTONE, *supra* note 1, at 126.

114. *Id.* at 123–36.

115. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

116. *See supra* notes 98–100, 108, 112, 115 and accompanying text.

117. *Cf. LOCKE, supra* note 105, at 271, 350 (using “Life, Liberty, and Estate” as a summary for many different personal interests).

something was a natural right preserved under the social contract, it was protected under the new language. Some interests fall into both categories, accounting for the apparent redundancy. “Life, liberty, or property” in this context, therefore, does not operate as three separate and distinct terms but rather a collective term of art. Massachusetts’s formula makes the Lockean link even more apparent. It adds “life, liberty, or estate,” rather than “life, liberty, or property,” to traditional law of the land language.¹¹⁸ As noted, Locke’s second *Treatise of Government* used “Estate” rather than “property” in his triad with “Life” and “Liberty.”¹¹⁹ By using “life, liberty, or estate,” Massachusetts’s law of the land clause signals more clearly the Lockean basis of its added protections.

Moreover, the American state constitutional texts of 1776 to 1788—not simply the law of the land and due process clauses, but the texts in their entirety—seem to employ “liberty” standing alone almost interchangeably with “life, liberty, and property” or similar language. For instance, Virginia’s declaration of rights identified “the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety” as “inherent rights” of man.¹²⁰ It then used “liberty” three more times throughout the document (not including the law of the land clause) to reference the beneficial order of society obtained and preserved through good government—i.e., the social order in which man enjoys his inherent rights under the protection of the law.¹²¹ Pennsylvania similarly identified man’s “inherent and inalienable rights” that included “enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”¹²² It also asserted, “[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expen[s]e of that protection.”¹²³ It then repeatedly used “liberty” alone much as Virginia’s declaration did, implying the absence of liberty proves the absence of good government.¹²⁴ Variations on this theme continued through most of the constitutional texts of the period and in the federal constitutional ratifications of Virginia, North Carolina, and New York.¹²⁵ In short, these texts suggest “liberty”

118. MASS. CONST. pt. 1, art. XII.

119. LOCKE, *supra* note 105, at 350.

120. VA. DECL. OF RIGHTS of 1776, § 1.

121. *See id.* §§ 12–13, 15.

122. PA. CONST. of 1776, decl. of rights I.

123. *Id.* decl. of rights VIII.

124. *See id.* decl. of rights XIII–XIV.

125. *See* MD. CONST. of 1776, decl. of rights IV–V, XV, XVIII, XXVI, XXX–XXXI, XXXIII; MASS. CONST. pt. 1, arts. I–II, X, XIII, XVII–XVIII, XXIX; N.H. CONST. pt. 1, arts.

standing alone was practically an abbreviation of the right to life, liberty, and property under the Lockean social contract.¹²⁶

One might question why the Fifth Amendment would employ “life, liberty, or property” rather than just “liberty” if these terms were substantially interchangeable. Justice Thomas uses this point, arguing his narrow reading of Due Process liberty “avoids rendering superfluous those protections for ‘life’ and ‘property.’”¹²⁷ The eighteenth-century American texts suggest an alternative. In proposing the original federal Due Process Clause in 1789, Madison likely balanced the competing interests of brevity, breadth, and elegance, qualities variously represented in the formulas adopted first by Virginia, Maryland, and Massachusetts, respectively. Madison, therefore, used “life, liberty, or property” as a unified term of art to describe the broad and imprecise class of interests protected; namely, all rights that are properly protected by due process under the social contract—rights discernible through reasoning about the social contract. Had Madison used “liberty” alone within this historical context, the term (and the clause) could have been interpreted too narrowly, including for instance in the way the originalists’ Due Process fallacy presently interprets the term as merely freedom from physical restraint.

IV. FREEDOM FROM PHYSICAL RESTRAINT OR FROM ARBITRARY GOVERNMENT?

The originalists’ Due Process fallacy next employs Blackstone’s narrow definition of “personal liberty”—freedom from physical restraint—as the interpretive key to “liberty” in American due process and law of the land clauses, particularly in the Fifth Amendment.¹²⁸ This definition comes from Blackstone’s chapter on the rights of individuals in the first volume of his *Commentaries*.¹²⁹ Justice Thomas justifies this approach by asserting “[t]he Framers drew heavily upon Blackstone’s formulation” in the state constitutions,¹³⁰ but there is little decent evidence supporting Justice

II, V, X, XII, XVII, XXV, XXXV; N.Y. CONST. of 1777, arts. VI, XXXVIII; N.C. CONST. of 1776, decl. of rights XI, XIII, XV, XVII, XXI, XXIV; VT. CONST. of 1777, ch. I, arts. I, IX, XV, XVI; RESOLUTION OF THE NEW YORK CONVENTION, *supra* note 90, at 190–93; RESOLUTION OF THE NORTH CAROLINA CONVENTION, *supra* note 74, at 266–69; RESOLUTION OF THE VIRGINIA CONVENTION, *supra* note 74, at 377–80.

126. *Cf.* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2634–35 (2015) (Thomas, J., dissenting) (discussing the Lockean notion of civil liberty).

127. *Id.* at 2633.

128. *Id.* at 2632–33; Shattuck, *supra* note 20, at 369, 375–80; Warren, *supra* note 20, at 440.

129. 1 BLACKSTONE, *supra* note 1, at 121.

130. *Obergefell*, 135 S. Ct. at 2633 (Thomas, J., dissenting).

Thomas's assertion. Instead, the American states likely developed their due process and law of the land clauses independently or substantially independently of Blackstone.¹³¹

Blackstone's *Commentaries* were first published in England between 1765 and 1769, and they were not published in America until 1771 to 1772.¹³² While lawyers and jurists used the *Commentaries* as an accessible articulation of contemporary English law, Blackstone's constitutional ideas were initially viewed by some with suspicion; critics argued that Blackstone presented Tory notions antithetical to the Whig values of the American Revolution.¹³³ Coke's works had been the chief texts for understanding the English constitution, including the Magna Carta, for generations in America.¹³⁴ Locke and other social contract philosophers were also widely read in America before Blackstone's *Commentaries* arrived on American shores.¹³⁵ The drafters of these American texts were thus generally trained through Coke and guided by Locke, not Blackstone, in constitutional matters.

The author has found no reference to Blackstone's *Commentaries* in close connection with the adoption of any American law of the land or due process clause prior to Madison's formulation of the first federal Due Process clause.¹³⁶ Moreover, the Journals of the Continental Congress, covering 1774 to 1789, record only two express references to Blackstone,¹³⁷ despite repeated use of "life, liberty, and property" or similar language.¹³⁸ Farrand's *Records of the Federal Convention* also shows only

131. *Cf. id.* at 2634–35 ("The founding-era understanding of liberty was heavily influenced by John Locke.").

132. HOWARD, *supra* note 10, at 125.

133. *See, e.g., id.* at 130–31.

134. *Id.* at 117–32.

135. *Id.* at 119.

136. This research has included, *inter alia*, the available journals, constitutions, or draft constitutions of Virginia (1776), Pennsylvania (1776, 1790), Maryland (1776), Delaware (1776), North Carolina (1776, 1777), New York (1777), South Carolina (1778), Massachusetts (1780), as well as Vermont's Council of Censors (1785). Most of the other relevant journals have been lost.

137. *A Century of Lawmaking for a New Nation*, LIBRARY OF CONG., <https://memory.loc.gov/ammem/hlawquery.html> (search conducted on Aug. 22, 2017, using the search term "blackstone or black. or bl."). These references are found at 3 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 503 (Worthington Chauncey Ford ed., 1905) (1775), [hereinafter JOURNALS], (discussing national debt) and 24 JOURNALS, *supra*, at 89 (Gaillard Hunt ed., 1922) (1783) (recommending that Congress purchase Blackstone's *Commentaries*).

138. *See, e.g.,* 1 JOURNALS, *supra* note 137, at 67, 105–06 (Declaration and Resolves of the First Continental Congress and Address to the Inhabitants of Quebec); 5 JOURNALS,

two references to Blackstone.¹³⁹ Elliot's *Debates* contains several more references,¹⁴⁰ suggesting the growing influence of Blackstone in approximately the last decade-and-a-half of the eighteenth century. This increasing influence is also reflected in case law, but very few eighteenth-century cases cite Blackstone's chapter on the absolute rights of individuals, and these cases do not support the originalists' narrow view of Due Process liberty.¹⁴¹ Blackstone's *Commentaries* were a major influence on early nineteenth-century American law, but the American formulations of due process and law of the land clauses were largely established by that time.¹⁴² Blackstone, therefore, was not likely the primary source for understanding "liberty" or the chief source for "life, liberty, or property" language between 1776 and 1791.

A broader concept of liberty was current at the time, as Justice Thomas concedes subsequently in his *Obergefell* dissent.¹⁴³ In fact, Justice

supra note 137, at 510–12 (1906) (1776) (Declaration of the Thirteen United States of America).

139. *A Century of Lawmaking for a New Nation*, *supra* note 137. These references are found at 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 472 (Max Farrand ed., 1911) (related to equality of representation), and 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra*, at 448 (related to ex post facto laws).

