

THE ORIGINAL MEANING OF “DUE PROCESS OF LAW” IN THE FIFTH AMENDMENT

Max Crema & Lawrence B. Solum***

The modern understanding of the Fifth Amendment Due Process of Law Clause is dramatically different from the original meaning of the constitutional text. The Supreme Court has embraced both substantive due process—a jurisprudence of unenumerated rights—and procedural due process—a grab bag of doctrines that touch upon almost every aspect of administrative and judicial procedures. We demonstrate that the original meaning of the Clause is much narrower. In 1791, “due process of law” had a narrow and technical meaning: the original sense of the word “process” was close to the modern sense that the word has when used in the phrase “service of process,” and it did not extend to all legal procedures, much less to all laws that impact liberty or privacy. In the late eighteenth century, “due process of law” was distinguished from two other important phrases. The phrase “due course of law” referred broadly to all aspects of a legal proceeding, including trials, appeals, and other matters. The phrase “law of the land” extended to all of what we would now call the positive law of a particular state or nation. Once these three ideas are properly distinguished and the relevant history is examined, the evidence for the narrow understanding (what we call the “Process Theory”) is overwhelming. As a consequence, almost all modern Fifth Amendment Due Process of Law Clause cases are either wrongly decided or wrongly reasoned from an originalist perspective.

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** William L. Matheson and Robert M. Morgenthau Distinguished Professor of Law & Douglas D. Drysdale Research Professor of Law, University of Virginia School of Law.

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INTRODUCTION

There are two Due Process of Law Clauses in the United States Constitution. The first is found in the Fifth Amendment:

No person shall be . . . *deprived of life, liberty, or property, without due process of law.*¹

The second Due Process of Law Clause is found in Section One of the Fourteenth Amendment:

No State shall make or enforce any law which shall . . . *deprive any person of life, liberty, or property, without due process of law.*²

The conventional wisdom is that the Fifth Amendment applies only to the federal (national) government; the Fourteenth Amendment applies to the states.

¹ U.S. Const. amend. V (emphasis added).

² U.S. Const. amend. XIV, § 1 (emphasis added).

This Article is about the original meaning of the Fifth Amendment Due Process of Law Clause; our findings may be relevant to the meaning of the very similar language of the Fourteenth Amendment, but they may not—the meaning of “due process of law” might have changed between 1791 and 1868.

The original meaning of the Fifth Amendment Due Process of Law Clause is surprising. The contemporary understanding of the phrase is ambiguous and contested, encompassing two distinct but related theories of its meaning. The first of these theories, the “Fair Procedures Theory,” is that “due process of law” means legal procedures that are fair (procedurally just). The fairness view is reflected in *International Shoe Co. v. Washington*’s idea of “fair play and substantial justice” and many other cases.³

The second account of the Due Process of Law Clause, the “Legal Procedures Theory,” holds that the phrase means procedures that are required and/or permitted by positive law. This second theory comes in two variants. The first variant requires that the procedures comply with contemporary positive law⁴—this variant is associated with Justice Hugo Black.⁵ The second variant requires that the procedures comply with the positive law at the time the Fifth Amendment was framed and ratified, roughly 1791—this version of the Legal Procedures Theory is associated with Justice Antonin Scalia.⁶ None of these views are correct from an originalist perspective.

Instead, the original meaning of the Fifth Amendment Due Process of Law Clause is captured by a third theory, which we call the “Process

³ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

⁴ By “contemporary positive law,” we mean the law that was in effect at the time the alleged rights violation occurred.

⁵ Justice Black articulated this view in his dissenting opinion in *International Shoe*, 326 U.S. at 324–25 (Black, J., dissenting), and his concurrence in *In re Gault*, 387 U.S. 1, 62 (1967) (Black, J., concurring) (“The phrase ‘due process of law’ has through the years evolved as the successor in purpose and meaning to the words ‘law of the land’ in Magna Charta which more plainly intended to call for a trial according to the existing law of the land in effect at the time an alleged offense had been committed.”).

⁶ Justice Scalia’s articulation of his view is not stated clearly and with precision. See *Burnham v. Superior Ct.*, 495 U.S. 604, 610–11 (1990) (identifying 1868 as the crucial date for the meaning of the Due Process of Law Clause).

Theory.” The phrase “due process of law” had a very precise and restricted meaning: the Clause is limited to legally required “process” in what is today a narrow and technical sense of that word.

The key to understanding the Process Theory is the word “process.” That word is ambiguous. One sense of the word “process” today is very abstract and general. In this sense, the word “process” can refer to a variety of phenomena, including chemical processes, mechanical processes, and legal procedures of any kind. This is the sense specified by the Oxford English Dictionary (“OED”) as the eighth (and most common) definition of the noun form of the word “process”:

A continuous and regular action or succession of actions occurring or performed in a definite manner, and having a particular result or outcome; a sustained operation or series of operations.⁷

But the word “process” has today and had in 1791 a very specific and precise meaning. We can begin to get at that meaning of process via the “b” variant of the fifth definition in the OED:

The formal commencement of any legal action; the mandate, summons, or writ by which a person or thing is brought into court for litigation.⁸

Of course, this narrow meaning is familiar to all American lawyers: this is the sense of the word “process” as it is used in the phrase “service of process.” Process is a formal document that provides a person notice of legal obligation, such as the obligation of a defendant in a civil action to appear at trial (at the risk of default for nonappearance). Process can also grant authority, such as the authority to arrest an individual or to seize their home.

The Process Theory of the meaning of the Fifth Amendment Due Process of Law Clause maintains that the Clause requires that deprivations of life, liberty, or property must be preceded by process of law in this narrow and technical legal sense. In other words, a criminal defendant may not be deprived of life or liberty without first either personal service of process or some legally valid alternative such as service by publication in a narrow category of cases. Similarly, civil

⁷ Process, OED Online, <https://www.oed.com/view/Entry/151794> [<https://perma.cc/MY5V-Z5BL>] (last visited Oct. 7, 2021).

⁸ Id.

defendants may not be subject to a damage award or judgment depriving them of property without legally valid process. In this sense, the Fifth Amendment Due Process of Law Clause ensures notice and jurisdiction.

There are other implications of the Clause as well. “Due process of law” encompasses “original process,” the service of process that is required by Rule 4 of the Federal Rules of Civil Procedure, but it also includes mesne and final process. Here is Blackstone’s summary:

The next step for carrying on the suit, after suing out the original, is called the *process*; being the means of compelling the defendant to appear in court. This is sometimes called *original* process, being founded upon the original writ; and also to distinguish it from *mesne* or intermediate process, which issues, pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. *Mesne* process is also sometimes put in contradistinction to *final* process, or process of *execution*; and then it signifies all such process as intervenes between the beginning and end of a suit.⁹

The core idea of the Process Theory is that “due process of law” means legal process in the technical sense that is approximated by Blackstone’s discussion—i.e., formal documents, generally issuing from a court, that impose legal obligations or rights. Absent such process, the Clause prohibits any deprivation of certain essential rights (life, liberty, or property) by a government actor. Put another way, the Due Process of Law Clause requires that the executive secure the judiciary’s approval *before* depriving an individual of their rights. The Clause therefore prohibits arbitrary deprivations and furthers separation of powers principles. The Fifth Amendment’s Due Process of Law Clause does not extend to all legal procedures; for example, it does not include trial by jury, pleadings, summary judgment, discovery, and many other legal procedures that are not “process.” Nor does the Clause require that procedures be fair.

We do not mean to say that the constitutional doctrines presently derived from the Fifth Amendment Due Process of Law Clause are necessarily unsupported by the constitutional text. From an originalist perspective, there may be other constitutional provisions that are relevant. For example, even if the Clause does not specify the timing or form of hearings that must be provided by the federal government, the Sixth and

⁹ 3 William Blackstone, Commentaries *279 (footnote omitted).

Seventh Amendments guarantee a right to a jury trial. The Fifth Amendment Due Process of Law Clause would not support unenumerated rights under the rubric of “substantive due process,” but the Ninth Amendment provides that the “enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,”¹⁰ and originalist scholars have argued that this provision does protect unenumerated rights against the federal government.¹¹ None of these protections, however, are located in the Fifth Amendment’s Due Process of Law Clause.

In sum, starting with *Murray v. Hoboken Land & Improvement Co.*¹² and proceeding through contemporary Fifth Amendment Due Process of Law Clause doctrine, including *International Shoe*,¹³ *Mathews v. Eldridge*,¹⁴ and dozens of other cases, the whole corpus of due process of law doctrine is inconsistent with the original meaning of the Fifth Amendment Due Process of Law Clause. In other words, the living constitutionalist construction of the Due Process of Law Clause is inconsistent with its original meaning. So, too, are some of the most important originalist interpretations, which extend the meaning of “process” to all legal procedures.

This suggests that “due process of law” has undergone linguistic drift—its meaning has changed since the First Congress proposed it for ratification. This Article does not tell the story of how the meaning changed; instead, we are focused on the meaning as it existed in 1791, when the language of the Due Process of Law Clause was ratified. We do have important things to say about developments in the nineteenth century,¹⁵ but we will not purport to settle questions about the meaning of “due process of law” in the Fourteenth Amendment. And we do not offer an account of the emergence of the conflation of “due process” with “fair process” or the development of the Supreme Court’s substantive due process jurisprudence.

We are mindful that the Process Theory has normatively significant implications for Fifth Amendment Due Process of Law Clause doctrine.

¹⁰ U.S. Const. amend. IX.

¹¹ Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1, 80 (2006).

¹² 59 U.S. (18 How.) 272 (1856).

¹³ 326 U.S. 310 (1945).

¹⁴ 424 U.S. 319 (1976).

¹⁵ See *infra* Part IV.

Recall that the Process Theory is limited to the Fifth Amendment and hence that its implications only extend to actions by the federal government. Examples of Fourteenth Amendment doctrines that are conventionally understood to extend to the national government include:

- The minimum contacts approach to personal jurisdiction articulated in *International Shoe*.¹⁶
- Procedural due process doctrines that regulate the form and timing of hearings and trials, including the balancing approach of *Mathews v. Eldridge*.¹⁷
- Substantive due process rights, including the right to privacy articulated in *Griswold v. Connecticut*¹⁸ and extended in *Roe v. Wade*¹⁹ to the right to choice with respect to abortion.

Because our analysis is limited to federal action, it has no direct implications for any of these decisions as they apply to state governments.

From an originalist perspective, the meaning of the Fifth Amendment Due Process of Law Clause does not depend on a normative assessment of the consequences that would flow from its original public meaning. For originalists, the role of normative assessment occurs at a more general level of analysis. Thus, originalists argue that constitutional actors should be bound by the original public meaning of all the Constitution's provisions; originalists reject the idea that judges can amend the Constitution when they believe that good consequences would result. This idea is expressed in the Constraint Principle, which is stated below.²⁰

We recognize that living constitutionalists reject the Constraint Principle and therefore believe that the Supreme Court ought to have the power to adopt amending constructions of the Constitution in order to achieve good outcomes. That belief is not limited to the Fifth Amendment Due Process of Law Clause; it extends in principle to every constitutional provision. Nonetheless, at least some living constitutionalists may believe that the original public meaning of the constitutional text is relevant to constitutional interpretation and construction—an idea we discuss below.²¹

¹⁶ 326 U.S. at 316.

¹⁷ 424 U.S. at 334–35.

¹⁸ 381 U.S. 479, 484 (1965).

¹⁹ 410 U.S. 113, 152–53 (1973).

²⁰ See *infra* text accompanying note 23.

²¹ See *infra* Section V.C.

Here is the roadmap. Part I situates our project in the context of originalist constitutional theory. Part II explicates three fundamental phrases: “due process of law,” “due course of law,” and the “law of the land.” Part III provides the first half of our case for the Process Theory via an examination of the meaning of “due process of law” before the framing and ratification of the Fifth Amendment. The second half of that case is provided in Part IV, which surveys developments during and after the ratification of the Fifth Amendment. Part V addresses unanswered questions and implications of our findings. We conclude with a summary and some speculations about the consequences that might follow if judges were to pay serious attention to the original meaning of the Fifth Amendment Due Process of Law Clause.

I. THE PUBLIC MEANING ORIGINALIST FRAMEWORK

The primary aim of this Article is to recover the original public meaning of the Fifth Amendment Due Process of Law Clause. In this Part, we situate that effort by articulating the theoretical and methodological framework of contemporary public meaning originalism. We begin with theory, then distinguish ordinary and technical meanings, and finally move to methodology. We shall be concise!

A. Public Meaning Originalism

“Public Meaning Originalism” is a member of the originalist family of constitutional theories. Almost all originalists affirm the Fixation Thesis and the Constraint Principle:

Fixation Thesis: The communicative meaning of the constitutional text is fixed at the time each provision is framed and ratified.²²

Constraint Principle: Constitutional practice, including the decision of constitutional cases and the articulation of constitutional doctrine, ought to be consistent with the original meaning of the constitutional text.²³

²² Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 *Notre Dame L. Rev.* 1, 1 (2015).

²³ Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 2–3 (Mar. 24, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [<https://perma.cc/4M4N-L52V>].

What makes Public Meaning Originalism distinctive is its endorsement of a third idea, the Public Meaning Thesis:

Public Meaning Thesis: The original meaning of the constitutional text is its public meaning—the content communicated to the public at the time each provision was made public. Content is communicated to the public if it is made “publicly available”—reasonably accessible to the public.²⁴

Not all originalists endorse the Public Meaning Thesis. Other forms of originalism include Original Intentions Originalism,²⁵ Original Methods Originalism,²⁶ and Original Law Originalism.²⁷ Although we believe that our claims could be made out on the basis of any of these theories, we will not attempt to show that in this Article.

Public Meaning Originalism makes several other claims, including the following:

Moderate Under-determinacy: The original public meaning of the text is not radically indeterminate, but some provisions of the text are moderately under-determinate because of vagueness, open texture, or irreducible ambiguity.²⁸ Moderate indeterminacy is consistent with the claim that the Constraint Principle has real bite: it will make a difference with respect to the resolution of most constitutional issues and many constitutional cases.²⁹

²⁴ Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. Rev. 1953, 1962–63 & n.24 (2021) [hereinafter Solum, *Public Meaning Thesis*].

²⁵ Larry Alexander & Saikrishna Prakash, “Is That English You’re Speaking?” Why Intention Free Interpretation Is an Impossibility, 41 San Diego L. Rev. 967, 969 (2004).

²⁶ John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 751, 769 (2009).

²⁷ Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol’y 817, 875 (2015).

²⁸ Moderate indeterminacy contrasts with radical indeterminacy, which in the case of the constitution would entail that original meaning would have no constraining effect. The case against strong or radical versions of the indeterminacy thesis and for the claim that the law is only moderately indeterminate is made in Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462 (1987).

²⁹ Because of selection effects, it seems likely that a disproportionate share of the cases that are actually filed and litigated will be those in which the constitutional issues will be under-determined by original meaning—even if the Supreme Court renders consistently originalist

Adequate Methodology: The methodological tools of originalism are sufficient to provide evidence of the original public meaning of almost all of the provisions of the constitutional text. A methodology for the recovery of original meaning was briefly outlined by one of us in a short article, *Originalist Methodology*,³⁰ and elaborated in *Triangulating Public Meaning*.³¹

Realistic Possibility: Constitutional originalism is a realistic possibility in the feasible choice set, a topic that is briefly examined in *Constitutional Possibilities*.³² An account of a reasonable path from the constitutional status quo to the full implementation of originalism will be examined by one of us (Solum) in future work.

Each of these claims is controversial. For the purposes of this Article, we simply assume that each claim can be supported by good and sufficient reasons in due course.

Our theoretical framework assumes that constitutional originalism aims to recover the content that a constitutional provision conveyed to the public when the provision was framed at ratification. By “content,” we mean to refer to the propositions that are communicated to the public. The term “proposition” is used in a technical sense to distinguish between words and sentences, on the one hand, and the concepts and propositions those words and sentences convey, on the other.³³ For example, the word “law” represents a concept, *law*, that can be represented by other words, e.g., “loi” in French, “ley” in Spanish, and “recht” in German. Propositions are to sentences as words are to concepts. So, we aim to recover the proposition communicated by the Due Process of Law Clause of the Fifth Amendment and the concept represented by the phrase “due process of law.”

decisions. Litigants have incentives to file cases they have a chance of winning and to avoid filing sure losers.

³⁰ See generally Lawrence B. Solum, *Originalist Methodology*, 84 U. Chi. L. Rev. 269 (2017).

³¹ See generally Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. Rev. 1621 (2017) [hereinafter Solum, *Triangulating Public Meaning*].

³² See generally Lawrence B. Solum, *Constitutional Possibilities*, 83 Ind. L.J. 307 (2008).

³³ See Matthew McGrath & Devin Frank, *Propositions*, Stan. Encyclopedia of Phil. (Jan. 25, 2018), <https://plato.stanford.edu/entries/propositions/> [https://perma.cc/632N-9TX6]; Eric Margolis & Stephen Laurence, *Concepts*, Stan. Encyclopedia of Phil. (June 17, 2019), <https://plato.stanford.edu/entries/concepts/> [https://perma.cc/D2AM-RFDK].

The idea of communicative content is technical, but it can be expressed in language that is more familiar to lawyers and legal scholars. The communicative content of the constitutional text is roughly equivalent to the contextual meaning of the constitutional text. In other words, communicative content is not limited to the literal meaning of the constitutional text; it includes contextual disambiguation and content that is implicit given the context. Lawyers and judges are familiar with the idea that the full content conveyed by the constitutional text is richer than its literal meaning. In the philosophy of language and theoretical linguistics, this idea is called “pragmatic enrichment.”³⁴

B. Technical Meanings and Ordinary Meanings

Public Meaning Originalism assumes that the constitutional text has a publicly accessible meaning. Public accessibility can be achieved by using words and phrases in their ordinary senses: the constitutional text uses this mechanism for many of its provisions. But not all of the constitutional text is written in ordinary language. Some of its provisions employ technical terms. For example, “letters of marque and reprisal” is a technical phrase used in maritime law. The use of technical terms is consistent with public accessibility, so long as members of the public can identify the technical word or phrase and access its meaning through reasonable effort. Thus, a member of the public in 1787 would have been able to access the meaning of “letters of marque and reprisal” by consulting a reference work or consulting someone learned in the law.

Today, “due process of law” has acquired an ordinary meaning that is quite different than the technical meaning that it had in 1791 when the Fifth Amendment was ratified. As will become apparent from the evidence that we consider below, “due process of law” was not in common use. This is not a case of ordinary-versus-technical-meaning ambiguity³⁵—as may have been the case with the phrase “ex post facto.”³⁶ For this reason, we will focus on legal materials and the writings of persons who were learned in the law.

³⁴ Lawrence B. Solum, Contractual Communication, 133 *Harv. L. Rev. F.* 23, 28 (2019); François Recanati, Pragmatic Enrichment, in *The Routledge Companion to Philosophy of Language* 67, 67 (Gillian Russell & Delia Graff Fara eds., 2012).

³⁵ The phrase “ordinary-versus-technical-meaning ambiguity” is used to express the kind of ambiguity that arises when a word or phrase has both an ordinary meaning and a technical meaning.

³⁶ See Solum, *The Public Meaning Thesis*, supra note 24, at 2029–30.

Thus, the Due Process of Law Clause provides an example of the convergence of Public Meaning Originalism with Original Methods Originalism. The publicly available technical meaning is binding for both theories.

C. Originalist Methodology

We employ the methodological framework outlined by one of us (Solum) in *Originalist Methodology*³⁷ and *Triangulating Public Meaning*.³⁸ That framework suggests three broad approaches to the recovery of original meaning: (1) study of the constitutional record, (2) corpus linguistics, and (3) immersion in the linguistic world of the relevant period. In this Article, we focus on the first two approaches.³⁹ Our investigation of the constitutional record includes a survey of American and English legal materials that were accessible to Americans who were learned in the law. We complement this through application of the method of corpus linguistics. Because the evidence for the Process Theory is quite strong, we believe that it is very unlikely that immersion in the linguistic world of the late eighteenth century would undermine our conclusions. The phrase “due process of law” had a well-defined technical meaning, and thus the value of generalist immersion in the linguistic world of the eighteenth century is less relevant in this context than it would be for determining the original meaning of words and phrases that had ordinary meanings.

D. What Is Original Public Meaning?

The word “meaning” is ambiguous. For the purposes of constitutional theory, “meaning” can be used in at least three distinct (but related) senses:⁴⁰

Application Meaning: The application of a constitutional provision to a particular case or category of cases. Example: What

³⁷ Solum, *Originalist Methodology*, supra note 30.

³⁸ Solum, *Triangulating Public Meaning*, supra note 31.

³⁹ *Id.* at 1624.

⁴⁰ On the ambiguity of “meaning,” see C.K. Ogden & I.A. Richards, *The Meaning of Meaning* 186–87 (8th ed. 1946); Michael L. Geis, *The Meaning of Meaning in the Law*, 73 Wash. U. L.Q. 1125, 1128–32 (1995); A.P. Martinich, *Four Senses of “Meaning” in the History of Ideas: Quentin Skinner’s Theory of Historical Interpretation*, 3 J. Phil. Hist. 225, 226–31 (2009).

does the Due Process of Law Clause mean for the validity of a statute?

Teleological Meaning: The purpose or goal of a constitutional provision. Example: What did the authors of the Fourteenth Amendment mean to accomplish?

Communicative Meaning: The content (concepts and proposition) conveyed by a constitutional provision. Example: What idea did the phrase “right to jury trial at common law” in the Seventh Amendment convey?⁴¹

As used in the phrase “original public meaning,” the word “meaning” refers to communicative meaning. This sense of meaning relies in turn on the idea of “communicative content.” The communicative content of a constitutional provision is the set of propositions that the provision conveys or makes accessible to the public at the time the provision is framed and ratified.

The original public meaning of the Due Process of Law Clause is the meaning that was conveyed or made accessible to the public. Original public meaning is not the meaning that was actually understood by each and every member of the public. Most members of the public likely did not read the Constitution. Some members of the public likely misunderstood some provisions under circumstances in which they never learned of their mistake. When the Constitution uses technical words and phrases, like “due process of law,” most members of the public may not bother to take reasonable steps to ascertain the meaning of the term of art for the relevant linguistic subcommunity. Original public meaning includes meanings that are accessible to ordinary folk who are competent speakers of American English as it was spoken and written in the late eighteenth century. The relevant idea of accessibility requires that the technical meaning could be discovered through reasonable effort. In the case of the phrase “due process of law,” such efforts could be made by consulting persons learned in the law or by reading a legal dictionary or treatise.

Original public meaning is distinct from the application beliefs formed by the public during the period of ratification and early implementation of the constitutional text. Such beliefs are relevant evidence of public meaning, but they are not public meaning itself. Similarly, beliefs about

⁴¹ The definitions are from Solum, *The Public Meaning Thesis*, *supra* note 24, at 1960.

the aims or purposes of a constitutional provision may provide relevant context for determining the communicative content of a constitutional provision, but such purposes are not themselves meanings in the communicative sense.

Finally, it is important to recall that communicative meaning is not literal meaning. The literal meaning of the constitutional text is a function of the words and phrases as combined by syntax and punctuation. But such literal meaning is frequently sparse because drafters rely on context to communicate content that is richer than what is literally said. Context plays another important role by disambiguating words and phrases that have multiple senses. The literal meaning of the phrase “due process of law” is ambiguous in many ways. “Due” has a sense that is time bound, as in “the payment is now due.” “Process” has a broad sense that includes physical processes. “Law” can refer to the physical laws discovered by science. But in context, the whole phrase “due process of law” refers to legal process in the sense in which the word “process” is used in the phrase “service of process.” In the philosophy of language and theoretical linguistics, the role of context comes under the heading of “pragmatics” as opposed to “semantics,” which refers to linguistic meaning or literal meaning. This sense of the word “pragmatic” is conceptually quite different from the sense in which contemporary legal theory uses the phrase “legal pragmatism.”⁴² Pragmatics is not an approach to the determination of communicative content that focuses on consequences.

