

## THE LITTLE WORD “DUE”

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### I. INTRODUCTION

The Fifth<sup>1</sup> and Fourteenth<sup>2</sup> Amendments bar the government from depriving anyone of “life, liberty, or property, without due process of law.” The ambiguity of that phrase has kept the judiciary busy for many generations, but that same ambiguity has become “completely eclipsed by the little word ‘due.’”<sup>3</sup> The goal of the present article is to study this critical word, and in particular to examine whether a process is automatically “due” if it is owed according to positive law,<sup>4</sup> or

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1. “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

2. The federal and state governments are limited by the Fifth and Fourteenth Amendments respectively.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

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

3. RODNEY L. MOTT, *DUE PROCESS OF LAW* 703 (Leonard W. Levy ed., Da Capo Press 1973) (1926). Mott’s book is a very useful tool for any researcher looking for leads to original material and early practices regarding due process. The key role of the word “due” in modern jurisprudence is exemplified by the abortion cases. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992) (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”)

4. Dictionaries tell us that the word “due” has several variations of meaning, depending on the context. However, the basic meaning of the word “due” is “owed.” *See* SAMUEL JOHNSON, *A DICTIONARY OF THE ENGLISH LANGUAGE* (11th ed. 1779): “The participle passive of owe. [dû,

alternatively whether a process can only be “due” if it accords with judicially ascertained principles of liberty and justice. The present article concludes that the latter interpretation is incorrect, and that the Due Process Clause should not be used to convert natural law into enforceable law outside the democratic and republican procedures established by the Constitution.

Justice Hugo Black, especially in his later years, advocated the objectivistic (as opposed to subjectivistic) interpretation: “[f]or me the only correct meaning of that phrase [‘due process of law’] is that our Government must proceed according to the ‘law of the land’ — that is, according to written constitutional and statutory provisions as interpreted by court decisions.”<sup>5</sup> The terms “objectivistic” and “subjectivistic” refer here to the perspective of the judiciary, which will either look primarily to external positive law such as statutes and constitutions in order to determine what is due (as objectivists), or will instead look to the judiciary’s own contrary experiences, standards, and precedents to determine what is due (as subjectivists). The essential question that this article addresses is not whether due process is substantive or procedural, but instead whether it is subjectivistic or objectivistic.

The present article does not dispute that various other constitutional provisions do grant the judiciary considerable flexibility to exercise restraint upon Congress and upon the states. Nor does the present article dispute that the Due Process Clause allows the judiciary to determine what is “due” based upon other factors when no pertinent positive law requirement exists, assuming that Congress intended the judiciary to fill

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French.] I. Owed . . . .” See also *infra* note 129 (a definition of “due” provided by the Supreme Court).

5. *In Re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) quoted in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2680 (2004) (Thomas, J., dissenting). See also John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 542 n.132 (1997) (“‘Due’ in this context much more likely means ‘proper under the applicable law.’”); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 272 (Univ. of Chicago Press 1992) (1985); Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 95-100; Congressman Thaddeus Stevens, Speech Introducing Fourteenth Amendment (May 8, 1866) in CONG. GLOBE, 39th Cong., 1st Sess., 2459 (explaining that the Due Process Clause would protect citizens by preventing states from “unlawfully depriving them of life, liberty, or property”) quoted in *Adamson v. California*, 332 U.S. 46, 104 (1947) (Black, J., dissenting). Note that the adjective “subjectivistic” is used in this article to describe an interpretation of the Due Process Clause, instead of using the adjective “subjective,” thus hopefully avoiding the negative connotations of the latter term. The Due Process Clause raises a unique question: “due according to what?” The term “objectivistic” is generally used here not to signify a positivist answer to that question (nor a textualist, originalist, or interpretivist answer), but rather is used here to signify a positivist answer *only* if positive law speaks to the issue, and otherwise the answer may be drawn from other sources.

up those details. However, when a pertinent positive law requirement exists, then it generally controls what is "due."

The assertion that courts have subjectivistically construed the Due Process Clause should not be taken as an accusation that judges have tried to selfishly insert their own emotions or personal beliefs into the clause, although that may have happened on occasion. Rather, the Supreme Court has developed principles for imposing due process restraints on legislators without having found those principles in any express or implied requirement of either the Due Process Clause or any other positive law.