140. *A Century of Lawmaking for a New Nation*, *supra* note 137. These references include, *inter alia*, Letter from Hon. Richard Henry Lee, Delegate in Cong. from the State of Va., to Governor Edmund Randolph (Oct. 16, 1787), in 1 DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 503, 503–04 (Johnathan Elliot 2d ed. rev., J.B. Lippincott Co. 1891), [hereinafter ELLIOT'S DEBATES]; 2 ELLIOT'S DEBATES, *supra*, at 423, 432, 437, 455, 518 (Pennsylvania debates); 3 ELLIOT'S DEBATES, *supra*, at 501, 506, 510, 512–13, 544 (Virginia debates); 4 ELLIOT'S DEBATES, *supra*, at 63, 278 (North Carolina and South Carolina debates).

141. *E.g.*, *Toogood v. Scott*, 2 H. & McH. 26, 28 (Md. 1782) (stating the proposition that all persons are free by nature, related to burden of proof in a petition for freedom for a person held in bondage).

142. HOWARD *supra* note 10, at 268–74.

143. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2634–35 (2015) (Thomas, J., dissenting). Justice Thomas argues that "[t]he founding-era understanding of liberty was heavily influenced by John Locke." *Id.* at 2634. He distinguishes between "civil liberty" and "natural liberty." *Id.* at 2635. "Civil liberty" is "natural liberty constrained by human law," and natural liberty is the Lockean notion of perfect freedom within the bounds of the law of nature. *Id.* Thomas then argues that "civil liberty" is only a negative liberty, and he argues that allowing only same-sex marriages does not restrict the behavior of same-sex couples. *Id.* Notably, however, in moving from the notion of "civil liberty" to "negative liberty," Justice Thomas relies on an interpretation of Locke, not Locke's work itself. *Id.* (citing JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 56 (1988)).

Thomas recently described this notion of liberty well in a separation-of-powers context:

At the center of the Framers' dedication to the separation of powers was individual liberty. The Federalist No. 47, at 302 (J. Madison) (quoting Baron de Montesquieu for the proposition that "[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates"). This was not liberty in the sense of freedom from all constraint, but liberty as described by Locke: "to have a standing rule to live by . . . made by the *legislative power*," and to be free from "the inconstant, uncertain, unknown, arbitrary will of another man." Locke § 22, at 13. At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free.¹⁴⁴

Shattuck, too, concedes prior British texts used the term "liberty" or "liberties" to mean more than absence of physical restraint, including many civil rights.¹⁴⁵ A.E. Dick Howard shows the Americans used "liberty" in this broader sense in their constitutional debates with the Crown.¹⁴⁶ John Phillip Reid has argued that the English of this period understood liberty as

144. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1245 (2015) (Thomas, J., concurring); *see also* *McDonald v. City of Chi.*, 561 U.S. 742, 813–15 (2010) (Thomas, J., concurring in part) (describing "liberties" as interchangeable with "rights," "privileges," "immunities," and "freedoms" from Blackstone to Reconstruction and admitting, "The fact that a particular interest was designated as a 'privilege' or 'immunity,' rather than a 'right,' 'liberty,' or 'freedom,' revealed little about its substance."). Justice Thomas's description of Lockean liberty in this concurrence seems somewhat at odds with his description of Lockean liberty in his *Obergefell* dissent. *See Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting). The conclusions, however, are both consistent with the Lockean notion that the legislature is the supreme branch of government, a notion that may inform Justice Thomas's opposition to substantive due process. *Id.* at 2631–37. Locke, however, conceived of a government with only two branches—the legislature and the executive—and he identified rational limits on the legislative authority, including both the duty not to delegate its powers and the duty not to act arbitrarily in depriving a person of his "Property." *See infra* text accompanying note 154. In *Ass'n of Am. R.Rs.*, Justice Thomas uses this Lockean reasoning to void a legislative attempt to delegate its powers. 135 S. Ct. at 1245 (Thomas, J., concurring). If the judiciary would likewise enforce the Lockean prohibition against arbitrary actions of the legislature, one could have a practice akin to judicial review employing substantive due process reasoning. But because Locke did not consider judicial review as a tool for enforcing the rational limits of legislative powers under the social contract, and indeed did not contemplate the judiciary as a separate branch of government, the debate concerning the merits of substantive due process as it exists today must proceed on other grounds.

145. Shattuck, *supra* note 20, at 368, 371–73, 375.

146. *See generally* HOWARD *supra* note 10, at 14–112, 185–202.

the contrary of arbitrary government.¹⁴⁷ This resembles Locke's use of the term in his second *Treatise*.¹⁴⁸ This notion of liberty is materially broader than freedom from physical restraint.

The American due process and law of the land clauses represent, to a greater or lesser degree, parallel attempts to capture or embody in constitutional law this notion of liberty as the contrary of arbitrary government. To appreciate this idea of liberty and its relation to the history of due process in early American constitutionalism, one should grasp the prior tension in English law between legal formalism and legal philosophy.¹⁴⁹ Legal philosophy can be understood as the discipline directed to a perfect understanding of jurisprudential matters, asking abstract questions such as "What is the law?" and "What is the best form of government?"¹⁵⁰ Legal formalism embodies the methods and devices used in law to address the practical concerns of jurisprudence, such as "How do we write this constitution so it will work for this nation?"¹⁵¹

The Magna Carta's law of the land clause is largely an example of legal formalism. It was born as a practical, legal precept insisting on legal forms and processes to restrain King John's perceived abuses of power.¹⁵² These legal forms and processes—i.e., law of the land or judgment of peers—were to provide a mechanism or forum to resolve certain debates about appropriate uses of coercive government power. By contrast, Locke's *Two Treatises* is an excellent example of legal philosophy.¹⁵³ He approached the need to restrain government power through philosophic reasoning about the social contract. Locke ultimately identifies four legal

147. JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE* 142–44 (1991); JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW* 37 (1993). See generally REID, *supra* note 143.

148. Cf. HOWARD, *supra* note 10, at 196 (arguing legal scholars like Coke and philosophers like Locke "were concerned with the same problem: how arbitrary power might be limited so that individual rights might be secured."). See generally LOCKE, *supra* note 105, at 265–428.

149. Cf. HOWARD, *supra* note 10, at 188–202 (discussing the lack of clear distinction between natural rights and legal rights in American discourse of the time).

150. *Legal Philosophy*, BLACK'S LAW DICTIONARY (8th ed. 1990) (defining "legal philosophy" by reference to its second entry for "general jurisprudence," defined as "[t]he scholarly study of the law, legal theory, and legal systems generally").

151. *Form*, BLACK'S LAW DICTIONARY (8th ed. 1990) (defining "form" as "[e]stablished behavior or procedure, usu[ally] according to custom or rule"); *Formal Law*, BLACK'S LAW DICTIONARY (8th ed. 1990) (defining "formal law" as "[p]rocedural law").

152. See MCKECHNIE, *supra* note 11, at 379–89; see also *id.* at 107–20 (discussing the legal formality of the document more generally).

153. See *supra* text accompanying notes 105–12.

precepts implicit in the social contract that restrain the government: the duty not to use power arbitrarily; the duty to act only through standing law; the duty not to deprive anyone of life, liberty, or estate without the implied consent of the majority; and the nondelegation of legislative authority.¹⁵⁴ Coke's *Institutes* and Blackstone's *Commentaries* fall between these two poles. Blackstone tends to follow a formalistic model. He uses philosophic notions like personal liberty, but he defines these in legalistic, rather than philosophic, terms.¹⁵⁵

The historical tension between legal philosophy and legal formalism—the tension between identifying the ideal and finding a way to embody it in law—produced periods in the fourteenth and the seventeenth centuries when Parliament, commentators, and jurists substantially reinterpreted the formal precepts of the Magna Carta's law of the land and related clauses.¹⁵⁶ These reinterpretations adjusted the meaning of the Magna Carta's norms, often under the guise of preserving or restoring an ancient practice.¹⁵⁷ These reinterpretations led to the creation of several new constitutional precepts founded loosely on Magna Carta text, including several of the “subordinate rights”¹⁵⁸ that are now preserved in the Fourth, Fifth, and Sixth Amendments. A good illustration of a new constitutional precept rooted in the Magna Carta tradition is the protected right to petition for a writ of habeas corpus, formalized as a constitutional norm in the Habeas Corpus Act of 1679.¹⁵⁹ It derives remotely from the Magna Carta's law of the land clause and a companion clause of the Magna Carta that

154. LOCKE, *supra* note 105, at 357–63.

155. See, e.g., BLACKSTONE, *supra* note 1, at 119–36; see also HOWARD, *supra* note 10, at 99–101 (citing BLACKSTONE, *supra* note 1, at 106–07) (discussing another example of Blackstone's legal formalism).

156. See, e.g., FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629* (1972); Charles Donahue, Jr., *Magna Carta in the Fourteenth Century: From Law to Symbol?: Reflections on the “Six Statutes”*, 25 WM. & MARY BILL OF RTS. J. 591 (2016); Alexander Lock & Jonathan Sims, *Invoking Magna Carta: Locating Information Objects and Meaning in the 13th to 19th Centuries*, 15 LEGAL INFO. MGMT. 74 (2015); Jack L. Landau, *Magna Carta Turns 800*, 75 OR. ST. B. BULL. 17 (2015).

157. See, e.g., MCKECHNIE, *supra* note 11, at 384–86 (criticizing Coke's interpretation of the law of the land clause, including accusing him of a “vicious method of assuming the existence, in Magna Carta, of a warrant for every legal principle of his own day”).