In conclusion, “original public meaning” is equivalent to the communicative content (propositions) conveyed or made accessible to the public at the time each constitutional provision was framed and ratified.

II. THREE FUNDAMENTAL IDEAS IN EIGHTEENTH-CENTURY JURISPRUDENCE

The American colonists considered themselves inheritors of the English common law. By history and tradition, three concepts dominated the constitutional and legal framework they claimed as their birthright. Foremost was Magna Carta’s guarantee that the king not act contrary to

⁴² Kapa Korta & John Perry, Pragmatics, Stan. Encyclopedia of Phil. (Aug. 21, 2019), <https://plato.stanford.edu/archives/spr2020/entries/pragmatics/> [https://perma.cc/X5P4-5SE4]; Wayne Davis, Implicature, Stan. Encyclopedia of Phil. (Sept. 6, 2019), <https://plato.stanford.edu/entries/implicature> [https://perma.cc/4D6S-M27Y].

the “law of the land”—a broad and ancient phrase meaning “the Common Law, Statute Law, or Custom of England.”⁴³ Encompassed within the law of the land’s broad reach was the less sweeping but equally significant principle of “due course of law.” As explained in Noah Webster’s *Dictionary of the English Language*, due course of law meant a legal proceeding held in the “usual manner,” following a “[s]tated and orderly method.”⁴⁴ Finally comes “due process of law.” Among the three, this phrase’s sweep was the narrowest—meaning, literally, duly issued writs or precepts. As we shall see, however, the right to due process of law was an important constitutional check on arbitrary power long before the Fifth Amendment was drafted.

Somewhat remarkably, the established view is that these three phrases—“due process of law,” “due course of law,” and “law of the land”—all meant the same thing to the Founding generation.⁴⁵ A number of commentators have, however, begun to question this understanding.⁴⁶ We join these scholars. Each of these phrases had a distinct role in the English common law tradition. Stated briefly, and translated into modern legal understandings, “law of the land” encompassed the procedural and substantive laws of England. “Due course of law” meant the procedural law governing any given legal action. And “due process of law” meant writs or precepts duly issued (usually by a court) or arising by operation of law.

⁴³ 2 Edward Coke, *Institutes of the Laws of England* 46 (London, W. Rawlins 6th ed. 1681) (1642) [hereinafter 2 *Institutes*].

⁴⁴ Course, 1 Noah Webster, *An American Dictionary of the English Language* 482 (N.Y., S. Converse 1828).

⁴⁵ See Rodney L. Mott, *Due Process of Law* 18–25 (1926); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 *Wis. L. Rev.* 941, 964, 991–95; *Weaver v. Lapsley*, 43 Ala. 224, 232 (1869) (“The terms ‘the law of the land,’ ‘due process of law,’ and ‘due course of law,’ . . . have the same meaning.”); Joseph Walker Magrath, *Due Process of Law*, in 10 *The American and English Encyclopedia of Law* 287, 289–90, 296 n.1 (David S. Garland & Lucius P. McGehee eds., N.Y., Edward Thompson Co. 2d ed. 1899).

⁴⁶ See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *Yale L.J.* 408, 429–430 (2010) [hereinafter Williams, *One and Only*] (“A more difficult question is whether Coke is best interpreted as saying that ‘due process of law’ and ‘law of the land’ should be viewed as synonymous for all purposes.”); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 *Am. J. Legal Hist.* 265, 277 (1975) (“When we peruse [*Institutes*] as a whole, . . . it becomes doubtful that Coke was simply equating ‘per legem terrae’ with ‘due process of law.’”); 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, 81–82 (2007) [hereinafter Davies, *Correcting History*].

A. Law of the Land

The phrase “law of the land” dates back at least as far as 1215, when the barons of England extracted, at the point of a sword, a series of concessions from their King enshrined in the Magna Carta Libertatum, or Great Charter of Freedoms.⁴⁷ Chapter 39 of the Magna Carta declared that no freeman was to be “taken,” “imprisoned,” “disseised,” “exiled or in any way destroyed,” “nisi per legale iudicium parium suorum vel per legem terre” (“except by the lawful judgment of his peers or [and] by the law of the land”).⁴⁸ Although debates over the precise meaning of Chapter 39 continue,⁴⁹ its primary significance was to establish that the King’s authority over his subjects was not absolute.⁵⁰

During the long road to the English Civil War, seventeenth-century common law lawyers exulted Chapter 39 as a check on the King’s power, seeking to restore Magna Carta, such that it might “walk abroad again with new vigour and lustre.”⁵¹ With ink and with blood, the English established Magna Carta as their birthright, a guarantee that the Monarch could only deprive his subjects of their rights according to “the law of the land”—that is, by “the Common Law, Statute Law, or Custom of England”⁵²—rather than through arbitrary will alone. American colonists

⁴⁷ Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 *Miss. L.J.* 621, 623 (2016) (“The terms of the Magna Carta were negotiated on the battlefield during a cessation in an English civil war between King John and rebellious barons.”).

⁴⁸ Williams, *One and Only*, supra note 46, at 428 (quoting William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 375 (2d ed. 1914)). In the original Latin, the terms “judgment of his peers” and “by the law of the land” are separated by the participle “vel,” which may be translated as either “and” or “or.” See Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 *Creighton L. Rev.* 735, 745–46 (1981) (summarizing debate over correct translation). Chapter 39 of Magna Carta was renumbered as Chapter 29 in later reissues of the charter. This Article uses the original numbering for consistency.

⁴⁹ Much of the debate is over whether *legem terrae* originally meant the customary laws of England, or whether it referred to a specific method of proof. Scholars similarly debate the meaning of “judgment of his peers.” See McKechnie, supra note 48, at 377–78, 379–80 (summarizing debate).

⁵⁰ The chapter’s primary purpose, it seems, was to end King John’s practice of sending armies against barons who displeased him, without any prior legal adjudication. Melville Madison Bigelow, *History of Procedure in England: From the Norman Conquest* 155 (London, MacMillan & Co. 1880).

⁵¹ Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300–1629*, at 86 (1948).

⁵² 2 *Institutes*, supra note 43, at 46.

carried this understanding with them, and most colonies enacted a law of the land guarantee into their organic laws.⁵³ From its start, the law of the land was a check on the power of the executive. As explained by one Founding-era court, these guarantees required that penalties only be imposed “by the judgment of a court of competent jurisdiction, proceeding by the known and established course of law.”⁵⁴

B. Due Course of Law

“Due course of law” never held the same constitutional resonance as “due process of law,” but it is at least as old and had a well-developed meaning at the Founding.⁵⁵ Simply put, “course of law” meant legal procedure, covering the entirety of a legal proceeding from initiation through to judgment and execution. In one of the earliest statutory elaborations on Magna Carta, for example, Parliament declared none could be put out of his “franchises” or “freeholds” until he had been “duly brought into answer, and forejudged . . . by the Course of the Law.”⁵⁶ This procedural meaning remained consistent through to the Founding era, as demonstrated by the 1787 Northwest Ordinance’s guarantee that citizens in the territory would enjoy “judicial proceedings according to the course of the common law.”⁵⁷ And “due *course* of law,” as explained in Webster’s *Dictionary*, simply meant a legal proceeding held in the “usual manner,” following a “[s]tated and orderly method.”⁵⁸

In many ways, “due course of law” parallels our own modern understanding of procedural due process. To say that one was convicted “by due course of law” meant they had been adjudged guilty after being afforded all the procedural protections to which they were entitled. Thus,

⁵³ See *infra* Subsection III.B.2.a.

⁵⁴ *Moore v. Bradley*, 3 N.C. (2 Hayw.) 142, 142 (1801).

⁵⁵ “Course of law” first appeared in English statutes in 1351, three years before “due process of law.” Compare 1351, 25 Edw. 3 c. 4 (first use of “course of law”), with 1354, 28 Edw. 3 c. 3 (first use of “due process of law”).

⁵⁶ 1351, 25 Edw. 3 c. 4.

⁵⁷ See Northwest Ordinance, art. II (July 13, 1787), *reprinted in* Sources of Our Liberties 392, 395 (Richard L. Perry ed., 1959).

⁵⁸ 1 Webster, *supra* note 44, at 482; see also *In re Dorsey*, 7 Port. 293, 329 (Ala. 1838) (“Due course of law, as that phrase has been understood ever since *Magna Charta*, means a correct and established course of judicial proceedings.”).

a 1788 New York statute required counterfeiters be put to death only after having been “convicted, according to due course of law.”⁵⁹

C. Due Process of Law

In the common law tradition, “process” meant the “writs or precepts that go forth” from a court.⁶⁰ Government officials used process to issue orders, impose obligations, or grant rights.⁶¹ Blackstone’s *Commentaries* divides “process” into three types: original, *mesne*, and final. Original process initiated the action, final process executed the judgment, and *mesne* (middle) process was all that issued in between, such as to summon jurors.⁶² Process could also arise by operation of law. Sir Edward Coke, in his *Institutes*, explains that fleeing felons may be arrested and held on “Proces[s] of Law,” notwithstanding the absence of a physical, written warrant.⁶³ Although “process” was occasionally used to refer to procedure more generally, such usage was rare.

The common law placed much stock in process. As remains the case today, parties were summoned through process, property was searched or seized on process, and punishments were ordered—following conviction—through process. Any deprivation of rights enacted without the appropriate process gave a remedy in law to those harmed.⁶⁴ Put another way, it was only through process that rights could be deprived, or duties imposed.

The phrase “due process of law” captures this principle of English law. A government official acted without due process of law if they deprived another of a right without the appropriate authorizing writ. This was true even if that deprivation was preceded by a fair or adequate procedure, for it was the absence of the writ, and not the absence of pre-deprivation procedural protections, that violated this principle.

⁵⁹ An Act for Preventing and Punishing Forgery and Counterfeiting (Feb. 7, 1788), in 2 *Laws of the State of New-York* 41, 42 (N.Y., Thomas Greenleaf 1792).

⁶⁰ Process, 2 Timothy Cunningham, *A New and Complete Law-Dictionary* (London, 1765).

⁶¹ W.S. Holdsworth, *Sources and Literature of English Law* 20 (1925) (“[W]rits have a long history. We can trace their formal origin to the Anglo-Saxon formulae by which the king used to communicate his pleasure to persons and courts.”).

⁶² See 3 Blackstone, *supra* note 9, at *279; Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 *Yale. L.J.* 52, 57 n.21 (1968).

⁶³ 2 *Institutes*, *supra* note 43, at 51.

⁶⁴ See *supra* Section III.A.

Of course, not any writ would do. “Due process of law” was an elaboration on Magna Carta’s law of the land guarantee and had a jurisdictional significance. Although due process of law did not always need to be issued by a court—consider a grand jury’s indictment—it had to be based on a cause determinable by a court. Thus, an executive official, such as a sheriff, could hold someone on nonjudicial process (say, for breach of the peace) but only so long as the foundation of the process—the underlying charge—was within the jurisdiction of the courts and ultimately subject to judicial adjudication.⁶⁵ To put it another way, executive officials could in certain circumstances deprive individuals of their rights without prior approval but only for as long as it took to bring the matter before a judge. At its core, the right to “due process of law” ensured that subjects could only be deprived of their rights according to the “law of the land,” as applied by the courts, and not according to the king’s arbitrary will.

D. A Preliminary Statement of the Process Theory in Light of the Three Fundamental Ideas

The Due Process of Law Clause of the Fifth Amendment states the federal government may not deprive individuals of their “life, liberty, or property, without due process of law.”⁶⁶ Giving this Clause its original meaning, it provides that none shall be deprived of certain essential rights (“life, liberty, or property”) by a government actor unless that deprivation was authorized by a lawfully issued writ or precept. To be lawful, or “due,” a process must either be issued from a court with competent jurisdiction or, in the case of deprivations preceding adjudication, be founded on a cause of action subject to a court’s jurisdiction.

The Clause prohibits arbitrary deprivations and furthers separation of powers principles by requiring that the executive secure the judiciary’s approval *before* depriving an individual of their rights. Because the judiciary must apply the law as written, any deprivation of rights thus requires the concurrence of all three branches. The legislature must authorize it, the executive must pursue it, and the judiciary must approve it. The Clause guarantees the rule of law by ensuring that certain essential

⁶⁵ As with nearly every other aspect of the common law, this jurisdictional requirement was subject to several historical exceptions. See, e.g., 2 Institutes, *supra* note 43, at 52 (describing examples).

⁶⁶ U.S. Const. amend. V.

rights may only be deprived by a court of law. It does not, however, constrain the government's powers or entitle citizens to procedural rights not otherwise available under existing law.

III. THE MEANING OF "DUE PROCESS OF LAW" BEFORE THE RATIFICATION

From its first recorded use in the 1300s through to the Founding era, "due process of law" was understood to mean a writ or precept authorizing the deprivation of a right or imposing an obligation. An examination of early English statutes suggests the term was essentially a shorthand for the less wieldy guarantee: "no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land."⁶⁷ Later English sources confirm "due process of law" meant process founded upon an "indictment or presentment . . . [or] Writ original of the Common Law."⁶⁸

Early American colonists shared this understanding. The cultural prominence of "due process of law" in our own time is largely an invention of the mid-nineteenth century; during the Founding era, "due process of law" was an obscure legal term used infrequently and only by lawyers. Brigham Young University's Corpus of Founding Era American English ("COFEA"), which includes more than 120,000 documents from the titular period, contains just twenty-two uses of "due process of law" in the three decades preceding the ratification.⁶⁹ Nearly all of these infrequent uses of "due process of law" conform with the term's narrow, centuries-old meaning. As one popular Founding-era legal handbook (published by Benjamin Franklin) explained: "due process of law" meant "Indictment, or Presentment of good and lawful Men of the Place, in due Manner, or by Writ original of Common-Law," and it required that all seizures and commitments be made only upon "lawful authority" as conferred by a "Warrant or *Mittimus*."⁷⁰

This understanding of "due *process* of law" is unsurprising given its constituent term "process." When used in a legal setting, "process" almost invariably meant process in the narrow technical sense, i.e., "the writs and

⁶⁷ 1368, 42 Edw. 3 c. 3.

⁶⁸ 2 Institutes, *supra* note 43, at 50 (citations omitted).

⁶⁹ See *infra* note 192.

⁷⁰ Conductor Generalis: Or, the Office, Duty and Authority of Justices of the Peace 420 (N.Y., J. Parker 2d ed. 1749); see also *infra* note 212–13.

precepts that go forth” from a court.⁷¹ Our corpus linguistic analysis found the term was used narrowly, to mean writs, at five times the rate it was used broadly, to mean legal proceedings more generally.

Colonial Americans had a different, much more popular term they used when referring to legal procedure. Although “due *course* of law” may strike contemporary readers as obscure, it was used much more frequently by early American writers than “due *process* of law.” Recall, we found only twenty-two uses of “due process of law” in COFEA in the three decades prior to the ratification. By contrast, the term “due course of law” appears 173 times—a seven-fold increase.⁷² “Due course of law” was well understood to refer to legal procedure as a whole—precisely the meaning most now assume was borne by “due *process* of law.” Indeed, when both terms were used together in Founding-era documents, they were each used to mean distinct things: “process” meaning writs and “course” meaning procedure. The Founders knew how to distinguish between process and procedure, and they used “due course of law” when they wished to refer to the latter.

Here is how this Part proceeds. First, we sketch the English history of “due process of law” from its origin in the fourteenth century through to the eighteenth century. Second, we turn to the American context, where we first investigate the ordinary meaning of “process” and “process of law” by analyzing how these terms were used at the Founding, employing methods associated with corpus linguistic analysis. We then interrogate pre-ratification statutes and caselaw to determine how Americans used “due process of law” during the same period. Finally, we analyze several important documents that use both “due *course* of law” and “due *process* of law” to show how the Founding generation distinguished between these two terms.

A. Due Process of Law in the English Common Law Tradition

In this Section, we sketch the English history of “due process of law” from its first appearance in written law through to the mid-eighteenth century. We proceed chronologically, beginning with the Six Statutes which gave the phrase its content and culminating with a discussion of seventeenth- and eighteenth-century legal treatises interpreting the phrase, with a particular emphasis on Sir Edward Coke’s *The Institutes of*

⁷¹ 2 Cunningham, *supra* note 60.

⁷² See *infra* note 235.

the Laws of England, the leading legal treatise at the time. In between, we discuss the *Trial of the Five Knights* and the Petition of Right, important episodes in the phrase's development.

It is now generally accepted that in the English common law tradition “due process of law” meant writs, in the narrowest sense. As Justice Scalia explained while commenting on the original meaning of the Due Process of Law Clause: “[H]istorical evidence suggests that the word ‘process’ in this provision referred to specific writs employed in the English courts.”⁷³ Modern scholarship concurs.⁷⁴

In early England, a writ was a written order from the king or another with lawful authority. Originally used administratively, writs took on a judicial character with the development of the royal courts of justice.⁷⁵ Suitors initiated legal proceedings by purchasing a writ original from the Chancery, which they then presented to a court.⁷⁶ The remedy, procedure, and process available in an action all varied depending on the underlying writ.⁷⁷ Take the process used to coerce a defendant into attendance: in an action founded upon an indictment, the first process issued may well be a *capias ad respondendum*, a writ commanding that the defendant's body be seized, but in other cases the first process might be a simple summons.⁷⁸ After adjudication, a court could enforce its judgment by issuing executory, or “final,” process.⁷⁹ Jurow has noted “it is not far-fetched to say that English law in the fourteenth century ‘spoke’ by means of writs.”⁸⁰ As remains the case today, courts primarily interacted with the world through process; whether that be writs

⁷³ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring).

⁷⁴ See, e.g., Thompson, *supra* note 51, at 69, 90–93; Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 *Const. Comment.* 339, 341 n.8 (1987); Jurow, *supra* note 46, at 266–71; Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *Harv. L. Rev.* 366, 368 (1911); see also *infra* note 331 and sources cited therein.

⁷⁵ 2 William Holdsworth, *A History of English Law* 520–21 (3d ed. 1923).

⁷⁶ 3 Blackstone, *supra* note 9, at *279; see also Levy, *supra* note 62, at 59–60.

⁷⁷ See Katherine Topulos, *A Common Lawyer's Bookshelf Recreated: An Annotated Bibliography of a Collection of Sixteenth-Century English Law Books*, 84 *Law Libr. J.* 641, 677 (1992). For an introduction, consult Randy E. Barnett, *Oxford Introduction to U.S. Law: Contracts* 1–4 (2010); see also Bradford E. Biegon, Note, *Presidential Immunity in Civil Actions: An Analysis Based Upon Text, History and Blackstone's Commentaries*, 82 *Va. L. Rev.* 677, 680–81 (1996) (summarizing the function of writs in the English common law).

⁷⁸ 3 Blackstone, *supra* note 9, at *279.

⁷⁹ *Id.*

⁸⁰ Jurow, *supra* note 46, at 268.

summoning parties, committing convicted defendants to prison, or transferring the ownership of property.

Writs were not just pieces of paper; rather, they were evidence of the bearer's authority. A bedrock principle of the common law was that no person could be incarcerated, or otherwise deprived of certain essential rights, except by "due process of law." This was a guarantee that none would be deprived of their rights but by lawful authority. But the guarantee extended further. As we shall see, the English understood "due process of law" to mean process issued upon an "indictment or presentment . . . [or] Writ original of the Common Law" rather than other forms of process, such as the arbitrary orders of the King (even if written down in a writ).⁸¹ Because only judicial actors could issue "due process of law," this foundational principle of English law protected the King's subjects from the arbitrary deprivation of their rights.

1. Magna Carta and the Six Statutes

The Six Statutes were enacted in the mid-fourteenth century during the reign of King Edward III. They mark the first use of "due process of law" in English law.⁸² These statutes were considered elaborations upon the meaning of Magna Carta's law of the land guarantee and later generations of English jurists came to celebrate them, granting the Six Statutes a constitutional level of significance. English interest in the Six Statutes (and in due process of law) peaked in the seventeenth century during a series of political and constitutional crises over the power of the Monarchy. Ultimately, these debates were settled by force of arms in the English Civil War, but the prominent role played by the Six Statutes and by "due process of law" left its mark on our shared legal history.⁸³

The King's Council emerged as a distinct institution separate from Parliament and the common law courts at the start of the fourteenth century.⁸⁴ In addition to its executive functions, the Council (later called

⁸¹ 2 Institutes, *supra* note 43, at 50 (citations omitted).

⁸² An earlier statute using this term was repealed soon after enactment. See Jurow, *supra* note 46, at 266 n.6.

⁸³ We have not discussed three of the Six Statutes in detail for reasons of brevity. For a comprehensive review, consult Charles Donahue, Jr., *Magna Carta in the Fourteenth Century: From Law to Symbol?: Reflections on the "Six Statutes,"* 25 *Wm. & Mary Bill Rts. J.* 591 (2016).

⁸⁴ 1 William Holdsworth, *A History of English Law* 481–82 (3d ed. 1922).

the Court of the Star Chamber) “was a court of general and undefined authority,”⁸⁵ and its proceedings were often unencumbered by the formalities of the common law.⁸⁶

Parliament “viewed the vague and indefinite jurisdiction of the Council with much suspicion” and objected to two aspects of the Council’s proceedings in particular.⁸⁷ First, they objected that the Council “took up criminal cases on ‘information’ or ‘suggestion’ by whomsoever it was offered,” a mode of proceeding which did not follow the traditional safeguards for preventing frivolous or malicious accusations.⁸⁸ Second, they objected to the Council’s use of the writ of subpoena,⁸⁹ which was employed to summon defendants for questioning under threat of penalty and without notice of cause. In common law courts, the process for summoning a defendant gave ample, often painstaking, notice of the charges or claims.⁹⁰ And, what was more, the process available to common law courts was more deliberate than that available to the Council—only allowing for immediate arrest or sanction in the most serious of cases.⁹¹ The Council, by contrast, could immediately require the defendant to appear without notice of the charges or claims, and all upon a mere suggestion.

Parliament protested, objecting that individuals should not be summoned without notice of the charges and that the Council’s

⁸⁵ Id. at 485 (quoting James Fosdick Baldwin, *The King’s Council in England During the Middle Ages* 262 (1913)).

⁸⁶ Id. at 477. By this time, the procedures of the common law courts had become unwieldy, and the King’s Council offered numerous procedural and efficiency advantages to petitioners. See 5 id. at 279–87.

⁸⁷ 1 Holdsworth, *supra* note 84, at 486.

⁸⁸ *Select Cases Before the King’s Council, 1243–1482*, at xxxvi–xxxvii (I.S. Leadam & J.F. Baldwin eds., 1918).

⁸⁹ The Latin term *sub poena* means, literally, “under penalty” and was used as early as the 1200s by the king to “stimulate the activity of [his] officials.” Theodore F.T. Plucknett, *A Concise History of the Common Law* 683 (5th ed. 1956). The Council’s innovation was to issue these writs in judicial proceedings to private parties, rather than administratively to the King’s officials. Id. at 683–84.

⁹⁰ To speak of writs was to speak of causes of action. See Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* 8 (London, Butterworth & Son 1824) (describing “the enumeration of writs, and that of actions” as “identical”). The common law system had a host of writs, each addressed to specific wrongs. For a brief description of a selection of writs and the causes of action they represent, see F.W. Maitland, *The History of the Register of Original Writs*, 3 *Harv. L. Rev.* 167, 170–73 (1889).