Bear in mind, by the way, that an objectivistic interpretation of due process need not allow Congress to "make any process 'due process of law,' by its mere will."<sup>6</sup>

Throughout this article, it will be assumed that the Supreme Court has correctly concluded that the word "process" encompasses both substantive and procedural aspects, as Congress indicated when it passed the Process Act of 1789.<sup>7</sup> Were it not for the technical way that Congress used and understood the word "process" in 1789, that word would have to be construed today according to its ordinary procedural meaning, rather than as having substantive content also. Similarly, the word "due" should be interpreted as intended by the Framers of the

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6. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855), *quoted in* O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 795 n.5 (1980) (Blackmun, J., concurring in the judgment). *See generally infra* text accompanying note 70 (objectivistic limits on Congress).

7. Federal courts were required to employ local "modes of process" in common lawsuits, and were required to employ civil law "modes of proceedings" in causes of equity. An Act to Regulate Processes in the Courts of the United States (Process Act of 1789), 1 Stat. 93 § 2 (1789). The word "modes" was not useless in either instance, and was specifically inserted by amendment in the latter instance. House of Representatives Journal, Sept. 24, 1789, *reprinted in* 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES 122 (Gales & Seaton 1825). Congress thus used the word "process" in a technical way. It was well known in 1789 that "process" was a term of art. *See infra* note 40 and accompanying text (Hamilton confirming that "due process" is a technical term). *See generally infra* note 25 and accompanying text (further discussing the Process Act). Justice Scalia has interpreted the word "process" in a less technical way. *See* United States v. Carlton, 512 U.S. 26, 39-40 (1994) (Scalia, J., concurring in the judgment, joined by Thomas, J.). *See generally infra* note 55 and accompanying text (Bouvier shared Scalia's view). Justice Scalia acknowledges that American colonists "almost certainly" equated the phrases "due process of the law" and "law of the land," *see* Pacific Mutual v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment), but the latter phrase facially connotes nothing about judicial procedure or about procedural versus substantive law. The Framers of the Bill of Rights apparently did not believe that the concept of "substantive process" was an oxymoron. *See generally* James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENTARY 315 (1999). There is a difference between "procedures" in a cause of action, and "proceedings" in a cause of action; the word "process" referred in 1789 to the latter. *See infra* note 40.

Constitution and as mandated by the structure of the Constitution, instead of according to a subjectivistic standard a la recent due process cases like *Lawrence v. Texas*.<sup>8</sup> The intended constitutional meaning of the word “due” ought to be respected — given our country’s devotion to the rule of law rather than the rule of judges — even if the results of cases like *Lawrence* may be laudable from a policy point of view, or laudable from a fundamental human rights point of view. In the context of the Fifth Amendment, the word “due” simply means “owed” according to the “law of the land,” and the Fourteenth Amendment was meant to adopt that same meaning. Of course, statutes are part of the “law of the land,” assuming they do not conflict with any other constitutional provisions.

The objectivistic meaning of the Due Process Clause is apparent in a number of different ways, one of which is to consider the structure of the Bill of Rights. The Due Process Clause is presently construed by the courts in a way that incorporates rights that are listed elsewhere in the Bill of Rights, and in a way that furthermore incorporates other rights that are listed nowhere in the Bill of Rights. This construction of the clause creates a well-known problem of superfluosness, in the sense that an explicit enumeration of a right like free speech becomes unnecessary to ensure judicial protection of that free speech right. However, the courts’ present construction of the Due Process Clause also creates a subtle but more compelling textual problem than superfluosness. The specific rights in the Bill of Rights are broken up into distinct amendments that were ratified simultaneously and apart from each other, instead of in one single amendment, and this apartness has ramifications. Suppose, for example, that the First Amendment had been rejected after having been proposed to the states, but the rest of the Bill of Rights had been entirely ratified by the states. The fact that Congress allowed the states to do such a thing implies that Congress did not view the Fifth Amendment as necessarily encompassing the First, for otherwise Congress would have been allowing the states to deliver simultaneous contradictory messages about whether free speech would be protected. As we shall see, the historical record confirms that the

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8. *Lawrence v. Texas*, 539 U.S. 558 (2003). Five justices voted to overturn “sodomy” laws in thirteen states on due process grounds. *Id.* at 563, 573. Three other justices voted against overturning any of those laws. Additionally, Justice O’Connor voted to strike down only sodomy laws of the four states that treated homosexual and heterosexual sodomy differently, arguing that the Equal Protection Clause “requires a sodomy law to apply equally.” *Id.* at 584 (O’Connor, J., concurring in the judgment). This aspect of the Equal Protection Clause is outside the scope of the present article.

separateness of each of the first ten amendments was a very deliberate congressional decision, which led the states to believe that those amendments dealt with distinct classes of rights.