158. Shattuck, *supra* note 20, at 380.

159. Habeas Corpus Act of 1679, *reprinted in* 8 THE STATUTES AT LARGE, FROM THE THIRTIETH YEAR OF THE REIGN OF KING GEORGE THE SECOND TO THE END OF THE SECOND YEAR OF THE REIGN OF KING GEORGE THE THIRD 432 (Danby Pickering ed., 1763); Amanda L. Tyler, *A “Second Magna Carta”: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1953–56 (2016).

promises, “To no one will we sell, to no one will we deny, or delay right or justice.”¹⁶⁰

The birth of American constitutionalism in the late eighteenth century represents a third period of reinterpretation and rapid development of these constitutional norms, this time under the strong influence of Lockean social contract theory.¹⁶¹ During this period, the law of the land norm typically stood alongside its progeny in constitutional texts of the day—progeny that included the right to trial by jury, the right to a speedy trial, and the right to habeas corpus relief.¹⁶² But the American law of the land and due process clauses of the eighteenth century were more or less abstract provisions when compared to these other, more specific formal precepts. Law of the land and due process clauses were, in a sense, a bridge to the philosophic, Lockean notion that every government is ordained to preserve certain interests properly claimed by the members of the society, and a government that fails to preserve these interests according to dictates of reason was no longer operating legitimately. These interests—whether described as “liberty” or as “life, liberty, or property” or using the traditional Magna Carta language or some combination or adaptation of these—were to be preserved by “the law of the land” or “due process”; that is, according to established practices governed by the dictates of reason.

The law of the land and due process clauses thereby served as a backdrop in continued discussions about how to regulate government power so as to preserve natural rights and avoid arbitrary impositions under color of law.¹⁶³ Put another way, these were more or less general constitutional principles that might generate additional, particularized constitutional norms. But interpreting the practical meaning of each state or federal law of the land and due process clause was ultimately left to *de jure* or *de facto* decision makers in the legislative, executive, and judicial branches within the jurisdiction’s constitutional framework of checks and

160. GREAT CHARTER OF LIBERTIES (1215), reprinted in SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY 42, 47 (George Burton Adams & H. Morse Stephens eds., 1901).

161. Cf. A.E. Dick Howard, *Magna Carta’s American Adventure*, 94 N.C. L. REV. 1413, 1416–22 (2016) (discussing the evolution of the Magna Carta’s principles in America during the Revolutionary era); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2634–35 (2015) (Thomas, J., dissenting) (discussing the meaning of “liberty” in America in the Revolutionary era and its Lockean roots).

162. See, e.g., MASS. CONST. pt. 1, arts. XI–XII, XV; *id.* pt. 2, ch. VI, art. VII; MD. CONST. of 1776, decl. of rights XVII–XIX, XXI; N.H. CONST. pt. I, arts. XIV–XVI, XX; *id.* pt. II, oath and subscriptions, para. 11; N.C. CONST. of 1776, decl. of rights VII–X, XI–XIV; PA. CONST. of 1776, decl. of rights IX, XI; VT. CONST. of 1777, ch. I, arts. X, XIII; VA. DECL. OF RIGHTS OF 1776, §§ 8, 11.

163. See *infra* Section VI.B; see also, e.g., HOWARD *supra* note 10, at 259, 270–74, 285–344.

balances. In practice, therefore, these diverse American clauses served as similar and related (though hardly identical) repositories of imprecisely defined metalegal principles concerning the appropriate limits of government authority—principles that could be used to formulate specific juridical rules or legislative or executive policies and practices to protect liberty, broadly defined.

Put still another way, in the American texts, “due process,” “law of the land,” and “life, liberty, and property” are almost Platonic forms—abstract principles rather than concrete precepts—that must be formalized into specific rules by those exercising political or judicial authority. These provisions were, in fact, interpreted in a variety of ways and applied in various contexts prior to the adoption of the Fourteenth Amendment. They were cited as pertaining to separation of government powers; a prohibition on special legislation and bills of attainder; a right to compensation for government deprivations of property; a right to notice and hearing; and the right to trial by jury.¹⁶⁴ Courts of different states, reviewing their state’s particular law of the land or due process clause, sometimes reached different, even contradictory, interpretations as to whether and how the norm applied in similar fact patterns.¹⁶⁵ These differences can be attributed either to formal difference between the states’ constitutional language or to differences in opinion about the meaning and application of the underlying constitutional norm.

An attempt to formalize due process by strictly defining each term of the constitutional texts, such as the term “liberty,” or to treat the distinct due process and law of the land clauses as one and the same, is inconsistent with the overall history of this norm, even if that history is severed at the adoption of the Fifth or Fourteenth Amendments. That is not to say the meaning of due process is entirely indeterminate. Beyond checks and balances, the limiting principle lies in maintaining a humble balance between concrete legal formalism and abstract legal philosophy; between legitimate government power and arbitrary government action; between individual license and coercive or legal restraints. This balance is liberty.¹⁶⁶

164. *See infra* note 223.

165. *See infra* Section VI.B.

166. This is perhaps too realistic a view of the political and judicial processes to win much support among conservative-minded originalists who desire to restrain the discretion of judges in shaping constitutional law. The structure of the federal Constitution, however, with separation of powers, checks and balances, and mechanisms for amendment, evidences a recognition by the Framers that the preservation of liberty will, in fact, require political and judicial struggle. Taking a formalistic approach to the Fifth Amendment Due Process Clause removes the federal judiciary’s power to check unforeseen and unprecedented

V. THE FEDERAL CONSTITUTIONAL TEXT AND HISTORY

The originalists' Due Process fallacy asserts that its narrow interpretation of Due Process liberty is the one most consistent with the text of the Constitution.¹⁶⁷ Justice Thomas, Shattuck, and Warren advance a few closely related arguments in support of this position.

First, as mentioned above, Shattuck and Justice Thomas argue that reading "liberty" so broadly as to include "life" and "property" makes the latter terms redundant in the Fifth Amendment.¹⁶⁸ Shattuck describes this as making the Clause absurd.¹⁶⁹ As argued above, however, had the framers of the Fifth Amendment used "liberty" alone, as Virginia, Massachusetts, and Vermont did,¹⁷⁰ the Due Process Clause could have been read to protect *only* "liberty," narrowly defined. Using "life, liberty, or property" balanced the competing goals of simplicity in the formulation, broad protections, and elegance of language. Within this historical context, this was the equivalent of protecting those rights preserved under the Lockean social contract and the rights traditionally protected in the Magna Carta law of the land clause.¹⁷¹

Second, Shattuck argues "liberty" cannot reasonably include rights that were recent inventions, such as the freedom of religion.¹⁷² This argument is limited on its own terms. The argument does not extend to all rights that may be included in "liberty," but only certain rights. It primarily affects the interpretation of the Fourteenth Amendment, specifically the issues of incorporation and substantive due process. This Article will not resolve that debate, as its resolution does not implicate the validity of this Article's central thesis. One should, of course, distinguish between the prior historical development of certain "procedural" rights (like habeas corpus protections) and "substantive" rights (like the freedom of religion).

executive and legislative actions, upsetting an important check in balancing the public good and private rights.

167. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632–33 (2015) (Thomas, J., dissenting); See Shattuck, *supra* note 20, at 369, 375–76, 380–81; See Warren, *supra* note 20, at 440–41.

168. *Obergefell*, 135 S. Ct. at 2633 (Thomas, J., dissenting) ("[T]hat usage avoids rendering superfluous those protections for 'life' and 'property.'"); Shattuck, *supra* note 20, at 375 ("It is as unreasonable to say that 'liberty,' in this connection, includes all civil rights, as it is to say that the term 'life' includes them, or that the term 'property' includes them. If it did, it would include life and property, and the clause reading, 'no person shall be deprived of life, all his rights, or property,' would be an absurdity on its face.").

169. Shattuck, *supra* note 20, at 375.

170. See *supra* text accompanying notes 65–68.

171. See *supra* Part V.

172. Shattuck, *supra* note 20, at 377–80.

The former may be more or less implicit in “due process” or “law of the land” rather than in “life, liberty, or property.”¹⁷³

Third, Shattuck argues that reading “liberty” as including other enumerated rights would make the Constitution unnecessarily duplicative of these enumerated rights.¹⁷⁴ He then separately argues, with Warren, that if “liberty” includes other rights, these other rights can be deprived through due process.¹⁷⁵ These arguments are unpersuasive. If the Fifth Amendment Due Process Clause provides only limited protection for a broad category of civil rights, but other constitutional provisions provide more absolute protection for specific civil rights, the Fifth Amendment Due Process Clause can be read as subordinate to the other provisions. Moreover, there are already substantial overlaps between the general guarantee of Fifth Amendment Due Process and the other specific protections afforded by, for instance, the Fourth, Fifth, Sixth, and perhaps even the Seventh and Eighth Amendments, as well as the habeas corpus protections in Article One.¹⁷⁶ These overlaps are a product of the historical development of the Magna Carta tradition and the tension between legal formalism and legal philosophy, discussed in the preceding Part.¹⁷⁷ They suggest the Due Process Clause was intended as a reservoir of as-yet imprecisely defined principles limiting government action to preserve liberty.

To these replies, we can add some arguments in favor of this Article’s interpretation of Due Process from this history and the text of the Fifth Amendment itself. First, the lack of a personal pronoun in the original federal Due Process Clause suggests “life, liberty, or property” was intended as a single, general term of art in that particular text, not a list of specific personal rights. Personal pronouns designate ownership or possession of *something particular*; a conspicuous lack of a personal pronoun where there ought to be one may denote language being used in an atypical, abstract manner. The Fifth Amendment provides, “No person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁷⁸ This does not say “*his* life, liberty, or property” or “*his* life, *his* liberty, or *his* property.” Blackstone’s paraphrase of the Magna Carta law of the land clause used personal pronouns, stating the Magna Carta “protected every individual of the nation in the free enjoyment of *his* life,

173. See *supra* text accompanying notes 36, 158–66.

174. Shattuck, *supra* note 20, at 380–81.

175. *Id.* at 381; Warren, *supra* note 20, at 440–41.