⁹¹ See 3 Blackstone, *supra* note 9, at *279–80.

jurisdiction should be limited to matters falling outside the common law.⁹² Pressure from Parliament ultimately led to the statute of 1351, aimed at limiting the Council's power.

The statute begins by drawing on Magna Carta, explaining:

Whereas it is contained in the Great Charter of the Franchises of England, that none shall be imprisoned nor put out of his Freehold, nor of his Franchises nor free Custom, unless it be by the Law of the Land; . . . [H]enceforth none shall be taken by Petition or Suggestion made to our lord the King, or to his Council, unless it be by Indictment or Presentment . . . , or by Process made by Writ original at the Common Law; nor that none be out of his Franchises, nor of his Freeholds, unless he be duly brought into answer, and forejudged of the same by the Course of the Law⁹³

There are three things to note. First is the statute's purpose. It strikes a balance in addressing Parliament's concerns over the jurisdiction of the Council and the process the Council used to procure attendance. The first clause of the statute restricts the underlying process upon which an individual may be "taken" before the King or his Council, disavowing petitions or suggestions, and requiring that defendants in criminal matters receive an "indictment or presentment."⁹⁴ As for civil matters, the requirement the Council use "process made by writ original" to summon defendants seems to have been aimed at stripping the Council of its jurisdiction over certain common law matters, such as suits concerning land ownership.⁹⁵ The net effect was to limit the jurisdiction of the Council and require it to proceed, in criminal matters, upon the process used in common law courts, granting defendants greater notice and procedural protections.⁹⁶

Second is the link drawn between process and Magna Carta. The statute opens by expressly linking Magna Carta's law of the land guarantee to

⁹² Select Cases Before the King's Council, *supra* note 88, at xxxvi–xxxvii.

⁹³ 1351, 25 Edw. 3 c. 4.

⁹⁴ The distinction we draw between civil and criminal matters is a necessary simplification that we hope the reader will forgive. See Plucknett, *supra* note 89, at 458–59.

⁹⁵ Holdsworth notes that the effect of this statute, and others we shall discuss, was to strip the Council of jurisdiction over questions of freehold, treason, and felonies. See 1 Holdsworth, *supra* note 84, at 487–88; see also Donahue, *supra* note 83, at 600–01 (noting that, at this time, "no original writ concerning land . . . was returnable in the council").

⁹⁶ Thompson, *supra* note 51, at 69.

the right to “indictment or presentment . . . [or] writ original at the common law.” This was not a misreading of Magna Carta (which does not mention these forms of process); rather, it reflected the widely held view at the time that the right to judgment “by the law of the land” included the right to “due process of law.”⁹⁷ As we shall see, the Six Statutes were understood to be an elaboration upon the meaning of “law of the land,” and were often expressly linked to Magna Carta’s law of the land guarantee.

Third, the statute draws a clear distinction between process and procedure, being primarily concerned with the manner in which an individual is “taken” before the Council and treating this as distinct from the resulting proceedings in which that individual may be “forejudged . . . by the Course of the Law.”⁹⁸ The statute describes in some detail which writs may be used to initiate proceedings and summon parties and yet is entirely unconcerned with the procedural rules governing those proceedings. This is somewhat unsurprising given that the underlying original process in many cases determined the applicable procedure. But it is nonetheless noteworthy that this statute, as with the remaining Six Statutes, only addressed the process, and not the procedure, leading to a deprivation.

The second of the Six Statutes, enacted in 1354, declares:

That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of Law.⁹⁹

This is the only English statute to ever use the phrase “due process of law.” As Jurow notes, it is easy to focus on the familiar phrase “due process of law” without noticing it regulates how someone might be “brought in Answer” rather than regulating the course of the proceeding which follows (as a modern reader might assume).¹⁰⁰ Like the statute of 1351, just discussed, it also forbids the deprivation of certain rights until an individual has been “brought in Answer.” But this statute uses a shorter

⁹⁷ See *id.* at 69–72 (discussing later middle age petitions and court cases assuming the right to due process of law derived from Chapter 39 of Magna Carta); see also *infra* Subsection III.A.2 (discussing the *Five Knights’ Case* and the Petition of Right).

⁹⁸ 1351, 25 Edw. 3 c. 4.

⁹⁹ 1354, 28 Edw. 3 c. 3.

¹⁰⁰ See Jurow, *supra* note 46, at 266.

(and now more iconic) formulation. Rather than spelling out that individuals may only be “taken” by “indictment or presentment . . . , or by process made by writ original at the common law,” this statute simply states that subjects ought to be “brought in Answer by due Process of Law.”¹⁰¹ Following this, “due process” caught on and began to be used in statutes, seemingly as a shorthand.

Later that same year, an additional chapter was added to this statute. Although not considered one of the Six Statutes, this chapter nonetheless sheds light on what Parliament understood “due process” to mean. The chapter seems to have been prompted by complaints that certain officials in the City of London had had writs of exigent issued against them in outlying counties, putting them at risk of outlawry and possibly death, without actual notice of any proceeding.¹⁰² The statute orders that in cases where certain officials are indicted outside the city:

[T]hey shall be caused to come by due Process before the King’s Justices . . . before whom they shall have their Answer And because [] the Sheriffs of London be Parties, [an alternative city official] shall serve in the Place of the Sheriffs to receive the Writs, as well Originals of the Chancery as Judicials, under the Seal of the Justices, to do thereof Execution in the said City; and Process shall be made by Attachment and Distress, and by Exigent, if need be.¹⁰³

Like the due process of law statute of 1354, this chapter’s focus is on ensuring that a defendant “shall be caused to come by due process” to answer before they are deprived of certain rights. But here, the statute defines what it means by “due process,” specifying that the appropriate process was “Attachment and Distress, and [] Exigent, if need be” served

¹⁰¹ Thompson suggests this statute was enacted to address certain abuses of process occurring outside London, where individuals were subject to the writ of exigent—which exposed them to the risk of outlawry and even death—without meaningful notice. See Thompson, *supra* note 51, at 92; Mark DeWolfe Howe, *The Process of Outlawry in New York: A Study of the Selective Reception of English Law*, 23 *Cornell L.Q.* 559, 563–64 (1938) (discussing the writ of exigent).

¹⁰² Thompson, *supra* note 51, at 92.

¹⁰³ 1354, 28 *Edw. 3 c. 10*. The reference to “Writs, as well Originals of the Chancery as Judicials” touches on a distinction the common law drew between “original writs,” issuing from the Chancery, and judicial writs, issuing from a court. See Topulos, *supra* note 77, at 677. This statute simply required that claimants present the Constable of the Tower with both the appropriate writ authorizing seizure of the individual (judicial writ) and the underlying original writ upon which the action was founded.

upon the defendants in their own city. Each of these three types of process were simply different writs authorizing increasingly severe means of securing a defendant's attendance.¹⁰⁴ This later-added chapter thereby reinforces the conclusion that "due process of law" meant a right to be summoned by lawfully issued writs before being deprived of certain essential rights and reinforces the close association between lawfully issued writs, jurisdiction, and actual notice.

Further evidence of the meaning of "due process of law" comes from a 1362 petition from Parliament to the King, reminding him that Magna Carta and the statutes we have discussed required that "no man shall be taken or imprisoned by special warrant, without an indictment or other due process to be made at law."¹⁰⁵ Parliament complained that despite these promises, "[many] are impeached, taken and imprisoned without an indictment or other process made at law on them."¹⁰⁶ Here we see again "due process," in what appears to be a short hand reference to the statute of 1351's requirement that individuals only be "taken" by the King upon "Indictment or Presentment . . . [made] in due Manner, or by Process made by Writ original at the Common Law."¹⁰⁷

The last of the Six Statutes we shall discuss was enacted in 1368. It recites that "false Accusers" who "oftentimes have made their Accusations more for Revenge and singular Benefit, than for the Profit of the King" had on occasions misled the King and caused some innocents to have "been taken" before his Council.¹⁰⁸ The statute acknowledged that sometimes the accused were taken "by writ," likely meaning by indictment or presentment, but also insisted that on other occasions individuals had been taken "upon grievous pain against the law," a reference to (and condemnation of) subpoena.¹⁰⁹ The statute therefore decreed:

¹⁰⁴ See supra notes 77–78, 94, and sources cited therein.

¹⁰⁵ 1362, 36 Edw. 3, Rolls of Parliament, No. 20, <http://www.sd-editions.com/PROME/home.html> [<https://perma.cc/HV2F-ZV4B>].

¹⁰⁶ Id.

¹⁰⁷ 1351, 25 Edw. 3 c. 4.

¹⁰⁸ 1368, 42 Edw. 3 c. 3.

¹⁰⁹ See Jurow, supra note 46, at 269–70.

It is assented and accorded . . . that no Man be put to answer without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land¹¹⁰

It can be observed that, once again, the statute is concerned with what process may be used to “put [a person] to answer” rather than with the method of procedure.¹¹¹

Despite the variations in language, several common threads bind the Six Statutes together. First is the association they draw between the right to “due process” and Magna Carta’s law of the land guarantee. Many expressly draw on Magna Carta and, as we shall see, the view these statutes were an elaboration or explanation of Magna Carta’s terms persisted through to the seventeenth century. Second, the statutes consistently link “due process” to indictment, presentment, writ original, and (occasionally) matter of record. Because these forms of process each had jurisdictional implications and determined how a defendant could be hailed into court, it seems that, from its start, “due process of law” was concerned with matters of jurisdiction, notice, and presence. Finally, we note that the Six Statutes were largely unconcerned with the actual manner of proceeding in a legal action, being entirely directed towards the manner of its initiation—reinforcing the distinction we have drawn between process and procedure.

2. *The Five Knights’ Case and the Petition of Right*

The Six Statutes were given fresh constitutional significance during the seventeenth century, as Parliament and the King clashed over the limits of royal power. Faced with an increasingly tyrannical Monarch, leading common law lawyers strove to exult Magna Carta and the Six Statutes as checks on the executive, working to see “that old, decrepit Law *Magna Carta* which hath been kept so long, and lien bed-rid . . . walk abroad again with new vigour and lustre, *attended and followed with the other six statutes*.”¹¹² The resulting debates enshrined “due process of law” in

¹¹⁰ 1368, 42 Edw. 3 c. 3.

¹¹¹ The statute differs from others we have seen, using “due process” in a narrower sense. Previous statutes used “due process” to describe indictments and, seemingly, presentment and process issued upon a writ original. However, this statute treats “due process and writ original” as separate from presentments and matters of record, through use of a disjunctive, suggesting the meaning of “due process” was perhaps context specific.

¹¹² Thompson, *supra* note 51, at 86 (quotation omitted).

our constitutional tradition and shine important light on the phrase's meaning in colonial America.

The stage can be sketched in brief. Embroiled in a costly war and unable to secure new taxes from Parliament without agreeing to political concessions he found unappealing, the recently crowned Charles the First simply ordered Parliament dissolved and attempted to raise the funds he needed himself, through (among other inventive methods) a series of forced loans.¹¹³ This caused an uproar amongst the propertied classes.¹¹⁴ A number of landowning knights refused to pay and Charles ordered them imprisoned.

The imprisoned landowners petitioned for a writ of habeas corpus and their case, dubbed the *Five Knights' Case*, became an instant *cause célèbre*. At issue: whether the return to the writ of habeas, which simply stated that the knights were imprisoned “by the special command of his majesty,” was valid.¹¹⁵ Essentially, could the King lawfully imprison whoever he wanted, without cause shown? The knights' lawyers, all noted protagonists of the common law, argued he could not, and their arguments are reflective of broader efforts by supporters of Parliament to forge Magna Carta and the Six Statutes into a constitutional bulwark against Charles.

The knights' central argument was that, should the court find indefinite detention without cause to be lawful, such detention might not “continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually” in violation of Magna Carta's guarantee that subjects could only be deprived of their liberty “by the law of the land.”¹¹⁶

The King's attorney was quick to respond that the law of the land allowed for pretrial detention and Magna Carta was thus, by its terms, inapplicable.¹¹⁷ The common law lawyers conceded this would be true,

¹¹³ Mark Kishlansky, *Tyranny Denied: Charles I, Attorney General Heath, and the Five Knights' Case*, 42 *Hist. J.* 53, 59 (1999).

¹¹⁴ *Id.* at 59–60.

¹¹⁵ *Proceedings on the Habeas Corpus, Brought by Sir Thomas Darnel et al. (1627)*, reprinted in 3 *A Complete Collection of State Trials and Proceedings* 1, 6 (T.B. Howell ed., London, T.C. Hansard 1816) [hereinafter 3 *How. St. Tr.* 1] (quotation translated from Latin).

¹¹⁶ *Id.* at 18 (Selden, arguing: “The statute of Magna Carta, cap. 29, that statute if it were fully executed as it ought to be, every man would enjoy his liberty better than he doth.”).

¹¹⁷ *Id.* at 38 (“No freeman can be imprisoned but by ‘[the law of the land],’ But will they have it understood that no man should be committed, but first he shall be indicted or presented?”).

had not “*legem terrae*” been “expounded by” the Six Statutes and thereby come to mean “the process of the law, sometimes by writ, sometimes by attachment of the person,” and that “imprison[ment] by special command” without process was therefore “against the Great Charter.”¹¹⁸ Selden stressed this theme, arguing the law required that “No freeman shall be imprisoned without due process of the law” and that this meant “either by presentment or by indictment,” neither of which were present here.¹¹⁹ And Serjeant Bramston argued for the petitioners that the return was invalid, given it did not show the imprisonment was based on “presentment or indictment, and not upon petition or suggestion made to the king and lords.”¹²⁰ The landowners’ great objection was they had been imprisoned by the Monarch’s command, rather than by “due process of law,” meaning process issued upon a presentment or indictment.

It is worth pausing to note the significant common ground shared by the parties. First, all assumed that “due process of law” was a term with a clear meaning (process issuing on an indictment, presentment, or writ original, and not procedure more generally). Second, the parties also assumed, as we suggested above, that the Six Statutes all referred to “due process of law” despite using slightly differing formulations of the term. Finally, the King’s attorney offered no rebuttal to arguments that the right to “due process of law” was an exposition of Magna Carta’s law of the land guarantee; he simply denied that the guarantee applied to pretrial detention.

Nonetheless, the knights lost. The King’s attorney pointed out that Justices of the Peace commonly committed individuals “before an Indictment can be drawn or a presentment can be made” and ridiculed the notion a Justice of the Peace could have more power than the King.¹²¹ He

I think that no learned man will offer that; for certainly there is no justice of peace in a county, nor constable within a town, but he doth otherwise, and might commit before an Indictment can be drawn or a presentment can be made.”).

¹¹⁸ *Id.* at 14–15.

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.* at 7.

¹²¹ *Id.* The knights’ attorneys were caught flatfooted by this (sensible) point and could not offer a satisfactory answer. Indeed, those who argued for an expansive definition of “due process of law” continued to flounder in answering this point. In one later debate, for example, an advocate sought to distinguish between commitment by the King and commitment by a Justice of the Peace by claiming that “due process of law” meant “one and the same thing” as “course of the law” and thus the term “comprehends the whole proceedings of law upon cause.” *Id.* at 152. Because a Justice of the Peace’s arrest was a part of the “proceedings of

called for each of the Six Statutes to be read and convincingly argued that they were either inapplicable or only referred to the process used to initiate judgment and conviction, having nothing to say about pretrial commitment.¹²² The landowners were remanded to prison (although Charles released them shortly thereafter).¹²³

The knights may have lost their case, but their arguments carried the day and were ultimately enshrined in the Petition of Right, “one of England’s most famous constitutional documents.”¹²⁴ Having exhausted all other potential sources of funding, Charles was forced to recall Parliament the next year. Several of the knights’ attorneys were elected to Parliament, where they were joined by Sir Edward Coke, the preeminent sage of the common law.¹²⁵ Led by Coke, the House of Commons resolved to refuse Charles’ demands for funds until his abuses had been addressed.

To that end, the Commons drafted the Petition of Right which, among other things, proclaimed that indefinite detention without cause shown was not “due process of law” and thus all such detentions were in violation of Magna Carta’s law of the land guarantee.¹²⁶ In a widely reported debate, a committee of the Commons, of which Coke was a prominent member, defended the Petition before the House of Lords.¹²⁷ Their central argument was that Magna Carta’s law of the land guarantee

law upon cause,” while the King’s “special command” was not, it was possible to distinguish between the two (or so the argument goes). This argument did not catch on, perhaps because it required considerable violence to the language of the Six Statutes. See *id.* at 152 (advocate claiming 1351, 25 Edw. 3 c. 4 reads “brought in to answer by the course of the law” when the statute, in truth, reads “brought in Answer by due Process of the Law” (emphasis added)); see also *id.* (advocate arguing that “due process and writs original” in 1368, 42 Edw. 3 c. 3 ought to read as “due process or writ[s] original”).

The common law lawyers did not develop a fully satisfactory rebuttal until Coke side-stepped the issue in his *Institutes* with a creative legal fiction. See *infra* notes 136–39 and accompanying text.

¹²² 3 How. St. Tr. 1, *supra* note 115, at 38–41.

¹²³ *Id.* at 59.

¹²⁴ Jess Stoddart Flemion, *The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory*, 45 *J. Modern Hist.* 193, 193 (1973).

¹²⁵ Coke was relieved of his position of Chief Justice of the Court of Common Pleas, and subsequently of his position as Chief Justice of the King’s Bench, after repeatedly using the tools of the common law to limit the power of Charles’ father, James the First of England. See Stephen D. White, *Sir Edward Coke and the Grievances of the Commonwealth* 6–7 & n.17 (1979).

¹²⁶ See *id.* at 236.

¹²⁷ See 3 How. St. Tr. 1, *supra* note 115, at 83–156.

had been “expounded” by the Six Statutes to mean that none may be committed but “by process made by the writ original at the common law”—a category of process which did not include warrants for arrest by the King’s “special command.”¹²⁸ Their arguments convinced, and Parliament adopted the principle that no “Freeman ought to be committed or detained in prison by the command of the King . . . unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be committed.”¹²⁹

The Petition, grudgingly approved by Charles, forbid the practice of imprisonment “by [His] Majesty’s special command,” declaring this to be “against the tenor” of Magna Carta and the Six Statutes.¹³⁰ Although it was swiftly repudiated by Charles once he received the funds he wanted (setting England on the path to civil war), the Petition of Right is still considered a part of England’s organic law and forever granted a constitutional luster to the phrase “due process of law.”

3. *English Legal Treatises Interpreting “Due Process of Law”*

Following these events, the right to due process of law took on fresh constitutional importance in England and the leading legal treatises published during the seventeenth and eighteenth centuries lavished particular attention upon it. Foremost among these was Coke’s *Institutes*, which remained the leading legal treatise for over a century until its later eclipse by Sir William Blackstone’s *Commentaries on the Laws of England*, published in the mid-eighteenth century.

The second volume of Coke’s *Institutes* (published posthumously in 1642) engages in a detailed discussion of Chapter 39 of Magna Carta.¹³¹ Coke opens boldly, as is fitting for the architect of the Petition of Right, declaring that Englishmen may not be deprived of certain rights “unles[s] it be by . . . the Law of the Land (that is, to speak it once for all) by the

¹²⁸ Id. at 87–88. Here, the Commons’ advocate appears to have misstepped by mentioning only writs original. The King’s attorney, Sir Robert Heath, seized on this, pointing out no original writs are used in criminal proceedings to suggest the Commons’ definition of “due process” was overly narrow. Id. at 152. However, Heath’s point was pedantic. The Six Statutes also allow for process issued upon an indictment or a presentment in criminal proceedings. See *supra* Subsection III.A.1.

¹²⁹ 3 How. St. Tr. 1, *supra* note 115, at 85.

¹³⁰ Petition of Right 1628, 3 Car. 1, c. 1, § 5.

¹³¹ Coke cites to a later version of Magna Carta in which Chapter 39 has been renumbered as Chapter 29.

due course, and process[s] of Law.”¹³² Interestingly, Coke appears to distinguish between procedure (“course”) and process, seeing both as encompassed by the “law of the land.” Coke’s subsequent discussion leaves little doubt that, by “due process of law,” he means writs.¹³³

Coke begins by proving up his earlier claim the “law of the land” requires “due process of law.” He quotes from one of the Six Statutes, pointing out that, in that statute’s preambulatory recitation of Magna Carta, “the words, by the Law of the Land, are rendred [or, replaced with] without due process of Law”—evidence to Coke that “due process of law” was simply an exposition of the meaning of “law of the land.”¹³⁴ Coke then quotes liberally from the Six Statutes to define “due process of law,” writing that it means:

[B]y indictment or presentment of good and lawful men, where such deeds be done in due manner, or by Writ original of the Common Law.

Without being brought in to answer but by due Proces of the Common Law.

No man be put to answer without presentment before Justices, or thing of record, or by due proces, or by writ original, according to the old Law of the Land.¹³⁵

Having explained that it was unlawful to seize Englishmen without indictment, presentment, or writ original, Coke then deals with the thorny question of whether individuals suspected of serious crimes may be arrested without waiting on a formal writ.¹³⁶ He explains that “Proces[s] of Law” includes warrants “in Law without Writ” (i.e., constructive process)¹³⁷ and offers various examples of when “a warrant in law” arises. He explains, for example, that if “[a] felony is done, and one is pursued upon Hue and Cry . . . he may be by a warrant in Law, attached and

¹³² 2 Institutes, supra note 43, at 46.

¹³³ Others have interpreted Coke’s meaning differently. We respond to these interpretations *infra* Section IV.D.

¹³⁴ 2 Institutes, supra note 43, at 50.

¹³⁵ Id. It would be a mistake to believe that the various formulations Coke offers here of “due process of law” were meant to be exact definitions. By all appearances, he is merely setting the table for his later, more detailed explanation of the meaning of the phrase.

¹³⁶ Id. at 51 (“Now here it is to be known, in what cases a man by the Law of the Land, may be taken, arrested, attached, or imprisoned in case of Treason or Felony, before presentment, indictment, &c.”); see supra note 121.

¹³⁷ 2 Institutes, supra note 43, at 51.

imprisoned by the Law of the Land” even if not currently under indictment.¹³⁸ In another example, he explains that “[i]f an affray be made to the breach of the king[']s peace, any man may by a Warrant in Law restrain any of the offenders . . . but after the affray ended, [the offenders] cannot be arrested without an express Warrant.”¹³⁹

These examples, and the many others Coke provides, show he took the requirement of “due process of law” quite literally—interpreting it to mean persons could not be deprived of their liberty or other rights absent a lawful and properly founded writ (actual or constructive). As Coke explains, this obsessive focus with writs was necessary to ensure “[t]hat he or they, which do commit [another person] have lawful authority.”¹⁴⁰ He cites ancient statutes to the effect that “it is most hateful” when “any man by colour of any authority, where he hath not any in that particular case, arrest, or imprison any man.”¹⁴¹ And he elaborates that the practical benefit of this focus on due *process* of law was to allow any person imprisoned or held against their will to test the validity of their capture through a writ or habeas action, as they would be set free unless their jailor could produce the appropriate writ authorizing their seizure.¹⁴²

Speaking generally, we can understand Coke’s interpretation of “due process of law” to be primarily jurisdictional. Under his scheme, writs (whether in deed or in law) were only valid if they arose from and stated a cause of action triable by a court. Any person held without a writ or held upon an invalid writ had a cause of action for release through habeas. Thus, any arrest or other deprivation created a case triable by a court of law, whether upon the stated cause or in a habeas, replevin, or similar action. The result was that *all* deprivations came within the jurisdiction of the courts—leaving (in theory) no room for arbitrary deprivations by the executive. What Coke is articulating is an important step towards our own modern understanding of the rule of law. Missing from his discussion, however, is any suggestion that “due process of law” governed legal procedure more generally.