The Due Process Clause in the Fourteenth Amendment mimics the same clause in the Fifth Amendment, and therefore the meaning of that clause in the Fifth controls the meaning in the Fourteenth. Given that the clause in the Fifth Amendment excludes the content of the other Bill of Rights amendments, the same clause in the Fourteenth Amendment cannot truly apply the protections of the rest of the Bill of Rights, such as free speech, against the states. However, another part of the Fourteenth Amendment does apply those protections.

Let us look once more at the text of the Constitution, to see a second way of independently deducing the objectivistic meaning of the word "due." This word was used before the Bill of Rights was added, in the infamous "Fugitive Slave Clause," which was adopted unanimously at the constitutional convention in Philadelphia even though many of the Framers opposed slavery.<sup>9</sup> No one seriously disputes the objectivistic meaning of the word "due" in that clause, because any other interpretation of the word "due" in the original Constitution would have been a license to disregard the oppressive and unjust demands of the southern states. Clearly, the Framers of the Bill of Rights were familiar with an objectivistic use of the word "due" in the Constitution. This is

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9. "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be *due*." U.S. CONST. art IV, § 2, cl. 3 (emphasis added). See *infra* note 54 (noting that the Framers carefully eliminated any language in this clause that might have implied slavery was moral). This clause is important historically, and also important as an aid to understanding how the Framers used terms in the rest of the document. A repealed clause may "no longer be found in the Constitution; but it aids in the construction of those clauses with which it was originally associated." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810). The *Fletcher* case is also mentioned in note 118 *infra*. See generally *United States v. Kozminski*, 487 U.S. 931, 943 (1988) ("not all situations in which labor is compelled by physical coercion or force of law violate the Thirteenth Amendment"); CONG. GLOBE, 38th Cong., 1st Sess., 1325 (1864) (documenting Thaddeus Stevens' proposal to the House that the Thirteenth Amendment explicitly repeal the Fugitive Slave Clause. His proposal was withdrawn after a preliminary vote of 69 to 38, which was short of the required two-thirds). Of course, the same word "due" can have two different meanings in the Constitution:

Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

*Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). At the very least, use of the word "due" in the Fugitive Slave Clause proves that the Framers knew how to use this word objectivistically. See generally *infra* note 46 (noting that many states opposed slavery in the 1780s).

true even if the Fugitive Slave Clause may have been correctly viewed by some people as merely an agreement between the states (i.e. an agreement that Congress had no power to enforce); such an agreement would have been not just unenforceable but also meaningless, if a northern state were entitled to say that no slave labor was “due” to any slave owner. In other words, regardless of whether Congress was meant to have power to enforce the Fugitive Slave Clause, that Clause still was a directive to the states as to their constitutional obligations, and those obligations would have been illusory using a subjectivistic interpretation of the word “due.” This consideration alone does not prove that the Framers used the same word the same way in the Due Process Clause, nor does it create any rigid presumption they did, but it does clearly show that the Framers were able and willing to use the word “due” in its objectivistic sense.

A third way of independently deducing the objectivistic meaning of the word “due” in the Fifth Amendment is to ignore the word “due” in the Fugitive Slave Clause. Suppose that the Fugitive Slave Clause did not even use the word “due.” Still, an African-American slave was a “person” covered by the Due Process Clause, while at the same time being a “person” subject to delivery back into bondage according to the Fugitive Slave Clause. Therefore, the Due Process Clause could not possibly have been intended as a prohibition against federal laws (such as the Fugitive Slave Clause) that were widely recognized in 1788 to be contrary to all principles of liberty and justice. The Due Process Clause and the Fugitive Slave Clause coexisted in the Constitution, and indeed when the New York ratification convention first proposed the “due process” language for inclusion in the Bill of Rights, that convention confirmed that the Due Process Clause would be “consistent with” the original Constitution, including the “wicked” and “unjust” Fugitive Slave Clause.<sup>10</sup> The New York political leaders who gave us the federal