176. See U.S. CONST. art. I, § 9, cl. 2 (Habeas Corpus Clause); *id.* amends. IV–VIII.

177. See *supra* text accompanying notes 158–60.

178. U.S. CONST. amend. V.

his liberty, and *his* property, unless [sic] declared to be forfeited by the judgment of his peers or the law of the land.”¹⁷⁹ Compare also the text of the Fourth Amendment: “The right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”¹⁸⁰ The contrast is even sharper in Madison’s proposed language. He used no personal pronoun in his proposed due process clause¹⁸¹ but proposed a prototype of the Fourth Amendment that read in relevant part: “The rights of the people to be secured in *their* persons; *their* houses, *their* papers, and *their* other property, from all unreasonable searches and seizures, shall not be violated.”¹⁸² The omission of a personal pronoun is justified if one understands “life, liberty, or property” to be a unified term of art borrowed from Lockean social contract theory that signifies, abstractly, all personal interests a government is rationally ordained to preserve and protect.

Second, while there was no recorded debate in Congress about the Due Process Clause particularly, aspects of Madison’s speech proposing the amendment suggest he used “life, liberty, or property” in his proposed due process clause to signify all those interests covered by the broad notion of “liberty.” Among his other proposed amendments, Madison suggested first and foremost:

That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.

That government is instituted and *ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.*¹⁸³

The parallel use of “life, liberty, or property” in Madison’s proposed due process clause suggests that due process serves a negative corollary of this foundational precept: government power is to be exercised for the benefit of the people; therefore, the government cannot deprive a person of life, liberty, or property without due process. In both clauses, life, liberty, and

179. BLACKSTONE, *supra* note 1, at 424 (emphasis added).

180. U.S. CONST. amend. IV (emphasis added).

181. ANNALS OF THE CONGRESS OF THE UNITED STATES, *supra* note 91 (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”). The only state formulations that avoided the use of a personal pronoun were New York’s constitutional text and Connecticut’s statutory text. See N.Y. CONST. of 1777, art. XIII; CONN. STAT. OF 1808, *supra* note 60.

182. ANNALS OF THE CONGRESS OF THE UNITED STATES, *supra* note 91, at 434–35 (emphasis added).

183. *Id.* at 433–34 (emphasis added).

property collectively signify all rights a person may properly claim under the social contract.

Later in his speech, Madison describes the various functions of his proposed amendments:

In some instances [the proposed amendments] assert those rights which are exercised by the people in forming and establishing a plan of Government. In other instances, they specify those rights which are retained when particular powers are given up to be exercised by the Legislature. *In other instances, they specify positive rights, which may seem to result from the nature of the compact.* Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, *but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.* In other instances, they lay down dogmatic maxims with respect to the construction of the Government; declaring that the Legislative, Executive, and Judicial branches, shall be kept separate and distinct.¹⁸⁴

Given the historical and substantive connections between trial-by-jury and Madison's proposed due process clause,¹⁸⁵ Madison likely envisioned the guarantee of due process as another "positive right" that is "essential to secure the liberty of the people." As a "positive right," Madison intended the clause to emphasize the government's obligation to provide due process, not the formal preconditions qualifying a person for due process. An emphasis on whether a person qualifies for due process by suffering a deprivation of life, or of liberty, or of property would be misplaced. Rather, "life, liberty, or property" was likely intended as a simple and imprecise way to describe the breadth of the government's obligation to provide due process, not precise, formal preconditions to qualify for due process protections.

We might still question why Madison used the term "due process" rather than "law of the land" in the text and what this indicates about the meaning of the clause. While several more or less plausible—and not always incompatible—theories have been proposed,¹⁸⁶ Madison likely

184. *Id.* at 437 (emphasis added).

185. MCKECHNIE, *supra* note 11, at 340–43.

186. For instance, in *Murray's Lessee*, Justice Benjamin Curtis argues Article III, Section 2 of the Constitution protects the right to jury trials in criminal cases and the Sixth and Seventh Amendments further protect the right to jury trials in civil and criminal cases, rendering the traditional reference to judgment of peers "superfluous and inappropriate" to the Fifth Amendment's guarantees. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–77 (1855). Justice Curtis then posits "law of the land," standing alone, could be ambiguous, suggesting that the Fifth Amendment, therefore, employs the "due process" language proposed by Coke. *Id.* at 276. He does not explain how "due process" is less ambiguous than "law of the land." Justice Curtis may have had in

adopted the due process formulation, in place of the traditional law of the land language, to signify that the range of protections afforded by the clause was to be analogous to the protections provided by New York's statutory bill of rights and the protections described in Coke's *Institutes*. New York was the only state to adopt "due process" language, borrowing from Coke's widely read *Institutes*.¹⁸⁷ New York's statutory due process provisions *also* went beyond the other states' law of the land clauses. Instead of merely requiring general compliance with the law of the land or the right to judgment of peers, New York recognized specific ways the government could abuse its citizens and expressly prohibited these, much

mind the potential conflict between using "law of the land" in the proposed amendment and Article VI's language about the federal Constitution, treaties, and laws being the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. This potential conflict is often suggested as motivating Madison's use of "due process." See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 445–46 (2010). While "Law of the Land" in the Supremacy Clause relates to positive law, "law of the land" in the Magna Carta context likely meant the common law in addition to (or instead of) positive law. Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS: NOMOS XVIII 3, 11 (J. Roland Pennock & John W. Chapman eds., 1977). Some scholars emphasize the inherent risk of a positivist interpretation of "law of the land" regardless of the use of that phrase in Article VI. See Gedicks, *supra* note 7, at 661–63. This positivist interpretation, it is argued, could preclude judicial review of legislation that effects deprivations directly or eliminates traditional procedural safeguards. Use of "due process," by contrast, implies the norm regulates all branches of government. This includes the right of judicial review of legislative enactments that effect deprivations directly or alter the process by which deprivations may occur. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679–80, 1703–17 (2012). At least one author has recently asserted that this clause "arguably effectuated a general constitutional ban on legislative adjudications." Matthew R. Grothouse, *Implicit in the Concept of Ordered Liberty: How Obergefell v. Hodges Illuminates the Modern Substantive Due Process Debate*, 49 J. MARSHALL L. REV. 1021, 1043 (2016). Others read the proposal in its historical context as placing renewed emphasis on the traditional pretrial safeguards described by Coke and preserved in New York's statutory bill of rights. Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 122–27, 146–48 (2007); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 408–37 (2002). Some suggest that Madison borrowed directly from Coke or the English Bill of Rights, but this addresses only Madison's supposed source and not Madison's motive. See Wayne McCormack, Lochner, *Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 453 (2005); Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 309–21 (2001).

187. See *supra* text accompanying notes 83–90.

as Coke did.¹⁸⁸ New York's statutory due process clauses required a proper indictment or presentment contemporaneous with arrests and imprisonment, presentment prior to an answer, the right to have the legal process progress to a definite conclusion, and the right to judgment prior to execution of the penalty.¹⁸⁹

By implicitly referencing New York's statutory due process clauses and Coke's interpretation of the Magna Carta law of the land clause,¹⁹⁰ the Due Process Clause intimates its protections do not apply simply to the initial deprivation of life, liberty, or property. Rather, different protections apply at different points of the legal process. Additionally, these prohibitions fall on the legislature, the executive, and the judiciary alike.¹⁹¹ For instance, the legislature cannot authorize a prolonged criminal arrest without indictment or presentment or some other initial charge (at least without suspending the right of habeas corpus); the executive cannot conduct one; and the judiciary cannot tolerate such an abuse. In contrast, the law of the land language could be (and occasionally was) read as a restriction on the executive and judiciary alone.¹⁹² True, Madison's due process clause was not as specific as New York's statutory clauses. Madison would have been cautious about which specific procedures he would propose to be constitutionally protected in light of the difficulty of amending the Constitution. The specifics, however, could be established through political and judicial rulemaking, guided by the textual reference to due process.

In summary, the textual arguments advanced by Justice Thomas in support of the originalists' due process fallacy are weak, and his interpretation of the historical evidence is suspect. The text of the Fifth Amendment itself, lacking a personal pronoun in "life, liberty, or property," distinguishes it from Blackstone's formulation in a notable way, suggesting again that this phrase has a unified meaning. Madison's use of life, liberty, and property in his proposed federal amendment was likely derived from Locke, not Blackstone, as evidenced by the leading (albeit rejected) proposed amendment. In discussing his proposed amendments, he used "liberty" in a broad sense and likely intended "life, liberty, or

188. An Act Concerning the Rights of the Citizens of this State, *supra* note 63, at 289–91.

189. *Id.*

190. See COKE, *supra* note 11, at *45–*46.

191. See HOWARD, *supra* note 10, at 303–05.

192. See, e.g., State, 2 N.C. (1 Hayw.) 28, 38–40 (1794). *Mayo v. Wilson*, 1 N.H. 53, 57 (1817) is also typically read in this light. See HOWARD, *supra* note 10, at 303–04, 304 n.12; Williams, *supra* note 186, at 450. *But see* Chapman & McConnell, *supra* note 186, at 1724 n.233 (arguing *Mayo* should be read more narrowly).

property” to have a similar, broad meaning. Finally, even the choice of “due process” rather than “law of the land” suggests the meaning of the Fifth Amendment Due Process Clause does not lie in a formalistic definition of its terms but continued political and judicial decision making and through reference to historical practices.