The *Institutes* rapidly became the essential authority on the meaning of “due process of law” among English and American jurists. Matthew

¹³⁸ Id. at 52.

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id. at 54.

¹⁴² Id. at 55.

Hale's *The History of the Pleas of the Crown*, for example, cites Coke in explaining that the Six Statutes' requirement of "due process of law" prohibited the king from, among other things, seizing "the goods of a person accused of felony . . . if the person were not first indicted, or [subject to other legal process]." ¹⁴³ Although Coke's dominance began to wane following the publication of Blackstone's *Commentaries* in 1765, he nonetheless remained an extremely well-cited legal authority at the time of the Fifth Amendment's ratification. ¹⁴⁴ And legal treatises published around this time continued to cite Coke when discussing the meaning of "due process of law." ¹⁴⁵ Blackstone's *Commentaries* stand out amongst these authorities. Although he also regularly cites Coke for other propositions, Blackstone's treatise placed little emphasis on the right to due process of law, mentioning it only once in connection with the death penalty. ¹⁴⁶ His treatise does, however, include a substantial discussion of "process," which he divides into original, *mesne*, or final—not legal procedure more generally. ¹⁴⁷

The influence of Coke's views extended well beyond the legal profession. They were popularized by polemicists such as Henry Care, whose *English Liberties* (which quoted from and slightly embellished Coke's exposition) circulated in the lead-up to the Glorious Revolution and became a widely read handbook on civil liberties in Founding-era America. ¹⁴⁸ Benjamin Franklin also got in on the action, publishing in the

¹⁴³ 1 Matthew Hale, *The History of the Pleas of the Crown* 364–65 (London, Sollom Emlyn 1736).

¹⁴⁴ By the 1780s, the emergent nation's leading political thinkers were more likely to cite Blackstone than Coke in their political writings. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 *Am. Pol. Sci. Rev.* 189, 193 tbl.2 (1984). Indeed, Blackstone was cited twice during the Constitutional Convention on points of law, while Coke was not consulted—or at least not referenced. See 1 *The Records of the Federal Convention of 1787*, at 472, 488 (Max Farrand ed., 1911). Nonetheless, Blackstone only overtook Coke in the 1770s according to Lutz's study, meaning most lawyers alive at the Founding were trained reading Coke rather than Blackstone.

¹⁴⁵ See, e.g., Francis Stoughton Sullivan, *Lectures on the Constitution and Laws of England* 494 (Dublin, Graiseberry & Campbell 1790).

¹⁴⁶ 1 Blackstone, *supra* note 9, at *129–30.

¹⁴⁷ See 3 Blackstone, *supra* note 9, at *279. Hawkins similarly discussed various forms of arrest warrants and outlawry in his chapter "Of Process." See 2 William Hawkins, *A Treatise of the Pleas of the Crown* 392–433 (John Curwood ed., London, C. Roworth 8th ed. 1824); see also Jurow, *supra* note 46, at 277–78 (collecting similar sources).

¹⁴⁸ See Henry Care, *English Liberties, or the Free-Born Subject's Inheritance* 22–30 (London, G. Larkin c. 1680). For further information on the circulation of Care's work in colonial America, and on other similar pamphlets which also drew extensively on Coke's

1740s an extremely popular legal guidebook, aimed at lay readers, which also largely recited Coke's discussion of "due process of law."¹⁴⁹

The influence of Coke's *Institutes* upon our own law cannot be overstated. The *Institutes* were the "cornerstone" of legal education in colonial America,¹⁵⁰ and legally informed American colonists "were intimately familiar with Coke."¹⁵¹ John Rutledge, the second Chief Justice of the United States, described Coke's writings as "almost the foundations of our law."¹⁵² Coke's description of due process of law was the established consensus among English (and therefore American) jurists at the Founding.

* * *

This Section has sketched the history of "due process of law" in English law from that phrase's first appearance in the statute of 1354 through to its use by Blackstone in the mid-eighteenth century. Although the meaning of the phrase was not static over those four centuries, the evidence strongly suggests that "due process of law" meant process, in the narrow technical sense. True, there was debate, as we saw in the *Five Knights' Case*, over which writs constituted "due process of law." But there is little evidence suggesting "due process of law" meant legal procedure in general. Rather, "due process of law" meant writs and was closely tied to questions of jurisdiction, presence, and notice. Justice Scalia was correct to question whether the English common law lawyers shared our broad, modern understanding of the phrase.

B. Evidence from Colonial America

The American colonists considered themselves inheritors of the English common law, and the Revolutionary War was fought as much to defend those ancient English rights as to win independence from

discussion of "due process of law," see Davies, Correcting History, *supra* note 46, at 84–86 & n.258.

¹⁴⁹ See *infra* notes 212–16 and accompanying text.

¹⁵⁰ See A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 130 (1968).

¹⁵¹ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring).

¹⁵² *Klopfer v. North Carolina*, 386 U.S. 213, 225 (1967) (quoting Catherine Drinker Bowen, *The Lion and the Throne* 514 (1956)).

England.¹⁵³ Although the colonists often deviated from the common law to suit their local circumstances, it nonetheless formed the framework through which they understood their rights.¹⁵⁴ It is therefore unsurprising that they understood “due process of law” in the same manner as Coke and Hawkins.

In this Section, we analyze how colonial Americans used and understood the phrase “due process of law.” First, we examine how colonists used “process” and “process of law,” discovering these terms were overwhelmingly used to refer to process, in the narrow sense, rather than procedure more generally. Then, we analyze the available records showing how colonists used “due process of law” in the pre-ratification period, which supports our thesis that the term was used in accordance with Coke’s views. Finally, we highlight that American colonists had another, more popular phrase they used to describe court procedure: “due course of law.” And we demonstrate that the colonists distinguished between this term and “due process of law” with reference to three prominent documents that use both terms.

1. Colonial-American Use of “Process” and “Process of Law”

We begin with a discussion of methodology and then proceed to the evidence.

a) Corpus Linguistic Analysis Is an Appropriate Tool for Determining the Meaning of “Process” and “Process of Law”

When the Founders used “process” and “process of law” (which meant much the same), they most commonly used the terms to mean writs or precepts issuing from a court rather than courtroom procedure more

¹⁵³ See, e.g., Declaration and Resolves of the First Continental Congress (1774), in Charles C. Tansill, Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 69-398, at 3 (1927) (“[T]he respective colonies are entitled to the common law of England . . .”). For more on the reception of the common law in colonial America, see Harry W. Jones, The Common Law in the United States: English Themes and American Variations, in *Political Separation and Legal Continuity* 95–98, 110 (1976).

¹⁵⁴ When colonists referred to the common law they did not necessarily mean “the corpus of English case-law doctrine” but rather “such profoundly valued common law procedures as trial by jury and the subjection of governmental power to what John Locke had called the ‘standing laws.’” Jones, *supra* note 153, at 110. For a discussion on the differences in legal procedure between England and one colony (early Connecticut), see Bruce H. Mann, *Neighbors and Strangers* 81–88 (1987).

generally. Indeed, the Founders were often careful to distinguish between process and proceedings.¹⁵⁵ To demonstrate the ordinary meaning of “process” and “process of law,” we use a form of corpus linguistic analysis called Key-Words-In-Context (“KWIC”) to quantify the terms’ most common, or ordinary, meaning. We conducted our analyses using COFEA, the largest and most representative corpus of early American writing.¹⁵⁶

Corpus linguistic analysis in public meaning originalism is grounded in the commonsense assumption that the ordinary reader would have understood a term to bear its most common meaning, absent contextual evidence that a less popular meaning was intended.¹⁵⁷ As Associate Chief Justice Lee of the Utah Supreme Court has explained, corpus linguistics is a more precise way of doing what most interpreters do intuitively.¹⁵⁸ When judges search for the “ordinary” meaning of a term, they probe their understanding of the English language—based upon the sources they have encountered in their own lives—to determine which candidate meaning is most common. Probing a neutral, independently compiled corpus instead of our own experiences improves accuracy and transparency and reduces bias.¹⁵⁹ Corpus linguistic analysis is particularly valuable in originalist interpretation because developments in language over the past two centuries make it difficult for contemporary interpreters to reliably intuit the “ordinary” Founding-era meaning of words.

KWIC is increasingly used by originalist scholars to determine the meaning of ambiguous terms.¹⁶⁰ It is a form of corpus linguistic analysis

¹⁵⁵ See, e.g., *State v. Stone*, 3 Md. 115, 116 (Gen. Ct. 1792) (“[F]or their disobedience of the said state’s process, and their proceedings after the delivery thereof, they are guilty of a contempt of the state’s process.”); *An Act Directing the Manner of Issuing Process* (1789), in 25 *The State Records of North Carolina* 53 (Walter Clark ed., 1906) (“And in case any defendant or defendants should not be served with such process, the same proceedings shall be had as in cases of other similar process which has not been executed.”).

¹⁵⁶ See *Corpus of Founding Era American English (COFEA)*, Brigham Young University Law School (Oct. 11, 2019), <https://lcl.byu.edu/projects/cofea/> [<https://perma.cc/V365-VCTE>].

¹⁵⁷ James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 *Yale L.J.F.* 21, 21–22 (2016).

¹⁵⁸ See *State v. Rasabout*, 356 P.3d 1258, 1275–77 (Utah 2015) (Lee, A.C.J., concurring).

¹⁵⁹ See *id.* at 1274–75; Phillips et al., *supra* note 157, at 27–29, 31.

¹⁶⁰ See, e.g., *Rasabout*, 356 P.3d at 1275–82 (Lee, A.C.J., concurring); Jennifer L. Mascott, *Who Are “Officers of the United States?”*, 70 *Stan. L. Rev.* 443, 453 (2018). See generally Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 *U. Chi. L. Rev.* 101

that allows researchers to systematically examine how a term appears in naturally occurring speech or writing.¹⁶¹ The “core idea” is to determine the meaning of each occurrence of the term from the surrounding context.¹⁶² These individual, context-driven determinations of the author’s intended meaning, when replicated at scale, allow a researcher to quantify the most common, or ordinary, meaning of the term as it appears within the corpus.¹⁶³ Assuming the corpus is representative of written or spoken English during the relevant time period and amongst the relevant community, this allows a researcher to determine a term’s ordinary meaning from amongst a range of possible meanings.¹⁶⁴

As noted earlier, “process” is a word with many meanings; one Founding-era dictionary offers eight.¹⁶⁵ We are, of course, not interested in most of these. It is unlikely the Founding-era public would have believed “due process of law” bore anything but a legal meaning, particularly given its placement in the Fifth Amendment, which dealt entirely with legal rights and procedures.¹⁶⁶

We began by surveying ten Founding-era dictionaries that have each been cited by the Supreme Court as sources of original meaning.¹⁶⁷ These dictionaries offered two separate definitions for “process” when used in a legal context. The first appears almost exclusively in general purpose dictionaries which, broadly speaking, defined “process” as “the whole course of proceedings, in a cause, real or personal, civil or criminal”¹⁶⁸ or “all the proceedings in any cause.”¹⁶⁹ This meaning mirrors the modern

(2001) (canvassing every appearance of the word “commerce” in a set of Founding-era documents to determine the original meaning of the Commerce Clause).

¹⁶¹ Phillips et al., *supra* note 157, at 24–25.

¹⁶² Mascott, *supra* note 160, at 467.

¹⁶³ *Id.*

¹⁶⁴ *Id.*; see also Tony McEnery & Andrew Hardie, *Corpus Linguistics: Method, Theory and Practice* 1–3 (2012) (overviewing the basic theory of corpus linguistics).

¹⁶⁵ Process, 2 Noah Webster, *An American Dictionary of the English Language* 342 (N.Y., S. Converse 1828).

¹⁶⁶ U.S. Const. amend. V.

¹⁶⁷ To avoid selection bias, we surveyed each of the Founding-era dictionaries suggested in Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 *Geo. Wash. L. Rev.* 358, app. at 382–93 (2014).

¹⁶⁸ 2 Webster, *supra* note 165, at 342.

¹⁶⁹ Process, Nathan Bailey, *The New Universal Etymological English Dictionary* 86 (London, T. Waller 4th ed. 1756). Each of the general-purpose dictionaries surveyed included a similar definition of “process.” See, e.g., Process, Thomas Dyche & William Pardon, *A New*

understanding of the term. The second meaning appeared in the legal dictionaries from that period. These technical legal sources offered a narrower definition of “process,” defining the term to mean “the writs and precepts that go forth” in an action.¹⁷⁰

This leaves us with two candidate meanings, one narrow (“writs”) and one broad (“procedure or proceedings”). Fortunately, we can use KWIC analysis to quantify the relative frequency with which each meaning was used in Founding-era language. Gone are the days when textualists were forced to rely on dictionaries (or perhaps a most favored dictionary) to determine a term’s public meaning.

b) Corpus Linguistic Analysis of Colonial American Usage of “Process” and “Process of Law”

A search for “process” amongst COFEA’s database returns 6,754 results.¹⁷¹ We asked a computer program to select 500 results at random. We then analyzed these occurrences, reading each document to understand whether the author intended “process” in its broad sense, as procedure, or in its narrow sense to mean writs or precepts issued by a court. These occurrences, and our determination as to the meaning of each, can be found in the first database accompanying this Article.¹⁷²

We excluded 134 results as irrelevant because they used “process” in a nonlegal sense, such as in one medical text’s discussion of the “process”

General English Dictionary (London, 15th ed. 1771) (defining “process” as “all that has been done in a real or personal action, and all criminal and common pleas”).

¹⁷⁰ 2 Cunningham, *supra* note 60; accord Process, 2 Richard Burn & John Burn, *A New Law Dictionary* 245 (London, A. Strahan & W. Woodfall 1792) (defining “Process” as “that which proceedeth or goeth out upon former matter, either original or judicial” and further noting that in certain criminal cases “the first process is a venire, or summons” but that on “an indictment for treason or felony, a *capias* is the first process”); Process, Thomas Potts, *A Compendious Law Dictionary* 500 (London, T. Ostell 1803) (“[T]he manner of proceeding in every cause, being the writs and precepts that *proceed*, or go forth upon the original *Process* is the only means to bring the defendant into court”).

¹⁷¹ Search for Process, Brigham Young University’s Corpus of Founding Era American English, Version 3.00, <https://lawcorpus.byu.edu/> (search performed May 16, 2021, 11:02 AM).

¹⁷² Process Corpus—500 Results, Google Sheets (last updated June 3, 2021) <https://docs.google.com/spreadsheets/d/1xMjDgFYdP21LqGeNMcgN-Tky5HWSnSVtq4HzC6hnDvc/edit?usp=sharing>.

of putrefaction.¹⁷³ Of the 366 remaining sources, we found that 305 documents used “process” in its narrow sense, while only 59 used “process” in its broad sense. To state this as a percentage, we found “process” was used in its narrow sense in 84% of occurrences and used in its broad sense in 16% of occurrences.

In many instances, it is immediately apparent the author was using “process” to refer to writs. Statutes direct what process shall be issued and when.¹⁷⁴ Marshals report attempts to execute process.¹⁷⁵ An early federal statute titled “An Act to Regulate Processes in the Courts of the United States,” subsequently renewed, requires among other things that all process issuing from the Supreme Court be signed by the Chief Justice.¹⁷⁶ A state statute directs that defendants upon whom “process be duly served” must appear or face the risk of default.¹⁷⁷ Equally clear are references to writs of Attachment¹⁷⁸ (a form of *mesne* process).¹⁷⁹ There were also several references to “*mesne* process” more directly.¹⁸⁰

As noted above, “process” was used in its broad sense in only 16% of occurrences. Among these occurrences, the term was most commonly

¹⁷³ Although this unexpectedly low number of irrelevant results suggests COFEA may be biased towards legal meanings over other (presumably more common) meanings, this need not delay us as we are attempting to distinguish between two legal meanings.

¹⁷⁴ See Patent Act of 1793, ch. 11, § 10, 1 Stat. 318–23 (“[T]hereupon the said judge shall order process to be issued”); Act of Mar. 1778, ch. 9, § 3, *in* 1 *The Laws of Maryland* 349 (Balt., Nicklin & Co. 1811) (authorizing “process to issue”); A Bill Constituting the Court of Appeals, *in* 2 *The Papers of Thomas Jefferson* 575–78 (Julian P. Boyd ed., 1950) (requiring the clerk to issue process “for summoning the adverse party”).

¹⁷⁵ See Letter to George Washington (Aug. 5, 1794), *in* 17 *The Papers of Alexander Hamilton: August 1794–December 1794*, at 24, 34 (Harold C. Syrett ed., 1972) (“I spared no expence nor pains to have the process of the Court executed”).

¹⁷⁶ See An Act to Regulate Processes in the Courts of the United States, ch. 21, § 1, 1 Stat. 93 (Sept. 29, 1789).

¹⁷⁷ An Act for the Directing and Regulating of Civil Actions § 2, *in* *Acts and Laws of the State of Connecticut* 25 (Hartford, Hudson & Goodwin 1796).

¹⁷⁸ See An Act for Regulating Indian Affairs (1757), *in* *Laws of the Colonial and State Governments, Relating to Indians and Indian Affairs* 135 (D.C., Thompson & Homans 1832) (“[T]he process against him should be attachment”); *Respublica v. Oswald*, 1 Dall. 319, 327 (Pa. 1788).

¹⁷⁹ See *supra* notes 77–78, 94 and sources cited therein; Levy, *supra* note 62, at 60.

¹⁸⁰ See An Act for Settling Disputes Respecting Landed Property (Oct. 1785), *in* *Vermont State Papers* 500, 501 (Middlebury, Slade 1823); Hugh H. Brackenridge, *Incidents of the Insurrection in the Western Part of Pennsylvania, In the Year 1794*, at 57 (Phila., McCulloch 1795).

used as a noun to refer to a specific lawsuit.¹⁸¹ In one instance, for example, a court referred to the case before it as a “common law process” to distinguish the case from one in admiralty.¹⁸² In another, an explorer explains that in China cases are generally decided “by a single mandarin . . . after a short process.”¹⁸³ We found remarkably few instances in which “process” was used to mean procedure, as it is commonly understood today.

To confirm our results, we ran a second search in COFEA, this time for “process of law.”¹⁸⁴ Unsurprisingly, this returned fewer results: ninety-one, to be precise.¹⁸⁵ We found that “process of law” was used in its narrow sense forty-five times and used broadly to mean legal procedure in only seventeen sources. (We excluded several results, including three which were simply too ambiguous to count.)¹⁸⁶ Expressed as a percentage, we found that, in the records currently available through COFEA, the Founding generation used “process of law” to mean writs or lawful authority in 74% of occurrences, while only using that term to refer to legal procedure in 26% of occurrences.

Once again, it is often apparent that the author intended “process of law” to mean writs. One statute, for example, authorizes unusually expeditious process to issue when a debtor attempts to abscond “so that

¹⁸¹ See, e.g., 1 Jeremy Belknap, *American Biography* 322 (Bos., Isaiah Thomas & Ebenezer T. Andrews 1794) (“When they discovered the fraud . . . they instituted a process against him at law, and recovered large damages . . .”); 5 *Annals of Cong.* 2712 (1799) (Joseph Gales ed., 1834) (“[T]he summary process was begun and ended by a file of soldiers, who seized the body of the delinquent . . .”).

¹⁸² *Turnbull v. The Enterprize*, 24 F. Cas. 326, 327 (D. Pa. 1785) (No. 14,242).

¹⁸³ Louis le Comte & P. Du Halde, *A Description of China*, in 16 *The World Displayed* 119, 171 (London, Newbery 1767).

¹⁸⁴ Search for Process of Law, Brigham Young University’s Corpus of Founding Era American English, Version 3.00, <https://lawcorpus.byu.edu/> (search performed Nov. 8, 2020, 11:27 AM). Our full results can be viewed at Process of Law Corpus, Google Sheets (last updated Feb. 2, 2022), https://docs.google.com/spreadsheets/d/1KwEIsXod5uJKnZiarp_NUpkaAZa8YKbXsu_4QpZPWpl/edit?usp=sharing.

¹⁸⁵ The original search returned 106 results, from which fifteen duplicates have been excluded.

¹⁸⁶ We excluded twenty-six results as irrelevant to our inquiry—most of these were simple recitations of the newly passed Fifth Amendment. We also excluded one occurrence which was from a modern foreword to a reprint of a Founding-era document. Despite our best efforts, we could not offer a classification of the remaining three results without resorting to guesswork (Rows 14, 39, & 59 in the database listed *supra* note 184).

the ordinary Process of Law cannot be served upon him.”¹⁸⁷ Indeed, it appears that the problem of absconding debtors was widespread during the Founding era, judging by the number of statutes and cases describing what “process of law” ought to issue to attach their assets.¹⁸⁸ Another example is a federal statute authorizing the Secretary of the Treasury to issue new papers for ships sold “by process of law” (sold at a sheriff’s auction upon writ authorizing the same)¹⁸⁹ when the ship’s prior owners refused to surrender its papers.¹⁹⁰

Of course, there are also scattered sources that use the term more broadly. One statute, for example, authorizes summary proceedings in certain instances, directing that the “complaint shall be heard and determined, without any formal process of law.”¹⁹¹ But these instances are overshadowed by the majority of sources using “process of law” in its narrow sense.

Finally, we ran a search in COFEA for “due process of law.” As previously noted, our search returned only twenty-two results prior to the ratification.¹⁹² Of these, eleven sources use the term narrowly, five use the term broadly, and six use the term in a manner not susceptible to categorization.¹⁹³ We offer these results only for completeness, as this sample size is too small to support any meaningful conclusions. We

¹⁸⁷ Act of November 3, 1762, ch. 1, § 19, in 23 *The State Records of North Carolina* 554 (1904).

¹⁸⁸ See, e.g., *Waldo v. Mumford*, 1 Kirby 311, 311 (Sp. Ct. Err. 1787); An Act for Making Lands and Tenements Liable to the Payment of Debts (c. 1730), in *Acts and Laws, Passed by the General Court or Assembly of His Majesties Province of New-Hampshire in New-England* 88, 89 (Bos., B. Green 1726).

¹⁸⁹ See *Posten v. Posten*, 4 Whart. 26, 44 (Pa. 1838) (using “sale by process of law” to describe a sheriff’s auction).

¹⁹⁰ March 2, 1797, ch. 7, 1 Stat. 498, 498.

¹⁹¹ An Act Concerning Servants and Slaves, ch. 35, § 21 (1741), in 1 *Laws of the State of North-Carolina* 152, 159 (Raleigh, J. Gales 1821).

¹⁹² Search for Due Process of Law, Brigham Young University’s Corpus of Founding Era American English, Version 3.00, <https://lawcorpus.byu.edu/> (search performed June 5, 2021). In truth, the COFEA database returned forty-eight occurrences. Seven were duplicative, another was from a modern introduction to the reprint of a Founding-era document, and twenty simply recited the text of the Bill of Rights without offering further context. Our full results can be viewed at Due Process of Law Corpus, Google Sheets (last updated Feb. 2, 2022), <https://docs.google.com/spreadsheets/d/1WTbzKsGJaDKk9FFE9hTWeOvsEy9G3uqTvH8CKYUewjI/edit?usp=sharing>.

¹⁹³ For example, three of the six unclassifiable sources are congressional debates in which speakers claim that a certain practice or bill does not comport with “due process of law,” without otherwise elaborating on that term’s meaning.

discuss these occurrences (and others we have found) in greater detail below.