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10. See Ratification of the Constitution by the State of New York (July 26, 1788) reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 192, 195 (Johnson Reprint Corp. 1894). New York ratified the Constitution, including the Fugitive Slave Clause, while declaring that, “no Person ought to be taken imprisoned, or disseised of his freehold, or be exiled or deprived of his Privileges, Franchises, Life, Liberty or Property but by due process of Law,” and furthermore declaring that “the explanations aforesaid are consistent with the said Constitution.” *Id.* See generally *infra* note 50 (Robert Cover describing the relationship between due process and slavery). A leading delegate in the New York ratification convention, Melancton Smith, described the Constitution this way:

The very operation of it was to give certain privileges to those people who were so *wicked* as to keep slaves. He knew it would be admitted that this . . . was founded on *unjust* principles, but that it was the result of accommodation; which, he supposed, we should be under the necessity of admitting, if we meant to be in union with the Southern States, though utterly *repugnant* to his feelings.

Due Process Clause emphatically were *not blind* to the injustice of slavery, and at the same time they recognized that the requirement of "due" process does not protect an enslaved person's fundamental liberties against federally sponsored deprivation.<sup>11</sup> It is to be emphasized that this line of reasoning has nothing to do with the fact that the word "due" is used in the Fugitive Slave Clause. Moreover, this line of reasoning has nothing to do with whether or not the Fugitive Slave Clause was enforceable by Congress; this Clause was a federal law, and it conferred at least some rights that were enforceable by the federal courts even without action by Congress. These textual reasons for rejecting a subjectivistic "due process" are discussed further in Part II of the present article, along with others that are perhaps even more compelling.

One of the Supreme Court's motivations for its subjectivistic approach to the Due Process Clause has been a perceived need to ensure that this clause, unlike the Third Amendment in wartime,<sup>12</sup> will serve as a restraint on Congress. Whatever may be the merits of that perception, the Due Process Clause does in fact restrain Congress even if the word "due" is construed in an objectivistic manner, as discussed in Part III.

The objectivistic interpretation of the word "due" preserves the core meaning of the Due Process Clause, which is unrelated to restraining Congress. John Jay (later the first Chief Justice of the U.S.) explained as

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2 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 227 (1836) (emphasis added) (discussing apportionment of representatives). Alexander Hamilton said that slaves "are *persons* known to the municipal laws of the states which they inhabit, as well as to the laws of nature." *Id.* at 237 (emphasis added). See generally *infra* note 44 (municipal laws of the southern states). The Constitution thus intended that the Due Process Clause cover slaves. See *infra* note 45. According to English law predating the Revolution, the ability of a slave-owner to recover fugitive slaves found in England was not supportable by custom, usage, or unwritten law: "nothing can be suffered to support it but positive law." *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772). Of course, this became the rule in America as well. See *Prigg v. Pennsylvania*, 41 U.S. 539, 611 (1842); *cf.* *The Antelope*, 23 U.S. 66, 123 (1825) (custom and usage supported legality of the slave trade of other nations "on the high seas in time of peace"). See also 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176 (1836) ("If any of our slaves, said he [Iredell], go there, and remain there a certain time, they would, by the present laws, be entitled to their freedom, so that their masters could not get them again."); 3 *id.* at 452-54 ("At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws") (Madison speaking at the Virginia ratification convention). See generally *infra* note 46 for some history about the abolition of slavery.

11. See generally Ratification of the Constitution by the State of New York (July 26, 1788) reprinted in 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 192 (Johnson Reprint Corp. 1894).