VI. JUDICIAL INTERPRETATIONS OF DUE PROCESS AND LAW OF THE LAND CLAUSES

A. Justice Thomas's Erroneous Summary of Pre-Fourteenth Amendment Judicial Interpretations of “Liberty”

Finally, Justice Thomas's dissent in *Obergefell* argues, “State decisions interpreting [law of the land and due process] provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word ‘liberty’ to refer only to freedom from physical restraint.”¹⁹³ There are several weaknesses, however, in his argument and in the way he reads his sources.

Justice Thomas cites Warren's article in support of his assertion.¹⁹⁴ Warren acknowledges, however, “The term ‘liberty’ in the Due Process Clause was construed by the State Courts in very few cases” within those Warren studied,¹⁹⁵ a concession Justice Thomas does not note.¹⁹⁶ Warren's study also presupposes “liberty” in the Fifth Amendment is a distinct, formalistic term, and he interprets the cases accordingly.¹⁹⁷ For instance, Warren favorably quotes this passage from the 1855 Vermont case *Lincoln v. Smith*: “The liberty, spoken of in our bill of rights, is the liberty of the person of every subject.”¹⁹⁸ Warren describes this as “undoubtedly the conception of the meaning of [liberty] held by Courts and lawyers prior to 1868.”¹⁹⁹ In fact, the passage Warren cites in *Lincoln* continues by construing “liberty” as including “life.”²⁰⁰ This is not entirely consistent

193. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 (2015) (Thomas, J., dissenting).

194. *Id.* (citing Warren, *supra* note 20). *But cf.* Shattuck, *supra* note 20 (acknowledging this interpretation of liberty has been repudiated by several courts).

195. Warren, *supra* note 20, at 443.

196. *Obergefell*, 135 S. Ct. at 2631–34 (Thomas, J., dissenting).

197. *See* Warren, *supra* note 20, at 440.

198. *Id.* at 443–44 (quoting *Lincoln v. Smith*, 27 Vt. 328, 361 (1855)).

199. *Id.* at 443.

200. *Lincoln*, 27 Vt. at 361 (1855) (“The liberty, spoken of in our bill of rights, is the liberty of the person of every subject; and the right to the enjoyment of life is personal to all; and a proceeding affecting the life of a subject may well be termed a proceeding to deprive him of his natural personal liberty; all this is involved.”).

with a narrow, formalistic interpretation of liberty. Moreover, *Lincoln* represents the opinion of one court at one time in one American state concerning one particular formulation of a law of the land clause. It assumes too much to say this was “undoubtedly” the meaning of liberty across the nation for the entire period for all law of the land and due process clauses.

In the passage Justice Thomas cites from Warren’s article, Warren also restricts his study to those cases involving judicial review of the legislative power in general. Warren excludes cases considering the legitimacy of legislatively created judicial or quasi-judicial procedures.²⁰¹ This method greatly narrows the scope of his study and eliminates at the outset much of the potentially conflicting evidence. While the cases Warren reviews might be construed as prototypes of substantive due process, Warren identifies only seven cases in this study apart from *Lincoln* related to the meaning of due process liberty.²⁰² Four of these cases do not actually construe the meaning of “liberty,”²⁰³ as Justice Thomas’s citation suggests.²⁰⁴ In fact, two do not even use the term “liberty” in the opinion.²⁰⁵ One 1834 case that Warren discusses appears to construe Maine’s law of the land clause as applying to criminal cases alone.²⁰⁶ This was a reasonable interpretation of the particular law of the land clause at issue in the case, based on its context. In particular, like the early constitutions of Virginia, Pennsylvania, Vermont, and Massachusetts, Maine’s Constitution of 1820, as amended through 1834, had a law of the land clause as part of the criminal procedures provisions, not in an

201. See Warren, *supra* note 20, at 441.

202. *Id.* at 444 nn.33–35. The cases are *McCarthy v. Hinman*, 35 Conn. 538 (1869); *Parker v. Kaughman*, 34 Ga. 136 (1865); *Devin v. Scott*, 34 Ind. 67 (1870); *Herman v. State*, 8 Ind. 545 (1855); *Beebe v. State*, 6 Ind. 501 (1855); *Nott’s Case*, 11 Me. 208 (1834); *Kneedler v. Lane*, 45 Pa. 238 (1863).

203. See *Parker*, 34 Ga. at 139–50 (determining the Confederate legislature had the constitutional power to draft persons for non-armed service in the Confederate army); *Devin*, 34 Ind. at 69–70 (deciding the legislature had the power to pass a statute that deprived a habitual drunkard of “the right to enjoy, control, and dispose of his property, and to make contracts”); *Nott’s Case*, 11 Me. at 210–12 (deciding a poorhouse law was constitutional); *Kneedler*, 45 Pa. at 248–49 (holding Congress’s Article I powers do not extend to the institution of a military draft).

204. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 (2015) (Thomas, J., dissenting) (“State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word ‘liberty’ to refer only to freedom from physical restraint.” (citing Warren, *supra* note 20)).

205. *Devin*, 34 Ind. 67; *Nott’s Case*, 11 Me. 208.

206. *Nott’s Case*, 11 Me. at 211 (deciding a statute authorizing an indigent parent to be committed to the poorhouse did not deprive him of due process, as it was not a penal act).

independent clause.²⁰⁷ Warren also acknowledges a Pennsylvania case that invalidated the federal military draft law during the Civil War, but this was not expressly on due process grounds as Warren suggests,²⁰⁸ and Justice Thomas does not address this case directly.²⁰⁹

Justice Thomas acknowledges that one case examined by Warren may be cited as a counterexample to Justice Thomas's position, but he still tries to synthesize the case with the originalists' Due Process fallacy.²¹⁰ This is an 1868 case of the Indiana Supreme Court that held the state's liquor act unconstitutional in a habeas corpus proceeding.²¹¹ The court's conclusion was, in fact, not based on a due process or law of the land clause; indeed, Indiana did not have such a clause in its constitution.²¹² Rather, the act was primarily challenged based on a clause opening the state's declaration of rights that read:

[A]ll men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.²¹³

The Indiana Supreme Court interpreted this guarantee to mean, "[W]e all have some natural rights that have not been surrendered, and which

207. See ME. CONST. art. I, § 6 ("In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election; to demand the nature and cause of the accusation, and have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have a speedy, public, and impartial trial; and, except in trials by martial law or impeachment, by a jury of the vicinity. He shall not be compelled to furnish or give evidence against himself, nor be deprived of his life, liberty, property, or privileges, but by judgement of his peers, or the law of the land.")

208. See *Kneeder*, 45 Pa. at 283 (holding Congress's Article I powers do not extend to the institution of a military draft).

209. *Obergefell*, 135 S. Ct. at 2632–34 (Thomas, J., dissenting).

210. *Id.* at 2633 ("Even one case that has been identified as a possible exception to that view merely used broad language about liberty in the context of a habeas corpus proceeding—a proceeding classically associated with obtaining freedom from physical restraint." (citing Warren, *supra* note 20, at 444–45)).

211. Warren, *supra* note 20, at 444 (citing *Herman v. State*, 8 Ind. 545, 558–63 (1855)); see also *id.* at 444 n.35 (citing *Beebe v. Indiana*, 6 Ind. 501 (1855)). *Beebe* had similar facts and was issued only two months after *Herman*. The court copied portions of the *Herman* opinion and added to it for the *Beebe* opinion. *Beebe* does not include *Herman*'s broad language about liberty.

212. IND. CONST.

213. IND. CONST. art. I, § 46; see *Herman*, 8 Ind. at 556–60; *Beebe*, 6 Ind. at 510–21.

government cannot deprive us of, unless we shall first forfeit them by our crimes; and to secure to us the enjoyment of these rights, is the great end and aim of the constitution itself.”²¹⁴ The American constitutions protect, the court argued, a “great natural right of using our liberty in pursuing trade and business for the acquisition of property, and of pursuing our happiness in using it.”²¹⁵ It argued with a flourish:

[T]he right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages, so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment. If the constitution does not secure this right to the people, it secures nothing of value. If the people are subject to be controlled by the legislature in the matter of their beverages, so they are as to their articles of dress, and in their hours of sleeping and waking. And if the people are incompetent to select their own beverages, they are also incompetent to determine anything in relation to their living, and should be placed at once in a state of pupilage to a set of government sumptuary officers; eulogies upon the dignity of human nature should cease; and the doctrine of the competency of the people for self-government be declared a deluding rhetorical flourish. If the government can prohibit any practice it pleases, it can prohibit the drinking of cold water. Can it do that? If not, why not?²¹⁶

This logic might be best construed as a prototype of rational basis scrutiny, though it does not quite fit that mold. Rather, it portrays—rightly or wrongly—the legislative enactment as inappropriate because it would allow, by implication, too much interference with natural rights.

While Warren treats this case as an aberration from the standard, narrow judicial reading of “liberty” during the period,²¹⁷ Justice Thomas appears unwilling to brook any case that is contrary to his view. He attempts to justify this “broad language about liberty” on the grounds that the case was a habeas corpus proceeding, “a proceeding classically associated with obtaining freedom from physical restraint.”²¹⁸ This argument is thoroughly flawed. Certainly, a person was challenging his arrest, but the court opinion invalidated a formally valid state law because

214. *Herman*, 8 Ind. at 556–57; see also *Beebe*, 6 Ind. at 510 (employing substantially the same language).