Our analysis of Founding-era writings shows that “process” and “process of law” were overwhelmingly used to mean writs. Indeed, it appears this meaning was intended three out of every four times the terms were used. Although “process” and “process of law” were occasionally used to refer to lawsuits or legal procedure more generally, such occurrences were rare. When the Founding generation spoke of “process,” they meant writs.

2. Colonial-American Use of “Due Process of Law”

“Due process of law” may have been well-defined in leading English legal treatises, but there is little evidence to suggest the term was much used in America, even by lawyers or judges. Few surviving documents from the Founding period use “due process of law.” Those that do are practically all statutes, colonial declarations of rights, or American reprints of English treatises.

a) Colonial Declarations of Rights

Many American colonies chose to enact declarations of rights during the seventeenth century. These documents “formed a continuous tradition in colonial American life” and led “naturally to the ideas of the revolutionary generation and a new outpouring of declarations and constitutional guarantees of rights in state and federal constitutions” in the eighteenth century.¹⁹⁴

America’s first colonial settlement was also the first American colony to guarantee to its citizens the right to due process of law. In 1671, New Plymouth Colony enacted a declaration titled “The General Fundamentals,” which provided:

[N]o person in this Government shall be endamaged in respect of Life, Limb, Liberty, Good name or Estate . . . but by virtue or equity of some express Law of the General Court of this Colony . . . or the good

¹⁹⁴ Riggs, *supra* note 45, at 966 (quoting Bernard Bailyn, *The Ideological Origins of the American Revolution* 197 (1967)).

and equitable Laws of our Nation suitable for us, being brought to Answer by due process thereof.¹⁹⁵

Plymouth's declaration draws on both Chapter 39 of Magna Carta and the Edwardian Due Process of Law statute of 1354, essentially merging the two together and replacing "but by the law of the land" with "but by virtue or equity of some express Law of the General Court of this Colony . . . or the good and equitable Laws of our Nation *suitable for us*."¹⁹⁶ As should be apparent, the language of the "due process" provision demonstrates that these colonists understood the term to relate to the manner in which one was "brought in to answer," reflecting the traditional understanding of that phrase's meaning.

Only three other colonies enacted a declaration of rights that included language modeled after the Edwardian Due Process of Law statute. The first of these was New York's Charter of Liberties and Privileges, passed in 1683.¹⁹⁷ Like New Plymouth's General Fundamentals, the New York Charter contained both a law of the land and a due process of law guarantee. Unlike New Plymouth's declaration, New York's Charter located these guarantees in separate provisions.¹⁹⁸ The "due process of law" provision provides:

That Noe man of what Estate or Condi[ti]on soever shall be putt out of his Lands or Tenements, nor taken, nor imprisoned, nor dis[in]herited, nor banished nor any way[s] d[e]stroyed without being brought to Answe[r] by due Course of Law.¹⁹⁹

¹⁹⁵ The General Laws and Liberties of New Plimouth Colony (June 1671), in *The Compact with the Charter and Laws of the Colony of New Plymouth: Together with the Charter of the Council at Plymouth* 241, 241 (Bos., Dutton & Wentworth 1836). Several authors have suggested New Plymouth Colony enacted an even earlier guarantee of "due process of law" in 1621. See, e.g., Riggs, *supra* note 45, at 963 n.98 (doing so). These authors all seem to cite the same source, C. Ellis Stevens, *Sources of the Constitution of the United States* 208 (N.Y., Macmillan 1894), which does not itself provide authority.

¹⁹⁶ The General Laws and Liberties of New Plimouth Colony (June 1671), in *The Compact with the Charter and Laws of the Colony of New Plymouth: Together with the Charter of the Council at Plymouth* 241, 241 (Bos., Dutton & Wentworth 1836).

¹⁹⁷ Charter of Liberties and Privileges (1683), *reproduced in* 1 Charles Z. Lincoln, *The Constitutional History of New York* 95 (1906).

¹⁹⁸ Using language tracking Chapter 39 of Magna Carta, § 13 of New York's Charter provided that no man could be deprived of certain fundamental rights "[b]ut by the Lawfull Judgment of his peers and by the Law of this province." *Id.* at 100.

¹⁹⁹ *Id.* at 101.

Like the New Plymouth declaration, the New York Charter's due process of law provision largely tracks the language of the 1354 Due Process of Law statute. Indeed, the provision is a near word-perfect reproduction, indicating late-1600s colonists were aware of the historical significance of the due process of law guarantee. However, the New York Charter varies from the statute of 1354 in that it has replaced "due process of law" with the broader phrase "due *course* of law." It is not clear why those who enacted this Charter (and East New Jersey's verbatim copy, enacted a few years later)²⁰⁰ chose to make this edit—it may have even been a mistake.²⁰¹ But whatever the reason, New York returned to the more traditional "due process of law" formulation when the state enacted a new declaration of rights in 1787.²⁰²

The only other colony to explicitly guarantee the right to "due process of law" in the seventeenth century was Massachusetts Bay in 1692. Like New York's Charter, Massachusetts' "Act setting forth General Privileges" included separate "law of the land" and "due process of law" provisions. Once again, the language tracks the statute of 1354, reading:

No man, of what state or condition soever, shall be put out of his lands, or tenements, nor be taken or imprisoned nor disherited nor banished nor any ways destroyed, without being brought to answer by due process of law.²⁰³

In sum, four colonies during the seventeenth century enacted a "due process of law" guarantee in addition to a "law of the land" guarantee, indicating that they viewed these guarantees as distinct. Each of these colonies drew on the Due Process of Law statute of 1354, and consequently their charters—like the statute of 1354—prohibited the deprivation of certain essential rights unless the defendant was first "brought to answer" before a court in the appropriate manner. Despite

²⁰⁰ An Act Declaring What Are the Rights and Privileges, of His Majesty's Subjects, Inhabiting Within This Province of East New Jersey (1698), in Aaron Leaming & Jacob Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New Jersey* 368, 371–72 (Phila., Bradford 1881).

²⁰¹ See Thomas I. Parkinson, *Cases and Materials on Legislation* 107 (1932) ("The early colonists in America adopted hazy paraphrases of *Magna Carta*, which they replaced by more exact statements in their later charters and laws.").

²⁰² An Act Concerning the Rights and Citizens of this State (Jan. 26, 1787), in *2 Laws of the State of New York* 344, 344 (Albany, Weed Parsons & Co. 1886).

²⁰³ An Act Setting Forth General Privileges, Act of Oct. 12, 1692, reproduced in Mott, *supra* note 45, at 98 n.43.

their quirks of language, each of these provisions reflects an understanding of the right to due process of law as being concerned with the initiation of legal proceedings and the jurisdiction of the courts, rather than with general legal procedure.

b) Founding-Era Statutes, Case Reports, and Treatises

Turning from the seventeenth century to the three decades preceding the ratification, “due process of law” hardly appears in the surviving records. Where “due process of law” appears, it is almost exclusively used in legal documents—statutes and treatises in particular.

When used in statutes, the term is mostly employed as a rhetorical flourish where a simpler term, such as “lawful process” or “writ,” would suffice. One New York statute authorizes certain judges “to cause due process of law to be issued” to recover fines or debts owed to the state.²⁰⁴ Another prohibits the detention of militiamen “otherwise than by *due process of Law*.”²⁰⁵ And a New Jersey statute grants freedom to those held in debtor’s prison on a certain date and includes in its relief those temporarily absent “by Habeas Corpus, or other due Process of Law.”²⁰⁶ One statute in Massachusetts refers to “judgment had on due process of law.”²⁰⁷

None of these uses of “due process of law” shed much light on how the phrase was understood by the author. Taking the New York statute as an example, there seems to be little difference between authorizing a judge to issue “process” and authorizing them to issue “due process of law.” We

²⁰⁴ An Act for the Better Levying and Accounting for Fines, Forfeitures, Issues, Amerciaments, and Debts Due to the People of this State (Feb. 1786), in 1 *Laws of the State of New York* 200, 200 (N.Y., Greenleaf 1792).

²⁰⁵ An Act for the Speedy and Effectual Recruiting the Forces to Be Furnished by this Colony to Act in Conjunction with His Majesties Regular Troops and Those of the Neighbouring Colony’s Against the Subjects of the French King (Feb. 26, 1767), in 4 *The Colonial Laws of New York* 170 (Albany, James B. Lyon 1894) (emphasis added).

²⁰⁶ An Act for the Relief of Poor Distressed Prisoners for Debt, in 2 *Acts of the General Assembly of the Province of New Jersey* 23 (N.J., James Parker 1762).

²⁰⁷ An Act for Repealing Two Laws of this State, and for Asserting the Right of this Free and Sovereign Commonwealth, to Expel Such Aliens As May Be Dangerous to the Peace and Good Order of Government (Nov. 1784), in 1 *The Perpetual Laws of the Commonwealth of Massachusetts* 179, 181 (Bos., I. Thomas & E.T. Andrews 1801). A letter by Thomas Jefferson seems to use “due process of law” in the same sense—referring to certain goods that had been “seized and condemned on due process of law.” Letter from Thomas Jefferson to David Ramsay (Aug. 8, 1787), in 12 *Jefferson’s Papers*, supra note 174, at 8–9.

did find one case report that appears to support a broad interpretation of “due process of law,” but the report is somewhat unclear.²⁰⁸

One exception to the general lack of interest in “due process of law” during this period stands out. By the middle of the eighteenth century, many publishers in America were engaged in a flourishing business selling Americanized versions of English Justice of the Peace manuals. These manuals were widely circulated, serving “as an alternative to legal education in a growing society which depended upon local government for its stability.”²⁰⁹ Such manuals also frequently appear in libraries of the well-educated as a useful reference.²¹⁰

Foremost amongst these was *Conductor Generalis or a Guide for Justices of the Peace*. By 1800, *Conductor Generalis* had been published in eleven editions in six separate cities.²¹¹ From at least the middle of the eighteenth century onwards, *Conductor Generalis* was published by Benjamin Franklin and his secret business partner, James Parker.²¹² Although its circulation is impossible to calculate precisely, *Conductor Generalis* was a well-read legal hornbook.

²⁰⁸ In *Butler v. Craig*, 2 H. & McH. 214 (Md. 1787), the Maryland General Court freed Mary Butler, the descendant of an Irish woman who had been enslaved for the crime of marrying an enslaved man. Butler’s counsel argued, among other things, that his client’s ancestor had been entitled to trial by jury, stating:

If she committed the crime of marrying a negro slave, she would by law be subject to no punishment before conviction, in some mode, and she was entitled to the common law mode of trial by Jury, as no other mode was prescribed by law. By *magna charta*, (2 Inst. 45.) *nullus liber homo disseisietur de libertatibus, nisi per legem terræ*. *Libertatibus* signifies the laws of the realm. *Nisi per legem terræ*, without due process of law. 2 Inst. 50, 51.

Id. 233–34 (some citations omitted). Although counsel’s argument is ambiguous, we believe he most likely meant to equate “due process of law” with “*per legem terræ* [law of the land]” and suggest, based on Coke, that both required a regular course of proceedings. However, we are reluctant to place much weight in this statement; as Williams has noted, the case turned on a point of evidence and the court had no opportunity to consider the above quoted argument. See Williams, *One and Only*, supra note 46, at 451 n.184.

²⁰⁹ John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. Legal Hist. 257, 283 (1985).

²¹⁰ Id. at 263.

²¹¹ Id. at 264.

²¹² Id. at 288 n.63 (“Parker learned the printing business from Andrew Bradford and Benjamin Franklin. Franklin became Parker’s secret partner and helped him establish a printing shop in New York. In 1749 both Parker in New York and Franklin in Philadelphia printed the [*Conductor Generalis*].”).

In its section titled “Notes on Magna Charta,” the *Conductor Generalis* offers an abridged version of Coke’s discussion of “due [p]rocess of law.”²¹³ Like Coke, the manual states that none “shall be taken” without “due Process of Law, that is, by the Indictment, or Presentment . . . or by Writ original of Common-[L]aw.”²¹⁴ From this proposition, the manual explains several “Conclusions hereupon do follow” including that “Persons which commit [another person] must have lawful Authority” and that it is “necessary that the Warrant, or *Mittimus*, be lawful” and that the “Cause must be contained in the Warrant.”²¹⁵

Not only is the wording and structure of this section nearly identical to Coke’s own discussion of “due process of law,” but the nature of the discussion makes clear the manual understands “due process of law” to mean lawfully issued writs. The absence of any discussion of judicial procedure in this section must be remarked on. Rather, *Conductor Generalis*’s explanation of “due process of law” focuses on the necessity of an indictment, presentment, or writ original to initiate a proceeding and emphasizes the importance of securing a lawful warrant or mittimus before arresting an individual.

c) The New York Rights Act of 1787

In 1787, New York celebrated its newly won independence by passing the New York Rights Act.²¹⁶ The statute is one of the few pre-ratification texts to emphasize the right to “due process of law” and certainly the most prominent.

Unsurprisingly, the drafters of the New York Rights Act chose to borrow heavily from Magna Carta and the Six Statutes. In its first provision, the Act opens by asserting that all power is derived from the people.²¹⁷ The following four provisions declare various iterations of a right to due process of law.²¹⁸ That the drafters placed these provisions

²¹³ *Conductor Generalis*, supra note 70, at 418, 420. Although Benjamin Franklin is not listed as the publisher of the New York-printed version of this edition, he was secretly in business with its publisher. See supra note 212.

²¹⁴ *Id.* at 420.

²¹⁵ *Id.* at 420–21.

²¹⁶ An Act Concerning the Rights and Citizens of this State (Jan. 26, 1787), in 2 *Laws of the State of New York*, supra note 202, at 344.

²¹⁷ *Id.* at 344.

²¹⁸ *Id.*

above those guaranteeing all other rights, such as freedom of speech, indicates how important they considered them to be.

The second provision states that none may be deprived of certain rights “but by lawful judgment of his or her peers or by due process of law.”²¹⁹ This language is simply a restatement of Chapter 39 of Magna Carta but replaces “law of the land” with “due process of law.” As discussed above, this is in line with received wisdom. Moreover, a separate “law of the land” guarantee would have been redundant as the state’s constitution, passed the year before, already contained such a provision.²²⁰

The third, fourth, and fifth provisions are revealing reinterpretations of the Six Statutes, on which they are modeled. Recall that only one of the Six Statutes used the full phrase “due [p]rocess of [l]aw,” often using alternative formulations such as “due Process and Writ original”²²¹ or “Process made by Writ original at the Common Law.”²²² The New York Rights Act steamed out these variations, uniformly using “due process of law.” This suggests the drafters understood, like the English, that the Six Statutes together defined the meaning of “due process of law.”

The third provision of the statute states that citizens may not be “taken or imprisoned” unless upon “indictment or presentment . . . or by due process of law.”²²³ This guarantee, like the original statute of 1354 on which it is modeled, protects individuals against arbitrary arrest and imprisonment by requiring an indictment, presentment, or some other duly authorized writ.

The fourth provision protects individuals from being “put to answer,” that is, made a party to a proceeding or otherwise made to answer for themselves, “without presentment before justices, or Matter of Record, or due process of Law according to the Law of the Land.”²²⁴ Once again, the focus is on ensuring that government officials have the appropriate authority to impose on an individual’s liberty, requiring some form of process.

²¹⁹ *Id.*

²²⁰ N.Y. Const. of 1777, art. XIII.

²²¹ 1368, 42 Edw. 3 c. 3.

²²² 1351, 25 Edw. 3 c. 4.

²²³ An Act Concerning the Rights and Citizens of this State (Jan. 26, 1787), in 2 *Laws of the State of New York*, supra note 202, at 344.

²²⁴ See *id.* The original Edwardian statute used “or by due process and writ original, according to the old law of the land.” 1368, 42 Edw. 3 c. 3.

The fifth provision protects individuals from certain extreme deprivations, such as a sentence of imprisonment or death, without first “being brought to answer by due process of law.” By its terms, the provision (much like earlier similar declarations and statutes) is primarily concerned with protecting individuals from being judged in absentia without first being “brought to answer” in the appropriate or “due” manner.²²⁵

Each of these provisions of the New York Rights Act uses “due process of law” in its traditional sense to refer to duly granted legal authority, memorialized in a writ or arising by operation of law, permitting a government official to deprive an individual of a certain right. At no point does the statute use “due process of law” to refer to judicial procedure in the abstract. Indeed, as we discuss below in detail, the statute elsewhere uses a different term—“due *course* of law”—to describe legal procedure more generally.

Further insight into this Act’s meaning can be derived from comments made by Alexander Hamilton in a speech to the New York legislature on February 6, 1787. In his speech, made just eleven days after the Act’s passage, Hamilton offers contemporary definitions of both “due process of law” and “law of the land.” Hamilton gave his speech in opposition to a bill that would strip privateers of the right to vote, arguing that such a bill was unconstitutional. He began by quoting from the state constitution, noting it provided that “no man shall be disfranchised or deprived of any right he enjoys under the constitution, but by the *law of the land*.”²²⁶ He noted “[s]ome gentlemen hold that the law of the land will include an act of the legislature” but argued that these gentlemen were mistaken, noting “Lord Coke, that great luminary of the law . . . interprets the law of the land to mean presentment and indictment, and process of outlawry.”²²⁷ He continued:

²²⁵ An Act Concerning the Rights and Citizens of this State (Jan. 26, 1787), in 2 *Laws of the State of New York*, supra note 202, at 344.

²²⁶ Alexander Hamilton, Remarks on an Act for Regulating Elections (Feb. 6, 1787), in 4 *The Papers of Alexander Hamilton: January 1787–May 1788*, at 34, 35 (Harold C. Syrett ed., 1962).

²²⁷ *Id.* In this comment, Hamilton was responding to arguments of which the following is representative:

[T]he true import of the words “law of the land” . . . is an act of supreme legislative authority; and that this construction is justified by the most approved law authorities,

But if there were any doubt upon the constitution, the [New York Rights Act] enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words “*due process*” have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.

Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session?²²⁸

Hamilton’s remarks are “somewhat unclear” and scholars have reached differing conclusions as to his meaning.²²⁹ What is clear, however, is that Hamilton’s overarching purpose was to argue that any legislative deprivation of the right to hold public office was violative of both law of the land and due process of law principles which, according to him, permitted only a court to deprive individuals of such rights. To craft this argument, Hamilton makes several noteworthy moves.

First, in responding to arguments that the “law of the land” included acts of the legislature, Hamilton, citing Coke, defined “law of the land” to mean “presentment and indictment, and process of outlawry.”²³⁰ Here, Hamilton is being less than candid. Coke’s view was that the “law of the land” included “the common law, statute law, or custom of England.”²³¹ But such a broad definition would, of course, weaken Hamilton’s position because it would invite the argument that the law of the land could be altered through statute. What Hamilton actually offered was Coke’s definition of “due process of law,” thereby allowing him to present a much narrower interpretation of “law of the land”—one foreclosing the inclusion of statutory law.

and by the practice of the Kingdom of Great Britain, of whose constitution, as well as of this state, the above clause is a fundamental article.

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, 409 n.575 (2002) [hereinafter Davies, *Law-And-Order*] (quoting Whig Society Meeting Minutes, N.Y. J. & State Gazette, June 10, 1784, at 2).

²²⁸ Hamilton, *supra* note 226, at 35–36.

²²⁹ Williams, *One and Only*, *supra* note 46, at 442–43 (collecting sources).

²³⁰ *Id.* (quoting Hamilton, *supra* note 226, at 35–36).

²³¹ 2 *Institutes*, *supra* note 43, at 46.

Second, in discussing the meaning of “due process of law,” Hamilton states these words have a “precise and technical import, and are only applicable to the process and proceedings of the courts.”²³² He does not state what their “precise and technical” meaning is, possibly because he just gave their meaning in defining “law of the land.” Regardless, we are more interested in the latter half of Hamilton’s statement, in which he suggests the phrase is “only applicable to the process and proceedings” of courts. One interpretation is that Hamilton understood “due process of law” broadly, as encompassing both “process *and* proceedings.” But another interpretation is that Hamilton understood “due process of law” in the jurisdictional sense, as argued by Coke and the common law lawyers of the *Five Knights’ Case*, and was thus arguing that the consequence of the right to due process of law was that rights may only be deprived by the “process and proceedings” of a court. Certainly, his later writing on this topic supports such an interpretation.²³³ A further, equally valid position, is that this one newspaper report of Hamilton’s brief remarks is insufficient to allow us to accurately divine his true meaning.²³⁴

Finally, it is worth noting that Hamilton felt the need to address the law of the land and the due process of law provisions separately. This suggests these guarantees were not yet viewed as synonymous. Indeed, were they already understood as synonymous, then there would have been no need for Hamilton to engage in his sleight of hand regarding Coke’s writings on the meaning of “law of the land.”

In summary, “due process of law” was not often used in colonial America prior to the ratification of the Fifth Amendment. It appeared in four seventeenth-century colonial declarations of rights, where its usage was consistent with the traditional English understanding of the phrase. In the decades immediately prior to the ratification, the phrase appeared only infrequently in written records, mostly statutes. When used in statutes, it was mostly used as a rhetorical flourish where the author just as easily could have written “writs” or “process,” although two usages suggest a broader meaning. The phrase was also used in the most

²³² Williams, *One and Only*, supra note 46, at 442.

²³³ See infra notes 246–48 and accompanying text.

²³⁴ See Williams, *One and Only*, supra note 46, at 443 (“It is not possible to determine conclusively, based solely on the surviving record of this one speech, which, if any, of the competing interpretations that have been attributed to these remarks accurately reflects Hamilton’s actual views.”).

prominent legal hornbook of the period, *Conductor Generalis*, which drew its definition of the phrase from Coke's writings, once again reflecting the English common law understanding of the term. Finally, the phrase was used in the New York Rights Act of 1787, which also uses the term in its traditional sense to mean duly granted legal authority, memorialized in a written writ or arising by operation of law.

3. Colonial-American Documents Using “Due Process of Law” and “Due Course of Law”

The modern procedural understanding of “due process of law” becomes improbable when one considers that the Founding generation used a different term—“due course of law”—to refer to legal procedure more broadly. The phrase “due course of law” may strike contemporary readers as obscure, but it was significantly more popular among early American writings than “due process of law.” Recall, we found only twenty-two occurrences of “due process of law” in the three decades prior to the ratification amongst COFEA's 120,000 documents. By contrast, “due course of law” appears 173 times in that same time period.²³⁵

Older than its process-oriented cousin,²³⁶ “due course of law” was well understood by the Founding generation to mean due or appropriate legal proceedings—precisely the meaning most now associate with “due process of law.”²³⁷ As explained in Webster's *Dictionary*, “due course of law” meant a legal proceeding held in the “usual manner,” following a “[s]tated and orderly method.”²³⁸ Thus, a 1726 Connecticut statute provided that any person “convicted by due course of law” of felling trees owned by another while wearing a disguise might be publicly whipped.²³⁹ And Pennsylvania's first Constitution guaranteed that all citizens would

²³⁵ Search for Due Course of Law, Brigham Young University's Corpus of Founding Era American English, Version 3.00, <https://lawcorpus.byu.edu/> (search performed Nov. 1, 2021).

²³⁶ See *supra* note 55.

²³⁷ “Course of law” could also be used as a noun. For example, George Washington once wrote a (charmingly polite) letter to someone who owed him money, warning “a course of law” might be brought to recover the debt. Letter from George Washington to John Posey (Sept. 24, 1767), *in* 8 *The Papers of George Washington, Colonial Series: 24 June 1767–25 December 1771*, at 34, 35 (W.W. Abbot & Dorothy Twohig eds., 1993).