12. The Third Amendment states: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III. See also *infra* note 70 and accompanying text.

follows in the midst of the American Revolution:

It is the undoubted Right and unalienable Privilege of a Freeman not to be divested, or interrupted in the innocent use, of Life, Liberty or Property, but by Laws to which he has assented, either personally or by his Representatives. This is the Corner Stone of every free Constitution, and to defend it from the Iron Hand of the Tyrant of Britain, all America is now in arms . . . .<sup>13</sup>

The core meaning of the Due Process Clause is thus that laws protecting life, liberty, and property must be respected by all branches and officials of the government. However, the Supreme Court has read a great deal more into the Due Process Clause, and in so doing has greatly undermined that core meaning. The Court now regularly uses the Due Process Clause to override laws enacted by elected representatives, thereby eliminating various liberties of some people if those liberties conflict with unenumerated “fundamental” rights of other people. The Court accomplishes this deprivation without relying upon any applicable law, except the Due Process Clause itself. This subjectivistic doctrine of due process has turned John Jay’s “cornerstone” into wax, as discussed further in Part IV.

The revered English jurist William Blackstone explained why only the legislature — and not unaccountable judges or monarchs — should have power to abolish statutes that are generally unfair:

It were endless to enumerate all the affirmative acts of parliament wherein justice is directed to be done according to the law of the land: and what that law is, every subject knows; or may know, if he pleases: for it depends not upon the arbitrary will of any judge; but is permanent, fixed, and unchangeable, unless by authority of parliament. . . . Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament. . . .<sup>14</sup>

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13. John Jay, *A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 THE FOUNDERS’ CONSTITUTION 312 (Philip B. Kurland & Ralph Lerner eds., Univ. of Chicago Press 1987). This principle of Magna Carta is primarily a limitation on executive and judicial power. *Cf. infra* note 70 (the Court stating that the prohibition would be to no avail if it did not limit legislative power). The principles spelled out here by John Jay have not been met with enthusiasm by some judges and scholars, who have insisted that the Due Process Clause would be “absolutely nugatory” and “mere nonsense” if it did not restrict the legislature. THOMAS COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 433 (5th ed. 1883) (citations omitted). Note that John Jay was a leading member of the New York ratification convention that proposed the Due Process Clause for inclusion in the Bill of Rights.

14. WILLIAM BLACKSTONE, 1 OF THE RIGHTS OF PERSONS, COMMENTARIES ON THE LAWS OF

A similar principle applies under the U.S. Constitution, but this principle has been eroded by overextension of the Due Process Clause.

Many rights that the Court now classifies as due process rights actually are in a different class from due process, as evidenced by the fact (mentioned above) that the Bill of Rights amendments were submitted for separate ratifications in each state; this textual point is confirmed by the remarks of the Framers, including newly published correspondence of Roger Sherman. Many of those non-due-process rights can be protected against state infringement by other provisions of the Constitution, especially by the Privileges or Immunities Clause of the Fourteenth Amendment. Unfortunately, the Court has begun to overextend the Privileges or Immunities Clause also, as discussed in Part V.

Throughout the rest of this article, it is assumed that the Due Process Clause in the Fourteenth Amendment has the same basic meaning as in the Fifth Amendment. In other words, the primary goal of the Framers of the Fourteenth Amendment was to duplicate the inherent meaning of the Fifth Amendment's clause, and to generally follow judicial interpretation of the Fifth Amendment.<sup>15</sup> This assumption

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ENGLAND 137-138 (Univ. of Chicago Press 1979) (facsimile of the first edition of 1765-1769). *See generally infra* note 42 (further quoting Blackstone).

15. *See, e.g.,* Malinski v. New York, 324 U.S. 401, 415 (1945) ("To suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection" (Frankfurter, J., concurring in part)); Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905) (same); French v. Barber Asphalt Paving Co., 181 U.S. 324, 329 (1901) (assuming "that the legal import of the phrase 'due process of law' is the same in both Amendments" although different constructions may be proper); Hurtado v. California, 110 U.S. 516, 535, 541 (1884) ("when the same phrase was employed . . . it was used in the same sense and with no greater extent"). The primary author of the Fourteenth Amendment's Due Process Clause was John Bingham, and he (like other supporters of the Fourteenth Amendment) said that he *only* wanted to enforce pre-existing federal rights against the states. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1088-1089 (1866). Bingham disclaimed any intention to change the meaning of due process, saying that "the courts have settled that long ago." *Id.* It was very well-settled in 1866 that "due process" conveyed the same meaning as the phrase "law of the land." *See infra* note 38 and accompanying text. However, the meaning of the "law of the land" remained unsettled in the courts, as discussed in Section III of the present article, despite the seemingly clear guidance of the Constitution's Supremacy Clause. There is little doubt that the Framers of the Fourteenth Amendment intended for past and future judicial interpretation of the pre-existing Constitution to be followed. *See* Senator Jacob Howard, Speech Introducing the Fourteenth Amendment in the Senate (May 23, 1866) *in* CONG. GLOBE, 39th Cong., 1st Sess., 2765 (1866) ("we may gather some intimation of what probably will be the opinion of the judiciary by referring to . . . Corfield v. Coryell" regarding Article IV privileges and immunities) *quoted in* Adamson v. California, 332 U.S. 46, 105 (1947) (Black, J., dissenting). Incidentally, there were many purely procedural characterizations of Fifth Amendment due process during the 1850s from non-court sources. *See, e.g., infra* note 55 (John Bouvier). Also during that decade, there were substantive subjectivistic characterizations of the clause from non-court sources; for example, the Republican Party Platform