215. *Herman*, 8 Ind. at 557 (citing various provisions of the Indiana constitution); see also *Beebe*, 6 Ind. at 512 (“[W]e find that the people have expressly reserved the right of property, and its enjoyment, in forming their constitution, from the unlimited power of the legislature.”).

216. *Herman*, 8 Ind. at 558–59.

217. Warren, *supra* note 20, at 444–45.

218. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 (2015) (Thomas, J., dissenting).

it restrained citizens' natural liberty to select the beverages they wished to drink. The fact that it was a habeas proceeding did not factor into this analysis.²¹⁹ Moreover, Justice Thomas's argument would suggest criminal laws can be evaluated on substantive due process grounds if they authorize physical restraint, or at least if they are challenged in a habeas corpus proceeding. This is not consistent with Justice Thomas's absolute rejection of substantive due process.²²⁰ Notably, Justice Thomas does not directly cite the case in question, perhaps to obscure the obvious fault in his argument.²²¹

In summary, the pre-Fourteenth Amendment case law Justice Thomas references in this part of his dissent is not as favorable as he pretends. Rather, as Warren acknowledges, most of the case law of the period relates to property disputes, especially legislatively established judicial procedures governing property disputes.²²² Because the originalists' Due Process fallacy separates "liberty" cases from "property" cases, it can build a legal theory under the cloak of originalism without much support or opposition in the case law.

B. North Carolina's Early Interpretation of Its Law of the Land Clause

While it is fairly easy to show the faults in Justice Thomas's analysis when he argues that liberty had a uniform, narrow meaning in pre-Fourteenth Amendment case law, it is difficult to prove this Article's thesis by reference to this case law. This Article, after all, tries to emphasize the complexity of interpreting the various due process and law of the land clauses, and anything less than a thorough review of the case law of the period may yield a verdict of "not proved."²²³ With that acknowledgment,

219. See *Herman*, 8 Ind. at 545–46.

220. See, e.g., *McDonald v. City of Chi.*, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part) (describing substantive due process as a dangerous fiction).

221. *Obergefell*, 135 S. Ct. at 2633 (Thomas, J., dissenting).

222. Warren, *supra* note 20, at 442–43.

223. In fact, the constitutional norm was often cited, for instance, for the right to a trial, according to the ordinary course of judicial proceedings, with such safeguards as a complaint, a judge, and an opportunity to answer, before the imposition of a criminal or quasi-criminal punishment or criminal disability. See, e.g., *Newland v. Marsh*, 19 Ill. 376, 382 (1857); *Fisher v. McGirr*, 67 Mass. (1 Gray) 1, 37 (1854); *Attorney Gen. v. Bank of Niagara*, 1 Hopk. Ch. 354, 359 (N.Y. Ch. 1825); *Huber v. Reily*, 53 Pa. 112, 117–18 (1866); *Renney v. Mayfield*, 5 Tenn. (4 Hayw.) 165, 167–68 (1817); *Newcomb v. Smith*, 2 Pin. 131, 135 (Wis. 1849); see also HOWARD *supra* note 10, at 326–31. It was occasionally construed as guaranteeing the right to trial by jury—rather than merely the right to a judicial trial—in criminal matters and occasionally in civil matters. See, e.g., *Callahan v. State*, 2 Stew. & P. 379, 382–83 (Ala. 1832); *Tift v. Griffin*, 5 Ga. 185, 189–90 (1848); *Fetter v. Wilt*, 46 Pa. 457, 460–61 (1864); *Sevier v. Justices of Wash. Cty.*, 7 Tenn. (Peck) 334, 339 (1824);

it is instructive to consider the case law of North Carolina related to its law of the land clause. Of the states that adopted law of the land or due process clauses between 1776 and 1788, North Carolina's case law best illustrates the process of a state's judiciary using the state's law of the land clause to develop and apply formal precepts to resolve disputes about the appropriate limits of government powers.

North Carolina's law of the land clause, standing in an independent section of the state's declaration of rights, read, "[N]o freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land."²²⁴ The state had separate constitutional provisions protecting the right to jury trial in criminal matters and civil matters affecting property.²²⁵ It also protected several of the specific criminal law procedures preserved in other state constitutions, including the right of confrontation and the right against self-incrimination.²²⁶

These particulars likely influenced the judicial interpretation of North Carolina's law of the land clause. For instance, in 1785, the North Carolina legislature passed an act requiring courts to dismiss cases challenging the state's confiscation and sale of real property during the Revolution.²²⁷

Tipton v. Harris, 7 Tenn. (Peck) 414, 419 (1824); *Renney*, 5 Tenn. at 168; see also HOWARD, *supra* note 10, at 340–44. *But cf.* Rhinehart v. Schuyler, 7 Ill. (2 Gilm.) 473, 519–22 (1845) (contending this constitutional norm does not apply to civil proceedings, or has very limited application in civil proceedings). Legislation affecting property, or affecting court procedure related to property cases, was sometimes subject to particular constitutional scrutiny under this norm. See, e.g., Hilliard v. Connelly, 7 Ga. 172, 180 (1849); Gaines v. Buford, 31 Ky. (1 Dana) 481, 506–08 (1833); Morton v. Reeds, 6 Mo. 64, 73–75 (1839); see also HOWARD, *supra* note 10, at 332–40. *But see* Kinney v. Beverley, 12 Va. (2 Hen. & M.) 318, 336 (1808) (stating the state law could declare land forfeiture for failure to pay taxes without violating this norm). This norm was viewed by various courts as a prohibition on special legislation, a separation-of-powers provision, and a prohibition on bills of attainder. See, e.g., Wright v. Wright's Lessee, 2 Md. 429, 452–53 (1852); Little v. Frost, 3 Mass. (3 Tyng) 106, 117 (1807); *State ex rel. Pittman v. Adams*, 44 Mo. 570, 587 (1869); *Trs. of Dartmouth Coll. v. Woodward*, 1 N.H. 111, 129–30 (1817); *Wynehamer v. People*, 13 N.Y. 378, 446–47 (1856); *Brown v. Hummel*, 6 Pa. 86, 91 (1847); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 270 (1829); see also HOWARD, *supra* note 10, at 316–26; *Chapman & McConnell*, *supra* note 186. One early court stated it stood simply for the proposition that there “shall be no violation of the laws of the land.” *Minge v. Gilmour*, 17 F. Cas. 440, 442 (C.C.D.N.C. 1798) (No. 9361). The norm was even cited as constitutional authorization for the legislature to establish law permitting outlawry. *Sherrod v. Davis*, 2 N.C. (1 Hayw.) 282, 285 (1796).

224. N.C. CONST. of 1776, decl. of rights XII.

225. *Id.* decl. of rights IX, XIV.

226. *Id.* decl. of rights VII, VIII.

227. *Moore v. Bradley*, 3 N.C. 174, 175, 2 Hayw. 142, 142–43 (1801).

When this law was invoked in a case in 1786 and 1787, the trial court was hesitant both to follow the act and to rule on the constitutional validity of the act, encouraging the parties to try the matter by jury all the same.²²⁸ When pressed, however, the court reluctantly determined the act to be unconstitutional.²²⁹ While this decision was probably based on the state's constitutional guarantee of the right to jury trial in matters affecting property rather than the state's law of the land clause,²³⁰ the state supreme court later relied on this decision in interpreting the state's law of the land clause.²³¹ Notably, the state supreme court ruled in 1787 that the underlying confiscation and sale of land was valid and consistent with the law of the land guarantee.²³² It did not address the lower court's refusal to dismiss the suit.²³³ By that time, the legislature had altered the act compelling dismissal of such suits, receiving favorably the trial court's decision not to comply with the law on constitutional grounds.²³⁴

This early case did not prevent the legislature from trying to shortcut judicial procedures in other instances. A fascinating 1794 case reviews a statute authorizing the state's attorney general to obtain judgments by ex parte motions against receivers of public monies.²³⁵ When the attorney general acted on this statutory authority, a judge refused to grant the motion, citing the law of the land clause and the right to trial by jury.²³⁶ The attorney general returned later to the court and argued North Carolina's law of the land clause did not prevent the legislature from authorizing this procedure; it merely required the litigants and courts to follow whatever lawful procedure existed at the time.²³⁷ The judge declined to grant the motion again.²³⁸ The attorney general brought the motion and the

228. *Bayard v. Singleton*, 3 N.C. (1 Mart.) 42 (1787).

229. *Id.* at 44–45.

230. See N.C. CONST. of 1776, decl. of rights VIII.

231. *Moore*, 3 N.C. at 175–76, 2 Hayw. at 142–43.

232. *Bayard*, 3 N.C. at 45.

233. *Id.*

234. The Court in *Moore* provides this account:

In the year 1785, the Assembly passed an act taking from all persons the right of suing for property sold by commissioners of confiscated estates, and of course the rights of possession which such persons had: The Judges declared the act invalid, and in 1786 the Assembly altered it. On that occasion the Legislature concurred at last with the judiciary in the position, that the Legislature could not deprive any man of his right to property, or of his right to sue for it.

Moore, 3 N.C. at 175–76, 2 Hayw. at 142–43.

235. *State*, 2 N.C. (1 Hayw.) 28 (1794).

236. *Id.* at 29–30.

237. *Id.* at 30–39.