²³⁸ *Course*, 1 Noah Webster, *A Dictionary of the English Language* (E.H. Barker ed., London, Black, Young, & Young 1832).

²³⁹ An Act for the More Effectual Detecting and Punishing Trespass (Oct. 1726), *in* 7 *Public Records of the Colony of Connecticut* 80, 81 (Hartford, Case, Lockwood & Brainard 1873).

“have remedy by the due course of law” for any injuries done to them.²⁴⁰ If the Founding generation had wanted to guarantee due procedure in the Fifth Amendment, they knew the words to use.

As Davies has argued, “course of law” was understood to mean the entirety of a proceeding—including trial and judgment.²⁴¹ This is perhaps best demonstrated by the 1787 Northwest Ordinance’s guarantee that citizens of the territory would enjoy “judicial proceedings according to the course of the common law.”²⁴² By its terms, this guarantee ensured regular and orderly judicial proceedings, rather than the more limited understanding of “process” which has been sketched above. “Due course of law” thus encompassed the entirety of legal proceedings from initiation through to judgment and was synonymous with what most today understand as “legal process.”

We do not wish to overstate our case. “Due process of law” and “due course of law” were similar phrases with similar meanings. As detailed above, there are instances in which colonial Americans used “process” in the broader sense to refer to legal procedure. And there are examples where “due course of law” was used in circumstances suggesting the author believed the term to mean the same as “due process of law”—the New York Charter of 1683 being the clearest example.²⁴³ Nonetheless, we believe the popularity of “due course of law” supports a narrow interpretation of “due process of law.” Although “process” and “process of law” were infrequently used broadly to refer to judicial procedure in general, the same is not true of “course of law.” We have been unable to find any examples of the phrase being used to mean process alone, suggesting the terms had distinct meanings, despite whatever slippage occurred.

What’s more, Founding-era writers seemed to understand the distinction between these terms. When early American writers used both

²⁴⁰ Pa. Const. of 1790, art. IX, § 11. This language is drawn from *2 Institutes*, supra note 43, at 55–56.

²⁴¹ See Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 *Law & Contemp. Probs.* 1, 25–26 (2010); Davies, *Correcting History*, supra note 46, at 81–84; Davies, *Law-And-Order*, supra note 227, at 394–95 & n.521, 410–11 n.578, 411–12 n.579.

²⁴² See Northwest Ordinance, art. II (1787), *reprinted in Sources of Our Liberties* 387, 395 (Richard L. Perry ed., 1959). The Maryland Declarations of Rights also guaranteed that the inhabitants of that state were “entitled to the common law of England, and the trial by jury, according to the course of that law.” Md. Const. of 1776, Declaration of Rights, art. III.

²⁴³ See Parkinson, supra note 201.

terms in the same document, they used them to mean different things. We found three prominent Founding-era sources that use both “due course” and “due process.” Examining these sources reinforces the conclusion that each term had a separate meaning and, further, that “due process of law” referred to writs.

(1) *The New York Rights Act of 1787*

We begin by returning to the New York Rights Act, of which the fifth section reads:

Fifth, [1] 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 [2] 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 Law²⁴⁴

The structure of this section is drawn from the 1351 due process of law statute. But the drafters here have added to the Edwardian statute—replacing “course of law” with “*due* Course of Law,” suggesting the distinction the statute draws between “due Process of Law” and “due Course of Law” is intentional.

There are two clauses here. In the first clause, “due Process of Law” modifies the requirement that one be “brought to answer” before they may be “imprisoned . . . or put to death.” “Due Process of Law” thus governs the method of beginning a legal proceeding and restraining an individual’s freedom pending that proceeding.

In the second clause, “due Course of Law” modifies the forejudged requirement or, alternatively, modifies both the answer and forejudgment requirements. In any event, it has a different meaning from “due Process of Law” in the first clause, which is limited to the answer requirement. It is thus used more broadly, covering the entirety of the legal proceeding through to judgment. Here we see direct evidence of the two terms being used in the same document to mean different things.²⁴⁵

²⁴⁴ See An Act Concerning the Rights and Citizens of this State (Jan. 26, 1787), in 2 Laws of the State of New York, *supra* note 202, at 344.

²⁴⁵ See Davies, Law-and-Order, *supra* note 227, at 410–11 n.578 (reaching a similar conclusion).

(2) Alexander Hamilton's Letter to the Considerate Citizens of New York

As a member of the New York Assembly, Hamilton vigorously protested bills targeting Loyalists. He wrote a pamphlet under the pseudonym “Phocion,” in which he decried the confiscation of Loyalist property and their disenfranchisement.²⁴⁶

He begins by arguing disenfranchisement by the legislature, and not the courts, is contrary to New York’s Constitution, writing:

The 13th article of the constitution declares, “that no member of this state shall be disfranchised or defrauded of any of the rights or privileges sacred to the subjects of this state by the constitution, unless by the law of the land or the judgment of his peers.” If we enquire what is meant by the law of the land, the best commentators will tell us, that it means *due process of law, that is, by indictment or presentment of good and lawful men,** and trial and conviction in consequence.²⁴⁷

Here Hamilton is arguing that legislative disenfranchisement violates the “law of the land” guarantee in the New York Constitution. He interprets that guarantee to encompass “due process of law . . . , and trial and conviction in consequence.” Hamilton therefore uses “due process of law” in a way that distinguishes it from “trial and conviction,” giving it the narrow meaning we have proposed.

This interpretation is compelled by the grammar of the sentence and its context. Grammatically, the clause beginning “that is” is explanatory of the meaning of “due process of law” and is separated from “and trial and conviction” by a comma. Trial and conviction are thus separate actions which may occur following “due process” rather than being part of the definition of that term. This is reinforced by the placement of the asterisk immediately following the end of the emphasized text—i.e., before “trial and conviction.” The asterisk footnote reads “COKE upon Magna Carta, Chap. 29, Page 50” and the emphasized text (which is also emphasized in the original) is drawn from that treatise. Hamilton is thus saying “law of the land” requires “due process of law,” with a citation to a treatise defining that term, *and* that it also requires trial and conviction in consequence. The clear import is that “due process” does not encompass

²⁴⁶ A Letter from Phocion to the Considerate Citizens of New York (Jan. 1784), in 3 Papers of Alexander Hamilton: 1782–1786, at 483 (Harold C. Syrett ed., 1962).

²⁴⁷ Id. at 485 (first and second emphasis removed, third emphasis retained from original) (citing Coke at the asterisk).

trial procedure or judgment. Contextually, this interpretation rings true because it accurately reflects Coke's writings. As detailed above, the "law of the land" required both "due process of law" *and* trial and conviction before an individual could be deprived of certain rights. Hamilton was an educated lawyer; it is unsurprising he could accurately recite Coke when he wanted to.

"Phocion" next points out that the Treaty of Paris forbids the prosecution of Loyalists in the courts. He asks, rhetorically, whether the Legislature may enact a forfeiture that the courts may not:

No citizen can be deprived of any right which the citizens in general are entitled to, unless forfeited by some offence. It has been seen that the regular and constitutional mode of ascertaining whether this forfeiture has been incurred, is by legal process, trial and conviction. This [by definition], supposes prosecution. Now consistent with the treaty there can be no future prosecution for any thing done on account of the war. Can we then do by act of legislature, what the treaty disables us from doing by due course of law?²⁴⁸

"Due course of law" is here used broadly to mean regular legal proceedings, in contradistinction to acts of the legislature. This is apparent from Hamilton's equation of "due course of law" with "the regular and constitutional mode" of proceeding, which he explains is "by legal process, trial and conviction."²⁴⁹ This stands in contrast to his use of "due process of law," as explained above, to mean "indictment or presentment of good and lawful men" and *not* trial or conviction. It is thus apparent he uses the two terms as though they had different meanings.²⁵⁰

²⁴⁸ *Id.* at 488 (emphasis omitted).

²⁴⁹ One should not read "legal process, trial and conviction" to imply "trial and conviction" are explanatory of "legal process." The Oxford comma had not yet been invented. See Peter Sutcliffe, *The Oxford University Press: An Informal History* 114 (1978).

²⁵⁰ Our conclusion is reinforced by another statement Hamilton made during his earlier debate, also using "due course of law" in this manner. Hamilton, *supra* note 226, at 25, 28 ("[N]o man ought to be deprived of any right or privilege which he enjoys under the constitution; but for some offence proved in due course of law.").

(3) New York State's Ratification Letter

New York State voted to ratify the United States Constitution in July of 1788 after a bitterly contested convention.²⁵¹ Like other states, New York attached a lengthy list of reservations and requested amendments to its ratification. But New York's ratification letter is particularly noteworthy because New York was the only state to request a "due process of law" guarantee.²⁵² Many have therefore inferred New York's ratification letter was the inspiration for James Madison's decision to include the Due Process of Law Clause in what became the Bill of Rights. Indeed, New York's ratification letter may be the closest we have to a "legislative history" of the Due Process of Law Clause, given the complete absence of comment on that Clause during the Bill of Rights's ratification.²⁵³

New York's ratification letter uses "course of law" and "process of law" to mean different things. The document lists a series of rights that "cannot be abridged or violated" and which the ratifying convention understood to be "consistent with the [new] Constitution."²⁵⁴ These rights included:

That no person ought to be taken, imprisoned, or disseized of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty, or property, but by due process of law.

. . .

²⁵¹ State of New York Ratification as Transmitted to Congress (July 26, 1788), *in* 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution: As Recommended by the General Convention at Philadelphia, in 1787*, at 327, 328 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891); see also *Convention Debates and Proceedings* (July 10, 1788), *in* 22 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: New York* 2119 (John P. Kaminski et al. eds., 2008) [hereinafter *DHRC*] (overviewing the ratification debates in New York regarding the "due process of law" clause); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 *Neb. L. Rev.* 1, 73 (2002) (discussing the debate in the New York ratifying convention).

²⁵² See Williams, *One and Only*, *supra* note 46, at 445.

²⁵³ For one thing, both use the now-famous "life, liberty, and property" formulation rather than the more traditional list of rights associated with "due process of law." U.S. Const. amend. V. There is also reason to believe the debates over the New York Constitution's law of the land provision shaped Madison's thinking. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L.J.* 1672, 1723–24 (2012); Davies, *Law-and-Order*, *supra* note 227, at 408–15.

²⁵⁴ State of New York Ratification, *supra* note 251, at 328–29.

That all appeals in causes determinable according to the course of the common law, ought to be by writ of error, and not otherwise.²⁵⁵

The second clause seeks to protect the jury right by preventing appellate courts from deciding questions of fact.²⁵⁶ The provision reaches all “causes determinable according to the course of the common law.” It thus uses “course of the common law” in the broadest possible sense to mean, essentially, cases could be decided following the regular procedures of common law courts.

Turning to the first clause, it is admittedly more ambiguous. On its face, the clause does not tell us whether “due process of law” is used in a broad or narrow sense. But that ambiguity dissipates when the clause is considered in context. We know that the drafters considered and rejected using “due course of law” in place of “due process of law.” Notes from the ratifying convention show the clause, as originally proposed, read: “That no Freeman ought to be . . . deprived of his Life, Liberty or property but by due ~~Course~~ Process of Law.”²⁵⁷ The strikethrough signifies that the provision was amended during the convention to read “due process of law.” Thus, we know the convention believed the difference between these two terms was significant enough to warrant an amendment. And this alteration, coupled with the drafters’ choice to use “course of law” elsewhere to mean legal procedure more broadly, leads us to conclude they understood “due process of law” to mean something else, namely the narrow definition provided by Coke.

* * *

This Section has surveyed how colonial Americans used “due process of law” from the early colonial declarations of rights of the seventeenth century through to New York’s letter ratifying the United States

²⁵⁵ *Id.* (emphasis added).

²⁵⁶ Appellate courts reviewing a case on a writ of error could only review questions of law, generally, while courts reviewing a case on appeal (an import from civil law systems) could review both facts and law. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 *Harv. L. Rev.* 289, 297 (1966). Limiting courts to writs of error thus served to protect jury verdicts. This provision could be thought of as a precursor to the Seventh Amendment’s Re-Examination Clause.

²⁵⁷ 22 *DHRC*, *supra* note 251, at 2119. In truth, the drafting history of this clause is more complicated. John Lansing presented a proposed bill of rights—seemingly modeled after a draft produced by George Mason—to the New York Convention. *Id.* at 2106, 2111. That draft originally used “Law of the Land.” *Id.* This was then amended to “due Course of law” before being again amended to read “due Process of law.” *Id.* at 2119.

Constitution. We found colonial Americans were far more likely to use “process” and “process of law” to refer to writs and other forms of judicial process than they were to use those terms in reference to judicial procedure more generally. We also found the traditional English understanding of “due process of law” was reflected in the early colonial declarations of rights that used that phrase. Not only this, but this understanding was evident in the most prominent legal hornbook of the Founding Era, *Conductor Generalis*, and was also apparent from the text of the New York Rights Act of 1787. Finally, we noted Founding-era Americans had a different, more popular phrase—“due *course* of law”—they used to refer to judicial procedure more generally, suggesting the use of the narrower phrase—“due *process* of law”—in the Fifth Amendment was deliberate.

Given the phrase’s significance in modern-day jurisprudence, it is remarkable how infrequently “due process of law” appears in Founding-era texts. Thus, all conclusions about its original public meaning must be couched with caution. Nonetheless, the phrase’s robust and well-defined meaning within the English common law tradition coupled with the available evidence from pre-ratification America indicates that the phrase was understood much more narrowly by Founding-era Americans than previously suspected. When colonial Americans used “process,” they meant writs. And when colonial Americans used “due process of law,” they meant writs issued lawfully by a court of competent jurisdiction.

IV. “DUE PROCESS OF LAW” DURING AND AFTER THE RATIFICATION

At the time of the Founding, “due process of law” was an obscure legal term that meant writs. The norm of lawful rule that the phrase enshrined into our Constitution was so foundational that the unassuming Due Process of Law Clause went unnoticed during the enactment of the Bill of Rights. And the Clause continued to languish in obscurity for decades after its ratification, overlooked during the early Republic’s formative constitutional debates over the appropriate balance between popular sovereignty and individual rights.²⁵⁸ These debates instead focused on the “law of the land” guarantees of many state constitutions, a phrase that

²⁵⁸ See generally Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421 (1999) (overviewing debates over federal power and individual rights, with note of only one argument over the meaning of due process).

came to be understood as placing significant, substantive constraints on the power of state legislatures.²⁵⁹

Forty years later, a new generation of jurists began to read the rich substantive meaning of “law of the land” into the Due Process of Law Clause. Taking one passage of Coke’s *Institutes* out of context, they equated these two ancient terms, creating a “textual hook” in the federal constitution for an increasingly robust form of judicial review. After the Supreme Court blessed this in *Murray v. Hoboken Land & Import Co.*,²⁶⁰ caselaw interpreting state law of the land provisions was read into the Due Process of Law Clause, which thereafter swiftly became the “most important clause of the United States Constitution.”²⁶¹

This commingling of “due process of law” and “law of the land” forms the foundation of our modern understanding of the Due Process of Law Clauses.²⁶² But it is contrary to the original meaning of the Fifth Amendment. Not only is it rooted in a misinterpretation of Coke’s writings (which it is),²⁶³ the conflation arose decades after the Bill of Rights was ratified. For the first half century of its existence, the Due Process of Law Clause sat almost entirely overlooked, even as state and

²⁵⁹ See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 *Emory L.J.* 585, 648–54 (2009) (collecting early cases interpreting state “law of the land” provisions); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 *Va. L. Rev.* 493, 544–45 (1997) (same); Riggs, *supra* note 45, at 978–84 (surveying early state “law of the land” provisions).

²⁶⁰ 59 U.S. (18 How.) 272, 276 (1855).

²⁶¹ Corwin, *supra* note 74, at 366.

²⁶² See, e.g., *Murray’s Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta.”); *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (“[T]he guaranties of due process, though having their roots in Magna Carta’s [law of the land] and considered as procedural safeguards against executive usurpation and tyranny, have in this country become bulwarks also against arbitrary legislation.” (internal quotation marks omitted) (citing *Hurtado v. California*, 110 U.S. 516, 532 (1884))).

²⁶³ See *infra* notes 311–30 and accompanying text. We are not the first to suggest this conclusion. See Williams, *One and Only*, *supra* note 46, at 429–30 & n.82–83 (“A more difficult question is whether Coke is best interpreted as saying that ‘due process of law’ and ‘law of the land’ should be viewed as synonymous for all purposes [C]ertain of Coke’s statements . . . seem to imply a distinction between the two concepts.”); Riggs, *supra* note 45, at 959 (“Perhaps Coke only meant to say that ‘due process of law’ and the ‘law of the land’ were synonymous with respect to certain matters of procedure.”); Jurow, *supra* note 46, at 277 (“When we peruse the commentary as a whole, however, it becomes doubtful that Coke was simply equating [‘law of the land’] with ‘due process of law.’”); Davies, *Correcting History*, *supra* note 46, at 67–69.

federal courts grafted increasingly rich, substantive meanings upon state law of the land provisions. It was only in 1833, in Justice Story's *Commentaries*, that it was first seriously suggested that the two terms bore the same meaning, and this conflation was first seen in caselaw in the 1840s. Until that point, "due process of law" had been understood in its narrow traditional sense to mean writs issued lawfully by a court of competent jurisdiction. Only after the Founding did the phrase take on its modern, capacious definition.

A. The Ratification, the First Congress, and Early Federal Caselaw

The ratification history of the Due Process of Law Clause is "notoriously sparse."²⁶⁴ Little is known about why James Madison chose to include the phrase in his draft of the Bill of Rights, and the Clause itself elicited no discussion in the congressional and state ratification debates.²⁶⁵ As previously noted, scholars have speculated Madison was influenced by the language of New York's ratification circular. The original draft of that document used "law of the land" before this language was replaced with the now familiar "due process of law"—suggesting the two terms were not synonymous.²⁶⁶

The surrounding text of the Constitution also offers little insight into the Clause's meaning. The words "due process of law" appear only in the Fifth and Fourteenth Amendments. Some scholars have highlighted that Madison's original draft would have inserted the due process of law guarantee immediately after the prohibition of *ex post facto* laws, suggesting he viewed it as a constraint on Congress.²⁶⁷ The surrounding provisions of the Fifth Amendment are all concerned with protecting individuals from arbitrary or unfair governmental deprivations and mostly relate to questions of criminal procedure.²⁶⁸ The word "process" is used elsewhere in the Bill of Rights in its narrow sense to mean writs, appearing in the Compulsory Process Clause which guarantees to

²⁶⁴ Williams, *One and Only*, *supra* note 46, at 445.

²⁶⁵ Riggs, *supra* note 45, at 948; accord James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 *Const. Comment.* 315, 325 (1999) (noting the drafting and ratification history of the Bill of Rights is "remarkably skimpy" and that "a good deal must rest upon historical conjecture").

²⁶⁶ See *supra* note 257 and accompanying text.

²⁶⁷ Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 *Wm. & Mary L. Rev.* 1599, 1616–17 (2019).

²⁶⁸ See U.S. Const. amend. V.

criminal defendants the right to “have compulsory process for obtaining witnesses in [their] favor.”²⁶⁹

The First Congress also regularly used “process” in this narrow sense, as best exemplified by the Judiciary Act of 1789.²⁷⁰ But the words “due process” appear nowhere in its journals (apart from in reproductions of the Bill of Rights). A few early federal statutes use “due process” in a manner which indicates it was understood narrowly.²⁷¹ But again, this history is sparse.

Only eleven federal case reports from the first three decades of the Republic so much as use the words “due process of law.” Of these, two use the term to mean writs issued by the court. For example, in *United States v. The Anthony Mangin*, an *in rem* action, the United States Attorney requested in his petition “that due process of law may issue against the [libeled ship].”²⁷² Two more used the term rhetorically. For example, in *Bingham v. Cabot*, the plaintiff’s attorney in the lower court concluded his brief with a prayer that “justice, by due process of law, may be done, in this case.”²⁷³ In three other cases, attorneys merely recited the Due Process of Law Clause or a state statute without expanding on its

²⁶⁹ U.S. Const. amend. VI, cl. 6.

²⁷⁰ See Judiciary Act of 1789, ch. 20, § 6, 1 Stat. 73 (using “process” in a manner distinct from “proceedings”); id. § 12 (requiring as a condition of removal that the defendant present “copies of said process against him”); id. § 22 (describing a writ of error as “process”); see also Tuesday, April 14 (1789), in 1 Journal of the House of Representatives 14, 14 (D.C., Gales & Seaton 1826) (resolution authorizing the House’s Serjeant-at-Arms and requiring he shall “execute . . . all such process” issued therefrom).

²⁷¹ See, e.g., An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 4, 3 Stat. 510, 513 (1819) (allowing that private vessels “may be adjudged and condemned . . . after due process and trial”); An Act to Authorize the Defense of the Merchant Vessels of the United States Against French Depredations, ch. 60, § 2, 1 Stat. 572, 572 (1798) (same, but for hostile French vessels).

²⁷² 24 F. Cas. 833, 839 (D. Pa. 1802) (No. 14,461) (plaintiff’s motion); see also *Morehouse v. The Jefferson*, 17 F. Cas. 738, 739 (S.D.N.Y. 1803) (No. 9,793) (plaintiff’s complaint) (“[T]hese libellants pray due process of law, against the said brigantine . . .”).

²⁷³ 3 U.S. (3 Dall.) 19, 24 (1795) (plaintiff’s motion); see also *Trask v. Duvall*, 24 F. Cas. 136, 138 (E.D. Pa. 1821) (No. 14,144) (“[T]he guarantee was, that the note was good, and was collectable after due process of law.”).

relevance.²⁷⁴ The term also makes a cameo appearance in *Trustees of Dartmouth College v. Woodward*.²⁷⁵

Only two federal cases use the Clause meaningfully during these decades and—even then—only in passing. In *United States v. The Schooner Betsey & Charlotte*, another *in rem* action, the claimant objected to a bench trial under admiralty law, arguing, among many other things: “By the 5th amendment to the constitution, no person shall be deprived of property, *without due process of law*; which means by due process of the *common law*.”²⁷⁶ Chief Justice Marshall’s opinion quite rightly ignored this argument and implicitly rejected it in ruling for the Government.

In *United States v. Bryan*, in 1815, the defendants argued that a retroactive law passed by Congress could not be “Necessary and Proper” because, among a plethora of other reasons, “it would be *virtually* taking away private ‘property’ without ‘due process of law.’”²⁷⁷ The argument was once again ignored and implicitly rejected by the Court.

The words “due process” (rather than “due process of law”) also appeared in a handful of reports. For example, the United States Attorney in the trial of Aaron Burr moved “that due process issue to compel” Burr’s appearance.²⁷⁸ None of these uses departed from the traditional, narrow interpretation of the term.

B. “Due Process of Law” and “Law of the Land” in the Antebellum Period

One of the formative debates facing our new Republic was over the appropriate balance between individual rights and popular sovereignty.²⁷⁹

²⁷⁴ *Ex parte Burr*, 4 F. Cas. 791, 796 (C.C.D.C. 1823) (No. 2,186) (reciting the Due Process of Law Clause); *Anderson v. Dunn*, 19 U.S. 204, 218 (1821) (plaintiff’s argument) (same); *Auld v. Norwood*, 9 U.S. (5 Cranch) 361, 363 (1809) (counsel’s argument) (reciting Virginia’s statute of frauds, barring actions not “pursued by due process of law” within set time).

²⁷⁵ 17 U.S. (4 Wheat.) 518, 689 (1819) (“[T]he Crown] pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes . . . unless its corporate franchises should be taken away by due process of law.”); see also *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 828 (C.C.D.N.J. 1830) (No. 1,617) (explaining, in passing, that the right to due process emanates from Magna Carta).

²⁷⁶ 8 U.S. (4 Cranch) 443, 451 (1808) (counsel’s argument).

²⁷⁷ 13 U.S. (9 Cranch) 374, 379 (1815) (counsel’s argument) (emphasis added).

²⁷⁸ *United States v. Burr*, 25 F. Cas. 1, 1 (C.C.D. Ky. 1806) (No. 14,692); see also *Ross v. The Active*, 20 F. Cas. 1231, 1231 (C.C.D. Pa. 1808) (No. 12,071) (counsel praying that “due process may issue”).

²⁷⁹ See Wood, *supra* note 258, at 1433–41.

These debates were intimately tied to the meaning of “law of the land,” and many of our earliest precedents supporting judicial review rest upon state constitution law of the land provisions. In leading turn-of-the-century cases, state courts began to adopt a rich reading of the phrase, offering these courts a textual basis for striking down statutes perceived to impinge on the rights of individuals. Scholars debate whether these decisions were consistent with the original meaning of state law of the land provisions, but for our purposes it is enough that such provisions were generally believed to harbor rich, substantive restrictions upon legislative power by the late antebellum period.

Initially, courts applied state law of the land provisions to enforce only procedural rights. In one of the earliest cases, *Zylstra v. Corporation of the City of Charleston*, decided in 1794, Judge Thomas Waties opined that a municipal ordinance allowing for the fining of tallow chandlers without a trial by jury ought to be struck down because such a mode of proceeding was unauthorized by South Carolina’s law of the land provision.²⁸⁰ Other courts also adopted the view that the law of the land provided that individuals could only be deprived of their rights through historically recognized forms of judicial procedure, such as the trial by jury. Interestingly, many state courts buttressed their reasoning on this point by drawing on the connection between the “law of the land” and “due process of law” in a manner consistent with our own interpretation of Coke.²⁸¹

From there, it was only a short leap to the conclusion that legislative deprivations, which are inherently unaccompanied by the procedural protections of a trial, might violate state law of the land provisions. Applying this logic, a three judge court in *Trustees of the University of North Carolina v. Foy*, decided in 1805, struck down an act of the North Carolina legislature repealing an earlier grant of lands to the university.²⁸² The Court partly grounded their decision on the state constitution’s law

²⁸⁰ *Zylstra v. Corp. of City of Charleston*, 1 S.C.L. (1 Bay) 382, 384–85 (1794).

²⁸¹ According to one New York court, for example, “due process of law” is “an enlargement and extension of the words in Magna Charta, ch. 29: ‘No freeman shall be disseised of his freehold, &c., but by the law of the land.’” *In re John & Cherry Sts.*, 18 Wend. 659, 676 (N.Y. Sup. Ct. 1839); accord *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 507 (1833) (“Lord Coke, 2 Inst. 50, gives, as the settled construction and true meaning of the words ‘or by the law of the land,’ in Magna Charta, ‘without due process of law, so that no man be taken, imprisoned, or put out of his freehold, without due process of law’”).

²⁸² 5 N.C. (1 Mur.) 58 (1805).

of the land provision, which it interpreted as guaranteeing that none might be “deprived of their liberties or properties, unless by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution.”²⁸³ A similar argument was offered by Daniel Webster in *Dartmouth College*, where he defined “law of the land” to mean the “general law,” and prohibitive therefore of “acts of attainder, bills of pains and penalties . . . legislative judgments, degrees, and forfeitures.”²⁸⁴

Many courts refused to accept this novel interpretation of Magna Carta’s law of the land guarantee.²⁸⁵ Still, such was the trend in authority that by the late 1830s, state law of the land provisions had grown into one of the most dynamic fonts of judicial authority in the American system of governance.²⁸⁶

“Due process of law,” however, continued to languish in obscurity. Not once during these decades of development (so far as we know) did anybody suggest the Fifth Amendment’s Due Process of Law Clause imposed the same constraints on the federal government as were being discovered in state law of the land provisions.²⁸⁷ State courts occasionally drew on the meaning of “due process of law” in defining their state law of the land provisions, a usage consistent with Coke’s understanding of

²⁸³ *Id.* at 88.

²⁸⁴ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 581–82, 661 (1819). This argument was somewhat hinted at in dicta in Chief Justice Marshall’s decision in that case. *Id.* at 689; see also *Vanzant v. Waddell*, 10 Tenn. (2 Yer.) 260, 269–71 (1829) (defining state constitution’s law of the land provision to mean “a general public law equally binding upon every member of the community . . . under similar circumstances”).

²⁸⁵ *State v. ---*, 2 N.C. (1 Hayw.) 38, 43 (1794); *State v. Ledford*, 3 Mo. 102, 106 (1832); *Mayo v. Wilson*, 1 N.H. 53, 55 (1817).

²⁸⁶ See Corwin, *supra* note 74, at 378–85.

²⁸⁷ In one case, decided in 1815, counsel argued that a retroactive law passed by Congress could not be “Necessary and Proper” because, among a plethora of other reasons, “it would be virtually taking away private ‘property’ without ‘due process of law.’” *United States v. Bryan*, 13 U.S. (9 Cranch) 374, 379 (1815) (counsel’s argument) (emphasis added). This was ignored (and implicitly rejected) by the Court, which ruled for the opposing party. In a similar vein, Williams has pointed to two statements made during the 1820 Missouri debate in which representatives suggested that the restriction of slavery in certain federal territories would unconstitutionally deprive slaveholders of their property in violation of the federal Due Process of Law Clause. See Williams, *One and Only*, *supra* note 46, at 471 & n.288. Significantly, none of these pre-*Commentary* arguments drew on Coke or attempted to link “due process of law” to “the law of the land.”

the relationship between the two terms.²⁸⁸ But none argued “due process of law” encompassed the meaning of “law of the land.”

The U.S. Supreme Court’s 1819 decision in *Bank of Columbia v. Okely* is particularly telling.²⁸⁹ There, the Court considered whether a state statute granting a bank a summary mode of recovering on indorsed notes, without a trial by jury, violated the rights provided by the United States or Maryland constitutions.²⁹⁰ The Court first considered whether the statute violated the federal constitution’s Seventh Amendment jury trial right. Concluding this right had been waived, the Court then considered whether the act violated Maryland’s law of the land provision. The Court adopted the substantive view of that provision’s language, explaining it “secur[ed] the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice,” but found no violation of that provision on the case’s facts.²⁹¹ At no point did the Court’s decision mention the federal Due Process of Law Clause or suggest that it might bear a similar meaning to Maryland’s law of the land provision. Nor did the Court suggest, in any subsequent cases (until 1855), that its own substantive understanding of “law of the land” might color its interpretation of the Due Process of Law Clause.

In fact, and in contrast to the vibrant debate over the meaning of “law of the land,” the Due Process of Law Clause remained almost entirely overlooked. As noted above, only eleven federal court reports so much as used the words “due process of law” during the first three decades following the Founding.²⁹² And state statutes continued to occasionally

²⁸⁸ Sometimes the manner in which the court drew this link was somewhat ambiguous. In *Zylstra*, for example, the court passingly equated “the law of the land” with “due process of law” on the authority of Coke, arguably presaging Story’s later interpretation. 1 S.C.L. at 384–85. And in *Foy*, counsel commented that Coke had “expound[ed]” law of the land “to mean *due process of law*.” 5 N.C. at 75. See also *supra* note 281.

²⁸⁹ 17 U.S. (4 Wheat.) 235 (1819).

²⁹⁰ *Id.* at 242–45. At the time, the land ceded by Maryland to form the District of Columbia remained governed under the laws of Maryland. See An Act Concerning the District of Columbia, ch. 15, 6 Stat. 103, 103–105 (1801).

²⁹¹ *Id.* at 244.

²⁹² See, e.g., *Ex parte Burr*, 4 F. Cas. 791, 796 (C.C.D.C. 1823) (No. 2,186); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (“[T]he Crown] pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes . . . unless its corporate franchises should be taken away by due process of law.”).

use the term in its traditional, narrow sense.²⁹³ The same is also true of the few state court reports to use “due process of law” during this period.²⁹⁴

*C. The Mid-Century Conflation of “Due Process of Law” and
“Law of the Land”*

The first source we have found that expressly argued the Due Process of Law Clause should be understood to mean the same as “law of the land” is Justice Joseph Story’s enormously influential *Commentaries on the Constitution*, published in 1833. Writing four decades after the ratification, Justice Story states:

The [Due Process of Law Clause] is but an enlargement of the language of magna charta, . . . “neither will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land.” Lord Coke says, that these latter words, *per legem terre* (by the law of the land,) mean by due process of law, that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause in effect affirms the right of trial according to the process and proceedings of the common law.²⁹⁵

We conclude that Justice Story was the first to seriously propose that Coke intended to equate these two terms. Some have pointed to Chancellor James Kent’s *Commentaries on American Law*, published

²⁹³ See Act of Feb. 27, 1795, in 2 *Perpetual Laws of the Commonwealth of Massachusetts* 268, 268 (Worcester, Isaiah Thomas 1799) (declaring the state would begin paying for the upkeep of certain prisoners “committed by due process of law”); An Act to Prevent the Destruction of Oysters and Other Shell Fish, Throughout this Commonwealth, 1796 Acts & Laws of Massachusetts 578 (enacted Feb. 26, 1796) (authorizing any who discovered an oyster poacher in their town to temporarily seize their vessel until it “may be attached or arrested, by due process of law”).

²⁹⁴ *Nelson v. North*, 1 Tenn. (1 Overt.) 33, 34 (Tenn. Super. Ct. 1801) (“In civil suits [ex parte proceedings] are unknown to the principles of the common law, but introduced into the Court of Chancery, respecting . . . persons who willfully evade the due process of law.”); *Messier v. Amery*, 1 Yeates 533, 543 (Pa. 1795) (“The defendant has recovered his debt against Fairchild, by due process of law in the court of a foreign country, having competent jurisdiction. That decree remains in full force and unreversed to this day.” (emphasis omitted)).

²⁹⁵ 3 Joseph Story, *Commentaries on the Constitution of the United States* 661 (Bos., Brown, Shattuck, & Co. 1833).

between 1826 and 1830, as also adopting this interpretation,²⁹⁶ but we do not believe that to be a fair reading of Kent's treatise.²⁹⁷

Despite Story's influence, it took some time for his novel interpretation to enter caselaw. The first decision (so far as we are aware) to equate "law of the land" with "due process of law" was *Taylor v. Porter*, decided in 1843—five decades after the ratification.²⁹⁸ In *Taylor*, the New York Supreme Court struck down a statute authorizing the use of eminent domain to build private roads, relying upon both the law of the land and the due process of law provisions of the state's Constitution, the latter of which had been added in 1821.²⁹⁹ Justice Bronson's decision for the Court (citing Story and Kent) interprets Coke as equating "due process of law" and the "law of the land."³⁰⁰ Bronson therefore concludes that the meaning of New York's law of the land and due process of law provisions are identical, together guaranteeing that no member of the state could be

²⁹⁶ Riggs, *supra* note 45, at 994–95; Corwin, *supra* note 74, at 368; Barnett & Bernick, *supra* note 267, at 1615–16.

²⁹⁷ Kent writes:

The words, by the law of the land, as used in magna carta, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of these words.

2 James Kent, *Commentaries on American Law* 10 (N.Y., O. Halsted 1827). The words "in reference to this subject" indicate Kent understood "law of the land" to have a broader meaning which became more precise "in reference to this subject"—thus interpreting Coke in the manner we advocate. In a recent article, Barnett and Bernick, *supra* note 267, at 1615–16, also point to a passage in which Kent defines due process of law to mean "law[] in its regular course of administration." They cite, however, to an 1848 edition of Kent's work, published after his death. The original edition does not include this passage.

²⁹⁸ Six years earlier, a South Carolina state judge adopted this position in a concurring opinion in *State v. Dawson*, 21 S.C.L. (3 Hill) 100 (S.C. Ct. App. 1836) (Richardson, J., concurring) ("[T]he law of the land' of our own State constitution; and 'the due process of law' of the United States constitution, are precise synonymes."). It may also be fair to say *Taylor* was the logical conclusion of the analysis in *In re John & Cherry Sis.*, 18 Wend. 659, 676 (N.Y. Sup. Ct. 1839), which did not expressly rest on New York's law of the land provision.

²⁹⁹ *Taylor v. Porter & Ford*, 4 Hill 140 (N.Y. Sup. Ct. 1843).

³⁰⁰ Bronson highlights a passage where Coke defines "law of the land" to mean "by the due course and process of law." *Id.* at 146 (citing 2 *Institutes*, *supra* note 43, at 46). Not only does Bronson's interpretation mistake the context in which Coke's passage appears (as argued *supra*) but Bronson also misreads the definition to which he cites. Coke here defines "law of the land" to mean the "due course and process of [L]aw." 2 *Institutes*, *supra* note 43, at 46. Bronson's analysis simply overlooks Coke's use of "due course . . . of law."

deprived of his property “upon trial had according to the course of the common law” rather than “by mere legislation.”³⁰¹

Justice Bronson’s equation of “due process of law” with “law of the land” was a necessary step towards introducing the expansive procedural meaning of “law of the land” into the Due Process of Law Clause. This commingling culminated in 1855 with the United States Supreme Court’s decision in *Murray’s Lessee v. Hoboken Land & Import Company*.³⁰² There, for the first time, the Court held that a statutory procedure resulting in the deprivation of life, liberty, or property might be unconstitutional under the Due Process of Law Clause, despite complying with the Constitution’s specifically enumerated procedural requirements—such as the jury right. Citing Coke’s *Institutes*, Justice Curtis explained for a unanimous court that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in Magna Charta.”³⁰³ To support this proposition, Curtis cited a raft of early cases discussing state law of the land provisions—indeed, the only case he cites which so much as discusses a due process of law provision is Bronson’s opinion in *Taylor*.³⁰⁴ Drawing exclusively on law of the land cases, Curtis then defined “due process of law” to mean “regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.”³⁰⁵

Although the *Murray* Court concluded the summary procedure at issue was constitutional due to its historical pedigree, Justice Curtis’s decision opened the door to a dramatic reinvention of the Due Process of Law Clause as a check on the statutory enactment of novel methods of

³⁰¹ *Taylor*, 4 Hill at 146. Bronson discusses both provisions separately but offers identical definitions of their meaning. Compare *id.* (concluding “law of the land” means “no member of the state shall be . . . deprived of any of his rights . . . unless the matter shall be adjudged against him upon trial had according to the course of the common law”), with *id.* at 147 (concluding due process of law “cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities” of law).

³⁰² 59 U.S. (18 How.) 272 (1855).

³⁰³ *Id.* at 276 (citing 2 *Institutes*, *supra* note 43, at 50).

³⁰⁴ Justice Curtis’ long string cite here is based almost entirely on cases interpreting state law of the land provisions. See *Vanzant v. Waddell*, 10 Tenn. (2 Yer.) 260 (1829) (interpreting a state law of the land provision); *State Bank v. Cooper*, 10 Tenn. (2 Yer.) 599 (1831) (same); *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1 (1833) (same); *Jones’ Heirs v. Perry*, 18 Tenn. (10 Yer.) 59 (1836) (same). The only exception is his citation to Justice Bronson’s opinion in *Taylor v. Porter*.

³⁰⁵ *Murray*, 59 U.S. at 280.

procedure.³⁰⁶ And just as it had been a short leap for state courts to expand the reach of their law of the land provisions from the procedural into the substantive, the same was true of the Due Process of Law Clause. Not three years later, Chief Justice Taney's precipitous decision in *Dred Scott v. Sandford* did just that, concluding the federal government was powerless to emancipate an enslaved person because, among other reasons, a legislative deprivation of property "could hardly be dignified with the name of due process of law."³⁰⁷ Although much of *Dred Scott* was overruled by the Fourteenth Amendment following the Civil War, Taney's substantive understanding of the Due Process of Law Clause persisted and was given fresh relevance as that same amendment included a due process of law provision directly applicable against the states.³⁰⁸ From that point forward, "due process of law" proved to be exceptionally fruitful fonts of judicial power, having been invoked to strike down economic regulations,³⁰⁹ restrictions on abortion,³¹⁰ and all manner of things in between.

D. "Due Process of Law," "Law of the Land," and Coke

There is little evidence to suggest that Justice Story's understanding of Coke was held by anyone prior to the mid-nineteenth century. We have already discussed how caselaw interpreting state law of the land provisions developed separate and apart from the Due Process of Law Clause for much of our nation's early history. But it is also worth noting the evidence from colonial charters and declarations of rights, which indicates "due process of law" and "law of the land" were understood to mean different things.

Only a handful of states enacted due process of law provisions into their declarations of rights. Where such provisions were included, they were used in addition to, rather than in replacement of, separate law of the land guarantees. We have already seen how New Plymouth Colony's "General Fundamentals" appended a due process of law provision to their

³⁰⁶ For a brief summary of this doctrine's development, see Eberle, *supra* note 74, at 359–62.

³⁰⁷ 60 U.S. (19 How.) 393, 450 (1857) (overruled on other grounds by constitutional amendment).

³⁰⁸ U.S. Const. amend. XIV, § 1.

³⁰⁹ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

³¹⁰ *Roe v. Wade*, 410 U.S. 113, 164 (1973).

recitation of Magna Carta’s law of the land guarantee.³¹¹ The same is true of the late seventeenth century declarations of rights of New York, East New Jersey, and Massachusetts Bay—the only other colonies to enact due process of law guarantees.³¹² The Massachusetts Bay “General Privileges” are typical of the three, including separate law of the land and due process of law guarantees:

[Section 1.] “That no freeman shall be taken or imprisoned or be disseized of his freehold or libertys or his free customes, or be outlawed or exiled, or in any manner destroyed, nor shall be passed upon, adjudged or condemned, but by the lawful judgment of his peers of the law of this province.”

. . .

Section 5. “No man, of what state or condition soever, shall be put out of his lands, or tenements, not be taken or imprisoned nor disherited nor banished nor any ways destroyed, without being brought to answer by due process of law.”³¹³

That all of four of these colonies chose to include both provisions is powerful evidence that they did not believe their meanings to be synonymous. Examining the text, it is apparent the provisions were used to achieve distinct goals: the law of the land provisions govern the substantive law to be applied before certain fundamental rights are taken (“the law of this province”), while the due process of law provisions guarantee notice and the jurisdiction of the courts.³¹⁴

The New York Rights Act of 1787 took a similar tact. As noted previously, New York State’s first Constitution contained a “law of the land” provision. But the New York legislature of 1787 also enacted the Six Statutes into law to ensure the state’s citizens could benefit from both sets of protections, indicating they did not believe the two to be identical. Indeed, section four of the New York Rights Act expressly contemplates the two phrases as distinct, declaring “no person shall be put to answer without . . . due Process of Law, *according to the Law of the Land*.”³¹⁵

³¹¹ See supra note 195 and accompanying text.

³¹² See supra notes 197–201 and accompanying text.

³¹³ An Act Setting Forth General Privileges, supra note 203, at 97 n.43.

³¹⁴ See Williams, One and Only, supra note 46, at 438–41 (making this point).

³¹⁵ An Act Concerning the Rights and Citizens of this State (Jan. 26, 1787), in 2 Laws of the State of New York 344, 344 (Albany, Weed Parsons & Co. 1886).

Clearly, if “due process of law” and “law of the land” had the same meaning, this sentence would not make sense.

What’s more, Justice Story’s interpretation of Coke was simply wrong, and demonstrably so with reference to the very passage Justice Story cites. Coke was not equating these two terms; he was stating that the law of the land *required* due process of law, as was the general understanding of his time.³¹⁶

The passage at issue appears in Coke’s methodical analysis of Magna Carta Chapter 39’s language, in which he defines various phrases or terms as they appear in the Chapter, in turn. When he comes to “[b]ut by the law of the land,” he pauses to offer the following definition (to which Justice Story points):

[1] For the true sense and exposition of these words, see the statute of 37 E. 3. cap. 8[,] where the words, by the Law of the Land, are rendred, without due proces of Law, [2] for there it is said, though it be contained in the great Charter, that no man be taken, imprisoned, or put out of his free-hold without proces of the law, [3] that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by Writ original of the Common Law.³¹⁷

Unfamiliar phrasing aside, there is no great mystery to Coke’s meaning. In the [1] first part, Coke explains “due process of law” is an “exposition” or elaboration upon the meaning of “law of the land.” As evidence for this, he points out that one of the Six Statutes recites Chapter 39 of Magna Carta, but “render[s]” (or replaces) “law of the land” with “due process of law.” In the [2] second part, Coke proves this by quoting the relevant statute. In the [3] third part, Coke again draws on the Six Statutes to explain what is meant by “due process of law,” which he defines as “indictment or presentment . . . or by Writ original of the Common Law.”³¹⁸

As discussed above, Coke believed Magna Carta’s promise of “law of the land” required that due process of law be afforded. Here he is advancing this understanding, drawing on the Six Statutes to show that *in this context* the “law of the land” guarantee had long been understood as encompassing a right to “due process of law.” His analysis is entirely

³¹⁶ See *supra* Subsection III.A.3.

³¹⁷ 2 Institutes, *supra* note 43, at 50.

³¹⁸ Coke offered a variety of definitions of “due process of law” in this passage, all of which are drawn from the Six Statutes discussed above.

conventional; Coke is simply repeating the arguments made by the common law lawyers in the *Five Knights' Case*.

Like his contemporaries, Coke understood “law of the land” to have an extraordinarily broad meaning. His *Institutes* frequently use the term as a shorthand for England’s substantive laws. Indeed, had Justice Story read just one page further he would have observed Coke use “law of the land” to mean the laws of England.³¹⁹ And, not five pages earlier, Coke defines “law of the land” to mean “the Common Law, Statute Law, or Custom of England.”³²⁰ Coke’s *Institutes* use the term in this manner throughout, often contrasting the “law of the land” with another body of substantive law in place at the time: the canon law. In the fourth part of his *Institutes*, for example, Coke writes that though “spiritual persons are prohibited by the Canon Law to hunt, yet by the Common Law of the Land they may for their recreation.”³²¹ Elsewhere in *Institutes*, Coke describes how the “law of the land” defines tenancies,³²² prohibits extended detention prior to adjudication,³²³ restricts the jurisdiction of the Court of Chivalry against that of the common law courts,³²⁴ and imposes the dreaded *peine forte et dure* upon those who refuse to enter a plea.³²⁵

Coke’s broad substantive understanding of “law of the land” makes it difficult to read him as equating that term with “due process of law.” For

³¹⁹ 2 *Institutes*, supra note 43, at 51.

³²⁰ *Id.* at 46.

³²¹ Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 309 (London, W. Rawlins 1681) [hereinafter 4 *Institutes*]. Similarly, Coke elsewhere contrasts the canon law with the law of the land, explaining that a child born during the period of his parents’ engagement will be deemed mulier—born in wedlock—“by the law of holy church . . . albeit by the law of the land he is a bastard.” Edward Coke, *The First Part of the Institutes of the Laws of England* 244 (London, William Rawlins et al. 1684) [hereinafter 1 *Institutes*]. This is a translation of Littleton but is nonetheless relevant evidence of how “law of the land” was used in Coke’s *Institutes*. Coke also draws a similar comparison when he declares a group of Bishops who administered unlawful oaths went “against the express Law of God, and against the Law of the Land, for that they had no warrant to minister the [oaths].” Edward Coke, *The Third Part of the Institutes of the Laws of England* 165–66 (London, W. Rawlins 1683) [hereinafter 3 *Institutes*].

³²² 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 342 (London 1797) (translating an earlier statute).

³²³ 4 *Institutes*, supra note 321, at 168.