238. *Id.* at 40.

arguments before the court a third time, this time before a panel of two different judges.²³⁹ The judges, after taking the matter under advisement for a few days, allowed the attorney general to proceed, accepting the view that the law of the land clause did not restrain the legislature, but one judge initially had “very considerable doubts.”²⁴⁰

These cases illustrate the early questions about the legitimacy of judicial review, especially pursuant to a constitutional clause that expressly permitted deprivations by the “law of the land.” In a subsequent case, the North Carolina federal circuit court seemed deferential to the state’s legislature, construing the state’s law of the land clause as requiring only compliance with the law and refusing to void a legislative enactment on principles of natural justice.²⁴¹ The North Carolina Supreme Court, however, was open to judicial review, even under the law of the land clause, citing as precedent the 1786–1787 case, discussed above.²⁴² The supreme court resolved any lingering doubt in an 1805 case, *University v. Foy*, going so far as to construe the law of the land clause as applying *only* to the legislature.²⁴³ It held that the norm could not possibly apply to the judicial or the executive branches because of their limited constitutional authority.²⁴⁴ This affirmation of judicial review under the law of the land clause represents the first major rule culled from the constitutional norm after the Revolution.²⁴⁵ More specifically, *University v. Foy* also held that the law of the land clause prohibited the legislature from vesting in a person the property owned by another person.²⁴⁶

Twenty-eight years later, the North Carolina Supreme Court returned to this constitutional precept to invalidate a law that replaced an appointed court clerk with an elected court clerk.²⁴⁷ It ruled the appointed clerk’s office was his property, protected under the law of the land clause.²⁴⁸ While the office could be abolished and reestablished, the clerk could not be removed while the office continued.²⁴⁹ In this case, the court reasoned:

239. *Id.*

240. *Id.*

241. *Minge v. Gilmour*, 17 F. Cas. 440, 442–44 (C.C.D.N.C. 1798).

242. *Moore v. Bradley*, 3 N.C. 174, 175–76, 2 Hayw. 142, 142–43 (1801).

243. *Trs. of Univ. v. Foy*, 5 N.C. (1 Mur.) 58 (1805).

244. *Id.* at 87–88.

245. HOWARD, *supra* note 10, at 303–05.

246. *Foy*, 5 N.C. at 87–88; *see also, e.g.*, *Barnes v. Barnes*, 53 N.C. (8 Jones) 366, 372 (1861); *Allen’s Adm’r v. Peden*, 4 N.C. (Taylor) 442, 442 (1817).

247. *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833), *overruled by* *Mial v. Ellington* 134 N.C. 131, 139 (1903).

248. *Id.* at 30.

249. *Id.* at 17–21.

[S]uch legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually “laws of the land,” for those purposes.²⁵⁰

It also construed property broadly as covering “whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property.”²⁵¹

Despite these developments, North Carolina did not reduce the general law of the land precept to a specific rule, as the originalists’ Due Process fallacy would with respect to the meaning of “liberty.” The North Carolina Supreme Court occasionally read the state’s law of the land clause at its most general level as a limit on arbitrary government action.²⁵² In other instances, state courts declined to follow legislative acts changing court procedures when the change would deny a person the opportunity to enforce a vested right.²⁵³ By 1812, the North Carolina Supreme Court interpreted the constitutional norm as providing, “[N]o person should be deprived of his property or rights without notice and an opportunity of defending them.”²⁵⁴ On this interpretation, the court fashioned the very specific rule that a plaintiff claiming title to land through a sheriff’s sale must produce the judgment supporting the sheriff’s levy if the defendant challenges the plaintiff’s right of possession.²⁵⁵ At least one case suggested the provision prohibited special acts of the legislature,²⁵⁶ much as Daniel Webster argued before the United States Supreme Court in *Trustees of Dartmouth College v. Woodward*,²⁵⁷ but this interpretation did not gain significant traction in North Carolina.

The North Carolina courts also formulated various exceptions to specific rules they articulated. For instance, the state’s supreme court

250. *Id.* at 16; see also *Houston v. Bogle*, 32 N.C. (10 Ired.) 496, 504–05 (1849).

251. *Hoke*, 15 N.C. at 17.

252. See *State v. Glen*, 52 N.C. (7 Jones) 321, 331 (1859); *Raleigh & Gaston R.R. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451, 460–61 (1837); *Foy*, 5 N.C. at 89.

253. *E.g.*, *Barnes v. Barnes*, 53 N.C. (8 Jones) 366, 372 (1861).

254. *Hamilton v. Adams*, 6 N.C. (2 Mur.) 161, 162 (1812); see also *Walton v. Sugg*, 61 N.C. (Phil.) 98, 101 (1867); *In re Ambrose*, 61 N.C. (Phil.) 91, 93 (1867); *Etheridge v. Corprew’s Ex’rs*, 48 N.C. (3 Jones) 14, 16 (1855); *Otey v. Rogers*, 26 N.C. (4 Ired.) 534, 536–37 (1844); *Irby v. Wilson*, 21 N.C. (1 Dev. & Bet. Eq.) 568, 576 (1837); *Redmond v. Collins*, 15 N.C. (4 Dev.) 430, 445 (1834); *Bledsoe v. Wilson*, 13 N.C. (2 Dev.) 314, 316 (1830); *Delacy v. Meuse River Navigation Co.*, 8 N.C. (1 Hawks) 274, 278 (1821).

255. *Hamilton*, 6 N.C. at 162.

256. *Shaw v. Kennedy*, 4 N.C. 591, 592, 1 Taylor 158, 159 (1817).

257. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

authorized summary proceedings against sheriffs holding public monies,²⁵⁸ as well as summary judicial procedures if a jury could be requested on a *de novo* appeal.²⁵⁹ The courts likewise tolerated the imposition of tax penalties without trial by jury.²⁶⁰ The courts also remained deferential to the legislature on many other matters affecting judicial procedure. For instance, in 1801, the state supreme court enforced a law requiring a writ of restitution to issue against a person convicted of taking property unlawfully from another—even when the property subject to the writ purportedly belonged to the convict.²⁶¹

Notably, unlike some other states,²⁶² North Carolina was reluctant to understand the law of the land clause as requiring a jury trial in eminent domain proceedings. The issue was addressed in an 1837 case.²⁶³ By that time, North Carolina had established a statute authorizing eminent domain with a committee of freeholders determining the fair value of the property.²⁶⁴ The court affirmed this procedure.²⁶⁵ It expressed reluctance to act on supposed precepts of natural law, looking instead for words in the constitutional text on which to judge legislative acts.²⁶⁶ It wrote of the law of the land clause:

Under the guaranty of this article, it has been held, and in our opinion properly held, that private property is protected from the arbitrary power of transferring it from one person to another. We doubt not that it is also protected from the power of despotic resumption, upon a legislative declaration of forfeiture, or merely to deprive the owner of it, or to enrich the treasury, unless as a pecuniary contribution by way of tax. Such acts have no foundation in any of the reasons on which depends the power in virtue of the right of eminent domain, to take private property for the public use, and they could not be sustained by the offer of the fullest compensation. Though not so obvious, it may also be true that the clause under consideration is restrictive of the right of the public to the use of

258. *Oats v. Darden*, 5 N.C. (1 Mur.) 500 (1810).

259. *Keddie v. Moore*, 6 N.C. (2 Mur.) 41 (1811).

260. *Cowles v. Brittain*, 9 N.C. (2 Hawks) 204 (1822).

261. *State v. Butler*, 1 N.C. 501, 1 Cam. & Nor. 331 (1801).

262. *See, e.g., Inhabitants of Gloucester v. Cty. Comm'rs*, 44 Mass. (3 Met.) 375, 377 (1841); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795). *Compare Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38 (1796) (dividing evenly on whether compensation had to be provided in eminent domain proceedings), *with Gardner v. Trs. of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (declaring an act unconstitutional for failing to compensate landowners affected by waters being diverted for public use).

263. *Raleigh & Gaston R.R. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451 (1837).

264. *Id.* at 452–53.

265. *Id.* at 466.

266. *Id.* at 459–60.

private property, and impliedly forbids it, without compensation. But it is a point on which the Court is not disposed, nor at liberty, to give a positive opinion on this occasion.²⁶⁷

While the court assumed without deciding that the property owner had a right to compensation for the taking,²⁶⁸ the court determined this did not implicate the constitutional right to trial by jury on property issues.²⁶⁹ It reasoned the compensation was not a condition precedent to the taking,²⁷⁰ and therefore the amount of compensation was only an inquest into damages.²⁷¹ It read “trial by jury” as a term of art that excludes cases without a dispute of fact, and it considered an inquest into damages as not involving a dispute of fact.²⁷²

There were cases in which the North Carolina Supreme Court took a more formalistic approach to the clause, but typically this was only in dicta. For instance, in *University v. Foy*, discussed above, the court construed “liberty” to mean specifically “personal liberty.”²⁷³ The court was responding to arguments that corporations were not within the protections of the clause. The court rejected this argument, pointing to the clause’s reference to both “liberty” and “liberties.”²⁷⁴ It argued the former related to the personal liberty of individuals, while the latter related to the legal privileges and rights of corporations.²⁷⁵ Notably, it did not confine personal liberty to freedom from physical restraint.²⁷⁶ The rare cases in which the court construed the terms of the clause formalistically in its holdings often reached troubling results, such as when a criminal defendant was barred from claiming double jeopardy because the court ruled the first conviction was obtained through a proceeding that was unconstitutional under the law of the land clause, even though the initial proceeding was expressly authorized by a state law.²⁷⁷

North Carolina’s pre-Fourteenth Amendment jurisprudence related to its law of the land clause illustrates an important aspect of this Article’s

267. *Id.* at 460–61.