³²⁴ *Id.* at 123.

³²⁵ 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 177 (London 1797) (translating an earlier statute as “notorious felons . . . [who] will not put themselves in enquests of felonies . . . shall have strong and hard [*forte et dure*] imprisonment, as they which refuse to stand to the common law of the land”).

one thing, the very passage cited in support of this erroneous understanding defines “due process of law” to mean “indictment or presentment . . . or by Writ original of the Common Law.”³²⁶ Obviously, this definition is much narrower than Coke’s capacious understanding of “law of the land.” For another, Coke elsewhere makes clear he understood “law of the land” and “due process of law” to refer to different concepts, writing: “[N]o man can be taken, arrested, attached, or imprisoned but by due process[s] of Law, *and* according to the Law of the Land.”³²⁷ This text indicates Coke understood these to be two separate guarantees—much like the seventeenth century American colonists who chose to include separate “due process of law” and “law of the land” guarantees in their declarations of rights.³²⁸

Like his contemporaries, Coke did not believe “due process of law” meant the same as “law of the land.”³²⁹ The relationship Coke is describing is not one of direct equivalence. Coke’s view is that a violation of due process of law is a violation of the law of the land, but he does not say the inverse is necessarily true. According to his *Institutes*, for example, it would be against the law of the land to prohibit “spirituall persons” from hunting in certain forests, but it would not necessarily be a violation of due process of law. His understanding of “law of the land” was simply more expansive than that of “due process of law.” Coke, in this passage, was only explaining the “law of the land” required “due process of law” be afforded in certain circumstances.

The innovation of Justice Story and his mid-nineteenth century compatriots was to invert Coke’s argument. Where Coke believed “due process of law” should be read into the meaning of “law of the land,” these later-day interpreters used Coke’s writing to argue the mirror opposite—attempting to read the rich substantive meaning of “law of the land” into the Fifth Amendment. As explained, we do not believe Coke’s *Institutes* supports this interpretation. But even leaving aside the broader context of his writings, Coke’s post-ratification interpreters face a more direct problem. The passage on which their argument rests quite clearly defines “due process of law” to mean “indictment, or presentment . . . or

³²⁶ Id. at 50.

³²⁷ Id. at 52 (emphasis added); see Williams, *One and Only*, supra note 46, at 429 n.82 (noting this conjunctive).

³²⁸ See supra notes 195–201 and accompanying text.

³²⁹ See Jurow, supra note 46, at 272–77.

[] writ original of the common law.” Indeed, Coke then goes on to quote from several of the Six Statutes to reinforce that the phrase means legally issued process (i.e., writs).³³⁰ It is difficult to understand how a passage which defines “due process of law” so narrowly has become the primary citation for those who would interpret the term broadly.

E. Conclusion: “Due Process of Law” and “Law of the Land” Had Distinct Meanings

Modern scholars have long recognized that “law of the land” and “due process of law” had distinct meanings in the English common law tradition but have continued to conflate the two phrases’ original public meanings on Coke’s authority alone.³³¹ Such was Coke’s importance to the Founding generation that even his mistakes, we are told, were considered the law by our nation’s founders.³³²

³³⁰ 2 Institutes, supra note 43, at 50 (“[B]y indictment or presentment of good and lawful men, where such deeds be done in due manner, or by Writ original of the Common Law. Without being brought in to answer but by due Proces of the Common Law. No man be put to answer without presentment before Justices, or thing of record, or by due proces, or by writ original, according to the old Law of the Land.”).

³³¹ See *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 28 (1991) (Scalia, J., concurring) (citing *Jurov*, supra note 46, at 272–75) (“Although historical evidence suggests that the word ‘process’ in this provision referred to specific writs employed in the English courts (a usage retained in the phrase ‘service of process’) . . . Sir Edward Coke had a different view.”); *Gedicks*, supra note 259, at 594 (“[W]hether those who developed substantive due process misunderstood the original meaning of Magna Carta is irrelevant . . . the meaning of a constitutional text is its public meaning at the time it was . . . ratified”); *Riggs*, supra note 45, at 995 (“Modern commentators, while sometimes asserting that Coke was wrong when he said that the two were identical, generally agree that law of the land and due process clauses in state constitutions were regarded as interchangeable.” (citations omitted)); Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 96 (1982) (“It is necessary to pay attention to Coke, not because he was right in describing the law of England, but because the Framers may have thought Coke right”); Ralph U. Whitten, *The Constitutional Limitations on State Choice of Law: Due Process*, 9 *Hastings Const. L.Q.* 851–864–65 (1982) (“[Coke’s] errors, if they are errors, clearly do not affect the meaning of due process” (emphasis omitted)); *Barnett & Bernick*, supra note 267, at 1607 (“Thanks in significant part to Lord Edward Coke’s commentaries, the phrases ‘law of the land’ and ‘due process of law’ became synonymous.”); see also *In re Winship*, 397 U.S. 358, 379 (1970) (Black, J., dissenting) (citing Coke for the proposition “due process of law” and “law of the land” are synonymous); *Chapman & McConnell*, supra note 253, at 1682–83, 1722 (citing 2 Institutes, supra note 43, at 50) (same); *Eberle*, supra note 74, at 341 (same).

³³² See Max Radin, *On Legal Scholarship*, 46 *Yale L.J.* 1124, 1125 (1937) (“[I]t is useless to prove Coke to be mistaken on any given point. Coke’s mistakes, we are told, are the common law.”).

As we have argued, however, it was Coke's post-ratification interpreters—and not Coke himself—who were mistaken. Justice Story's interpretation of Coke was incorrect. More importantly, there is little evidence that anybody held this misunderstanding prior to the 1830s.³³³ Indeed, we have been unable to find any cases drawing such an equivalence prior to Justice Bronson's decision in 1843. Rather, the available evidence suggests the pre-ratification understanding of “due process of law” persisted for decades following the enactment of the Bill of Rights before becoming conflated with caselaw interpreting state law of the land provisions. The evidence strongly suggests our modern understanding of the meaning of “due process of law” is mistaken.

V. UNANSWERED QUESTIONS AND IMPLICATIONS

In this final section, we identify three important questions that we have not answered and sketch some of the implications of our findings for an originalist reformulation of contemporary Fifth Amendment Due Process of Law Clause doctrine.

A. Three Unanswered Questions

From an originalist perspective, the evidence for the process theory is very strong indeed. There is no evidence for the Fair Procedures Theory—it is a living constitutionalist invention. If we limit ourselves to 1791 and the Fifth Amendment Due Process of Law Clause, then evidence favoring the Process Theory over the Legal Procedures Theory is overwhelming. We believe that after full and fair debate and discussion and the replication of our research, many of the questions regarding the original meaning of the Clause will be settled. There are, however, three questions upon which it seems likely that there will be continued discussion and debate.

1. Is the Due Process of Law Clause Static or Dynamic?

The first question that we have not fully answered in this paper is whether the original meaning of the Fifth Amendment Due Process of

³³³ In a recent article, Chapman and McConnell (who support a thick understanding of the Due Process of Law Clause) cite several early cases as if those decisions rest on state due process of law provisions. Chapman & McConnell, *supra* note 253, at 1728–29 & n.246. But all the cases they cite (prior to 1859) were decided under state law of the land provisions—they do not so much as use the phrase “due process of law.”

Law Clause is “dynamic” or “static.” Let us define each of these two possibilities:

Dynamic Due Process of Law: The dynamic view of the Due Process of Law Clause is that the forms and incidents of the process itself (the document) and the service of process (the manner of delivery) are subject to change. The dynamic view entails that the details of process and its service can change over time but the requirement that there be judicial process and that it be delivered is fixed.

Static Due Process of Law: The static view of the Due Process of Law Clause is that the forms and incidents of the process and its service were fixed as of 1791. The static view entails that the content of the process and the modes of service that were in effect in 1791 must be followed today.

In order to avoid misunderstanding, we want to emphasize that the dynamic view of the Due Process of Law Clause is not equivalent to living constitutionalism. Dynamic Due Process of Law would allow for a variety of changes in the legal requirements for the process and its service. For example, the process might include a full copy of the complaint, or it might provide a summary and instructions for obtaining the full version. Service rules might allow for alternatives to in-hand service, such as service by mail or electronic service. But the dynamic interpretation would not authorize the extension of the Clause to matters beyond process itself and it would not authorize a change in the meaning of “due process” to fair process.

It seems unlikely that there will be decisive direct evidence that favors one of these possibilities over the other. The question could not have arisen until after the Fifth Amendment went into effect. Although the legal norms governing service and process may have been dynamic as a matter of pre-amendment history, there remains the possibility that the amendment would have been understood as requiring compliance with the legal norms as they existed in 1791. But as of that date, there would have been no practical difference between the dynamic and static understanding of the clause. The practical question would only arise at a later date after the legal requirements for service of process had changed in some significant way. And even after a change had occurred, the issue would only have come to the surface because someone objected, either during litigation or the legislative process. So far as we know, there is no

direct and unequivocal evidence that favors either the dynamic or the static understandings of “due process of law.”

Nonetheless, we believe that there are good reasons to favor the dynamic understanding over the static one. The Seventh Amendment is instructive: the Preservation Clause requires that the right of trial by jury at common law be “preserved,”³³⁴ explicitly freezing the right in place as of 1791. The Fifth Amendment Due Process of Law Clause has no such language. In the case of the right to jury trial, the Preservation Clause is a short cut—the alternative would have been to spell out the complex structure of the right, requiring a long and complex code of procedure. There is no such need in the case of the Due Process of Law Clause. In comparison to the right to jury trial, process and its service are relatively straightforward and simple in conceptual structure. Because the Due Process of Law Clause does not explicitly require process of law be preserved as of 1791 and because it does not provide specific directions regarding either the form of process or the mechanics of service, we believe that the dynamic view is likely correct.

But for the purposes of this article, we leave the question whether the static or dynamic understanding is the better interpretation unanswered. That question requires an article (hopefully shorter than this one) of its own.

2. What Is the Relationship of the Fifth and Fourteenth Amendment Due Process of Law Clauses?

Our inquiry has focused on the Fifth Amendment Due Process of Law Clause. We have not canvassed the historical evidence regarding the meaning of “Due Process of Law” in the Fourteenth Amendment. It is possible that the meaning changed between 1791 and 1868. Indeed, we have discussed some evidence that supports the thesis that the meaning did change. Justice Story’s misinterpretation of Coke,³³⁵ Alexander Hamilton’s legal arguments,³³⁶ and other events might have altered the understanding of “Due Process of Law” by 1868. We take no position on this question.

In addition to the historical question about the meaning of the phrase in 1868, the possibility of divergence raises a theoretical question about

³³⁴ U.S. Const. amend. VII.

³³⁵ See *supra* Section IV.D.

³³⁶ See *supra* Subsection III.B.2.c.

the relationship between the two Clauses. We believe that there are three possibilities:

Possibility One, Hermeneutical Independence: The meanings of the two Clauses are independent of one another. Although the phrase is the same, the communicative content of the two Clauses does not interact.

Possibility Two, The Meaning of the Fourteenth Amendment Conforms to the Meaning of the Fifth Amendment: Because the Due Process of Law Clause of the Fourteenth Amendment is identical to the Fifth Amendment, the meaning of the former provision is the same as the latter.

Possibility Three, The Meaning of the Fifth Amendment Was Altered by the Fourteenth Amendment: Ratification of the Fourteenth Amendment implicitly amended the earlier Fifth Amendment Due Process of Law Clause.

We do have a view about this question. We believe that the theoretical commitments of Public Meaning Originalism are most consistent with Possibility One. Defense of our view is outside the scope of this Article.

3. What Is the Original Meaning of “Deprive” and “Life, Liberty, or Property”?

Our focus in this Article has been on the original meaning of “due process of law,” but the full Due Process of Law Clause contains two other key elements with contested meanings. We will not tarry over the original meaning of “State” because it is clear from the context of the Fourteenth Amendment that the relevant sense of “State” refers to the states that ratified the Constitution or that were formally admitted to the union by Congress. But the original meaning of “deprive” and “life, liberty, or property” may be contested; moreover, it is far from clear that modern interpretations of these key terms are consistent with the original meaning. We leave these questions for another occasion.

B. The Implications of the Process Theory for Originalist Justices

What are the implications of the Process Theory of the Due Process of Law Clause from an originalist perspective? This is a rich and complex question. Here we will sketch our views, but a detailed development of our position would require substantial additional work. Because we are

only concerned with the Fifth Amendment Due Process of Law Clause, the implications that follow are limited to federal law.

1. Implications for Federal Procedural Due Process

The phrase “procedural due process” is used to distinguish the implications of the Due Process of Law Clause for judicial and administrative procedures from so-called “substantive due process.”³³⁷ The Process Theory suggests that the use of the word “procedural” is mistaken, because it implies that the Clause reaches all governmental “procedures” that deprive persons of life, liberty, or property. In other words, modern “procedural due process” doctrine goes beyond the original meaning of “Due Process of Law” and extends to what should be called the “Due Course of Law” from an originalist perspective.

Mathews v. Eldridge can be used to illustrate this implication. *Mathews* is understood to have established a balancing test for procedural due process. The question was “whether the Due Process Clause of the Fifth Amendment requires that, prior to the termination of Social Security disability benefit payments, the recipient be afforded an opportunity for an evidentiary hearing.”³³⁸ Justice Powell balanced “the degree of potential deprivation that may be created by a particular decision”³³⁹ as weighted by “the probable value, if any, of additional procedural safeguards”³⁴⁰ against “the public interest,” including “the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision.”³⁴¹ This balancing approach has been extended to many other domains of procedural due process.³⁴²

³³⁷ The distinction between substantive and procedural due process goes back at least as far as the late 1930s. See Willard Hurst, 52 Harv. L. Rev. 851, 855 n. 15 (1939) (reviewing Louis B. Boudin, *Truth and Fiction About the Fourteenth Amendment*, 16 N.Y.U. L.Q. Rev. 19 (1938)); Howard Jay Graham, *The “Conspiracy Theory” of the Fourteenth Amendment*, 47 Yale L.J. 371 (1938); and Louis A. Warsoff, *Equality and the Law* (1938)).

³³⁸ *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976).

³³⁹ *Id.* at 341.

³⁴⁰ *Id.* at 343.

³⁴¹ *Id.* at 347.

³⁴² See, e.g., Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 Colum. L. Rev. 599, 615 (2015) (“The Supreme Court’s standard framework for assessing whether a challenged procedure satisfies the requirements of due process focuses on the balancing test first articulated in *Mathews v. Eldridge*, as refined by the Court’s later decision in *Connecticut v. Doe* . . .”).

From an originalist perspective, the underlying premise of *Mathews* is mistaken. Administrative hearings are not “process” within the original meaning of the Fifth Amendment Due Process of Law Clause. Because *Mathews* decided that a hearing was not required, its outcome is not in question, but the fundamental premise of its reason cannot be supported on originalist grounds: the “form of hearing”³⁴³ is a matter of procedure, but it is not a matter of process.

2. Implications for the Federal Law of Personal Jurisdiction

Personal jurisdiction might be conceived as an aspect of procedural due process,³⁴⁴ but as a practical matter, it is a doctrinal field unto itself. Thinking about personal jurisdiction (or territorial jurisdiction) has evolved. It may come as a surprise to contemporary readers that the phrase “personal jurisdiction” did not make an appearance in *Pennoyer v. Neff*, which does, however, contain a multitude of references to “process” and “service by publication.”³⁴⁵

Service of process is the mechanism by which courts acquire personal jurisdiction over defendants in *in personam* actions. Because the Due Process of Law Clause requires process, it has implications for the validity of personal jurisdiction as a practical matter. Thus, in *Burnham v. Superior Court*,³⁴⁶ Justice Scalia’s opinion reasoned that service on a defendant who was physically present within the state was sufficient to validate personal jurisdiction whether or not the *International Shoe Co. v. Washington* minimum contacts test was satisfied.³⁴⁷ The flip side of that coin would be that in the absence of valid service of process, personal jurisdiction would violate the Due Process of Law Clause. *Burnham* was

³⁴³ *Mathews*, 424 U.S. at 333.

³⁴⁴ See Martin H. Redish & Eric J. Beste, Personal Jurisdiction and the Global Resolution of Mass Tort Litigation: Defining the Constitutional Boundaries, 28 U.C. Davis L. Rev. 917, 949 (1995).

³⁴⁵ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 726 (1878), overruled in part by *Shaffer v. Heitner*, 433 U.S. 186 (1977) (“If, without personal service, judgments *in personam*, obtained *ex parte* against non-residents and absent parties, upon mere publication of process, which, in the great majority of cases, would never be seen by the parties interested, could be upheld and enforced, they would be the constant instruments of fraud and oppression.”). This is the standard citation, but since *Pennoyer* did not involve *quasi in rem* jurisdiction, it was not actually overruled by *Shaffer*. Rather, it was dictum in *Pennoyer* regarding *quasi in rem* jurisdiction that was disapproved.

³⁴⁶ *Burnham v. Superior Ct.*, 495 U.S. 604 (1990).

³⁴⁷ *Id.* at 610–11; *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

a Fourteenth Amendment case,³⁴⁸ but the same reasoning would apply to a federal court under the Fifth Amendment.

The framework for assessing the validity of federal service of process is provided by Rule 4(k) of the Federal Rules of Civil Procedure.³⁴⁹ The rule has a complex structure and interacts with federal statutes that authorize nationwide service of process. Rule 4(k)(1)(A) authorizes service on a person “who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”³⁵⁰ That provision implicitly requires reference to state law governing service of process, including state long-arm statutes and the Fourteenth Amendment Due Process of Law Clause—implicating questions outside the scope of this Article.

Rule 4(k)(2) goes beyond the personal jurisdiction of the state courts:

For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.³⁵¹

Rule 4(k)(2)(B) goes to the constitutional limit in cases in which the claim arises under federal law and in which no state court of general subject-matter jurisdiction has personal jurisdiction. This provision implies that service of process is valid under the Rule outside the territorial limits of the United States so long as the Due Process of Law Clause of the Fifth Amendment is satisfied.

Given the original meaning of the Fifth Amendment, the reach of Rule 4(k)(2)(B) depends on the question whether the Clause is properly given a static or dynamic reading. Given a static reading, the limits imposed by *Pennoyer v. Neff* may still be in force, with the consequence that such process in an *in personam* action on someone that is not a citizen of the United States would be invalid. But if the dynamic understanding is correct, then such service would be valid, precisely because it is authorized by Rule 4(k)(1)(A).

³⁴⁸ *Burnham*, 495 U.S. at 607.

³⁴⁹ Fed. R. Civ. P. 4(k).

³⁵⁰ Fed. R. Civ. P. 4(k)(1)(A).

³⁵¹ Fed. R. Civ. P. 4(k)(2).

3. *Implications for the Federal Law of Substantive Due Process*

Substantive due process is not supported by the original meaning of the Fifth Amendment Due Process of Law Clause. This implies that the reasoning of unenumerated rights cases such as *Griswold v. Connecticut*,³⁵² *Lochner v. New York*,³⁵³ and *Roe v. Wade*³⁵⁴ would not extend to actions of the federal government. But that is not the end of the matter from an originalist perspective. The question whether the original meaning of the constitutional text requires the recognition of judicially enforceable, unenumerated constitutional rights depends on the meaning of other constitutional provisions, including the Ninth Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”³⁵⁵

The implications of the Ninth Amendment for the recognition of unenumerated rights retained by the people is far beyond the scope of this Article. Those implications are hotly debated.³⁵⁶

C. The Implications of the Process Theory for Living Constitutionalists

What about living constitutionalists? What relevance does the original meaning of the Fifth Amendment Due Process of Law Clause have for them? These questions cannot be answered in the abstract. Living constitutionalism is a family of theories that are united in their rejection of originalism but widely divergent in other respects.³⁵⁷ Living constitutionalists might reject judicial review altogether or restrict it to cases involving the right to vote and political speech.³⁵⁸ Other living constitutionalists might downplay the role of text and instead focus on

³⁵² 381 U.S. 479, 485–86 (1965).

³⁵³ 198 U.S. 45, 64 (1905).

³⁵⁴ 410 U.S. 113, 152 (1973).

³⁵⁵ U.S. Const. amend. IX.

³⁵⁶ See, e.g., Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *Tex. L. Rev.* 1, 3 (2006); Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *Tex. L. Rev.* 331, 336 (2004); Christopher J. Schmidt, *Revitalizing the Quiet Ninth Amendment: Determining Unenumerated Rights and Eliminating Substantive Due Process*, 32 *U. Balt. L. Rev.* 169, 169 (2003); Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 *Colum. L. Rev.* 498, 501 (2011).

³⁵⁷ Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 *Nw. U. L. Rev.* 1243, 1261 (2019).

³⁵⁸ *Id.* at 1273–74.

moral readings that are not constrained by original meaning.³⁵⁹ Constitutional pluralists (multiple modality theorists) believe that original meaning has an important role to play in constitutional interpretation and construction—even if the original meaning is not binding.³⁶⁰ And when it comes to the judiciary, we believe that almost all judges would accept that the original meaning of the constitutional text ought to be considered in constitutional cases. Thus, for many living constitutionalists, the original meaning of the Due Process of Law Clause will at least be relevant—even if it would not be decisive.

The role of the original meaning of the Fifth Amendment Due Process of Law Clause for living constitutionalists can be illustrated by considering the way that it might play a role for constitutional pluralists in cases that involve an extension of the *Mathews v. Eldridge* balancing test to new factual contexts. Constitutional pluralists consider multiple modalities of constitutional argument; a representative list might include text, historical practice, precedent, constitutional values, and considerations of institutional competence. Given that the original meaning of the constitutional text is very clear, a pluralist might conclude that the textualist modality should be controlling, given the lack of controlling precedent and contrary historical practice. On the other hand, the pluralist might conclude that the specific issues controlled by existing precedent, such as the application of the balancing test to social security disability benefits in *Mathews* itself, should remain in place on the basis of the precedent modality.

D. Further Implications: Due Process and Criminal Procedure

Before we conclude, we note an important area that we have not addressed in this Article. Our investigation of the implications of the Due Process of Law Clause has focused primarily on civil contexts, but many of the most important questions will arise in the context of criminal procedure. Explorations of those implications is a large topic that we must postpone for a future occasion. The Process Theory implies that the Due Process of Law Clause requires that criminal defendants receive timely formal notice from a court before any deprivation of liberty occurs. The implications of this requirement for temporary deprivations of liberty that occur in the context of policing raise issues that we cannot discuss here.

³⁵⁹ *Id.* at 1272.

³⁶⁰ *Id.* at 1271.

CONCLUSION

The original public meaning of the Fifth Amendment Due Process of Law Clause will come as a surprise to many readers. The decisions of the United States Supreme Court in the modern era read “due process of law” as equivalent to “fair procedures,” but that reading is unsupported from an originalist perspective. Many originalists believe that “due process of law” is equivalent to all of what is now called “procedural due process,” but that view is clearly wrong once all the evidence is considered.

The fact that almost all of modern Fifth Amendment Due Process of Law Clause doctrine, as articulated by the Supreme Court, is either wrong or wrongly reasoned from an originalist perspective raises a host of questions that we have not answered. Should the Supreme Court continue to adhere to these decisions on the basis of the doctrine of stare decisis? Or should they be reexamined, overruling some and disapproving the reasoning of others? Given the sheer volume of decisions, returning to the original meaning of the Fifth Amendment Due Process of Law Clause is a task for years or decades—not for a single term of the Supreme Court. And the likelihood of such a dramatic change is yet another question, the answer to which depends on the future composition of the Supreme Court and the willingness of even originalist Justices to overrule deeply entrenched precedent.