268. *Id.* at 459. *But cf.* *State v. Glen*, 52 N.C. (7 Jones) 321, 331 (1859) (stating *Raleigh & Gaston R.R.* “strongly intimated” the right to compensation “may be implied” from the law of the land clause).

269. *Raleigh & Gaston R.R.*, 19 N.C. at 464–66.

270. *Id.* at 461–63.

271. *Id.* at 464–66.

272. *Id.* at 466.

273. *Trs. of Univ. v. Foy*, 5 N.C. (1 Mur.) 58, 87 (1805).

274. *Id.* at 87–88.

275. *Id.*

276. *See id.*

277. *State v. Moss*, 47 N.C. (2 Jones) 66, 69–70 (1854).

thesis. Specifically, as a matter of practice, North Carolina treated its clause as embodying an imperfectly formulated norm that restrained arbitrary infringements on broad categories of protected interests—a norm to be formalized through judicial rule-making. While many of these North Carolina cases relate to the court procedures affecting property interests²⁷⁸ or legislative transfers of property,²⁷⁹ they reflect more generally the diligent effort of the judiciary to use the law of the land clause to balance personal rights and legislative or executive prerogatives by devising practical, enforceable rules in the preservation of liberty, broadly understood.

VII. TOWARD A BETTER ORIGINALIST INTERPRETATION OF FIFTH AMENDMENT DUE PROCESS

The originalists' Due Process fallacy of interpreting "liberty" to mean only freedom from physical restraint oversimplifies the history of due process in an effort to undermine the doctrine of substantive due process, if not also the doctrine of incorporation.²⁸⁰ This interpretation, however, is not good history or decent originalism. There was no single, accepted meaning of law of the land and due process clauses in late-eighteenth-century America. There were many variations of these clauses, and the Fifth Amendment Due Process Clause was an original formulation. The history, text, and early interpretations of these clauses suggest they embodied imprecisely formulated norms restraining government action in the interests of preserving liberty, broadly understood as freedom from arbitrary government action.

The earliest Supreme Court case construing the law of the land norm recognized the provision's general role in restraining arbitrary government.²⁸¹ Addressing Maryland's law of the land clause, which arguably applied in the District of Columbia at the time by virtue of a federal law,²⁸² the Court wrote:

As to the words from Magna Charta, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their

278. See, e.g., *State*, 2 N.C. (1 Hayw.) 28 (1794); *Bayard v. Singleton*, 3 N.C. (1 Mart.) 42 (1787).

279. *Barnes v. Barnes*, 53 N.C. (8 Jones) 366, 372 (1861); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833), *overruled by* *Mial v. Ellington* 134 N.C. 131, 139 (1903); *Foy*, 5 N.C. 58 (1805).

280. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632–34 (2015) (Thomas, J., dissenting).

281. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 240–43 (1819).

282. *Id.* at 240–43.

exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.²⁸³

This, however, is hardly a practical rule by which to judge a case.

*Murray's Lessee v. Hoboken Land & Improvement Co.*²⁸⁴ and *Hurtado v. California*²⁸⁵ developed rules that resolved some of the procedural due process cases through reference to historical practices, and these precedents seem fairly well-justified on originalism grounds, insofar as they go.²⁸⁶ *Hurtado* certainly supports the thesis of this Article, namely, that the Due Process Clause is a repository of principles from which to derive specific rules restraining arbitrary government rather than a rule itself to be read formalistically.²⁸⁷ This line of cases does not resolve all due process issues, though, especially when legislation departs from historically accepted practices.²⁸⁸ Some of the later rules in this line of cases may be criticized on originalism and other grounds, as Justice Scalia did in *Pacific Mutual Life Insurance v. Haslip*.²⁸⁹

While this Article argues the Fifth Amendment Due Process Clause cannot be wholly reduced to formalistic rules, one can identify factors based on this historical record that an originalist could use as loose guidelines in evaluating whether a government action complies with due process norms.

First, the pre-ratification history indicates Due Process and its predecessors most clearly were meant to regulate procedural matters that

283. *Id.* at 244.

284. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–82 (1856).

285. *Hurtado v. California*, 110 U.S. 516, 519 (1884).

286. *See also* *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 24–34 (1991) (Scalia, J., concurring) (summarizing these rules).

287. As Justice Scalia noted:

Hurtado, then, clarified the proper role of history in a due process analysis: If the government chooses to *follow* a historically approved procedure, it necessarily *provides* due process, but if it chooses to *depart* from historical practice, it does not necessarily *deny* due process. The remaining business, of course, was to develop a test for determining *when* a departure from historical practice denies due process. *Hurtado* provided scant guidance. It merely suggested that due process could be assessed in such cases by reference to “those *fundamental principles of liberty and justice* which lie at the base of all our civil and political institutions.”

Id. at 31–32 (quoting *Hurtado*, 100 U.S. at 535 (emphasis added)).

288. *Id.*

289. *Id.* at 33–34 (discussing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

may affect the imposition of criminal penalties or disabilities.²⁹⁰ Thus, originalists should be more willing to regulate, on due process grounds, (a) procedural issues, (b) criminal matters, and (c) impositions of penalties. They should be less inclined to impose due process constraints on “substantive” matters, noncriminal matters, and matters not affecting the imposition of penalties. That being said, some early American case law interprets this norm as applying with particular force to noncriminal property issues, and it may be fair to extend protections to those cases.²⁹¹ Each of these, however, lies on a spectrum. Thus, Justice Thomas has fairly argued that modern *civil* forfeiture may be unconstitutional on due process grounds.²⁹² One, therefore, should not be overly formalistic in this evaluation. For instance, while methods of collecting evidence in criminal cases may be only remotely related to the trial procedure and the imposition of criminal penalties, certain methods could be construed practically as the imposition of a criminal penalty itself and subject to due process constraints on that basis.²⁹³

Second, history suggests certain procedural norms are fundamental to due process, at least in criminal matters. These include the right to reasonable notice and an opportunity for a hearing before an impartial decision maker, the right to have legal process initiated contemporaneously with or prior to the arrest or deprivation of property, the right to present one’s case to the decision maker, and the right to have the process move without unreasonable delay to a definite conclusion.²⁹⁴ There are, of course, a few exceptions to these rules (such as the legislature’s limited power to suspend habeas corpus), and the protections plausibly could be extended by analogy, at least in part, to noncriminal matters.

Third, historical pedigree for specific conduct or its close analogue should generally favor a finding that the conduct does not violate Due Process, especially if the historical usage continued for a long period prior to and through the founding of this country. In this respect, *Murray’s*

290. *See supra* Parts III–VII.

291. *See supra* Part VII. From a historical perspective, this was probably due in part to the “life, liberty, or property” language, in part to the cultural emphasis on property as an instrument in securing liberty, and in part to the fact that the criminal implications of this constitutional norm were already well developed, so the courts had less reason to resort to the general law of the land or due process norms in criminal matters.

292. *See, e.g.,* Leonard v. Texas, 137 S. Ct. 847, 847–50 (2017) (Thomas, J., concurring) (denying certiorari).

293. *Cf. Rochin v. California*, 342 U.S. 165, 170–174 (1952) (concluding the use of a stomach pump to collect evidence is “too close to the rack and the screw to permit of constitutional differentiation”).

294. *See supra* notes 85–90, 184–89 and accompanying text.

Lessee and its progeny generally reflect an acceptable development of the due process norm, in an originalist framework.²⁹⁵

Fourth, the due process evaluation would differ based on whether the act in question was an exercise of legislative, judicial, or executive power. Legislative acts typically violate due process because of their content, rather than the procedure by which they were enacted,²⁹⁶ but judicial acts are the opposite. Meanwhile, executive acts may violate due process by failing to follow an established procedure or because of the effects or circumstances of the act. The evaluation must take into account the branch of government whose action is under scrutiny, the breadth of their appropriate discretionary powers on the subject within the constitutional framework, and the relative need and utility of a formal process to restrain potential abuses of that power.

Finally, there will be cases where judges have to break new ground in applying the due process norm, and this is consistent with the history of the Fifth Amendment Due Process Clause and its predecessors. In those cases, courts should take a broad look at both constitutional and practical issues. Constitutional issues would include separation of powers, federalism, the policy of *stare decisis*, and the preeminence of the legislature on policy issues. Norms of fairness, the need for certainty, and reasonableness certainly can play a role. Humble recognition of the meaning and significance of liberty as freedom from arbitrary government should be a guiding consideration.

As a closing comment, the originalists' Due Process fallacy seems based on the implicit assumption that a narrow, formalistic interpretation of Due Process is the best or only means of avoiding judicial abuses of power under the cloak of these Clauses. This view, however, sacrifices the implicit constitutional power of courts to act as an effective check on legislative or executive actions that go too far in infringing liberty by circumventing or short-circuiting established protocols or taking advantage of new social or technological developments. A more authentic originalist understanding of Due Process—with all of its historical uncertainty—better allows courts to play their appropriate role in maintaining the balance between private rights and the public's needs in the service of the common good. This balance is the essence of liberty.

295. *See, e.g.*, *Hurtado v. California*, 110 U.S. 516, 519 (1884); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276–82 (1856); *see also* *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 24, 30–33 (1991) (Scalia, J., concurring) (discussing this line of cases).

296. *Cf.* U.S. CONST. art. I, § 7 (establishing how a bill becomes a law).