follows not only from the constitutional text, but also from various other considerations, such as the following: (1) no supporter of the Fourteenth Amendment said that the Clause should be interpreted differently from how the same Clause in the Fifth Amendment should be interpreted, and (2) no supporter of the Fourteenth Amendment indicated any intention to amend or alter the meaning of the Fifth Amendment. That being so, the clear, ordained, and established intentions of those who wrote and ratified the Due Process Clause in the Fifth Amendment must control the meaning of the same clause in the Fourteenth Amendment, and the only dispositive legislative history is that of the Fifth Amendment. By the time the Fourteenth Amendment was adopted, the understanding of “due process” had become fragmented, with some leaders taking an objectivistic view, some a purely procedural subjectivistic view, and some taking a substantive subjectivistic view. Even if the Framers and ratifiers of the Fourteenth Amendment had misinterpreted the Fifth Amendment in a uniform way without any fragmentation, still their primary overriding belief about “due process” was that it meant just what the same clause in the Fifth Amendment meant, and there was no inclination in 1866 to alter the meaning of the venerated Bill of Rights. Unfortunately, in the decades after the Fourteenth Amendment was ratified, the meaning of the Due Process Clause was fundamentally misconstrued by the courts, thereby weakening the restraints that this vital Clause is supposed to place on the judiciary itself, as discussed in Part VI.

## II. THE MEANING OF “DUE” IS GOVERNED BY THE LAW OF THE LAND

It is well-known that the federal Due Process Clause has its origins in the “law of the land” clause of Magna Carta.<sup>16</sup> The Due Process

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of 1860 mentioned the Due Process Clause as a reason why slavery could not be legalized on federal territory. *See Downes v. Bidwell*, 182 U.S. 244, 297 n.11 (1901) (White, J., concurring). It is unclear how much the Republican Party Platform relied upon the Due Process Clause, and how much upon the abolitionist article of the Northwest Ordinance. *See Northwest Ordinance of 1787*, Art. VI, 1 stat. 50, 52 (1789) (note that the Ordinance professed to “forever remain unalterable”). *See generally infra* note 50 (Robert Cover on the relationship of due process to slavery); *infra* note 88 (discussing whether the Framers of the Fourteenth Amendment misconstrued the Second Amendment). It would be especially odd for all of the incorporated rights to apply identically in state and federal proceedings, except for the one right that is identically phrased. *See William J. Brennan, The Bill of Rights and the States*, 61 N.Y.U. L. REV. 535, 545 (1986) (“[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court”). *See also Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“the same constitutional standards apply against both the State and Federal Governments”).

16. “No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties,

Clause refers to a process of law that is owed to a person according to "the law of the land," rather than according to some different set of principles or beliefs. This objectivistic interpretation of the Due Process Clause follows not just from an originalist analysis of how the Framers felt, what they expected, and where they got their ideas; it also follows from the meanings that they attached to the words they used in the Due Process Clause, as well as the place of the Due Process Clause in the overall structure of the Bill of Rights and Constitution. The meaning of the phrase "law of the land" has itself occasioned controversy, and it is asserted here that this phrase in the present context refers to positive law, as well as compatible common law. Judges can formulate common law rules, subject to modification by elected representatives.

When the New York ratification convention first proposed the "due process" language for inclusion in the federal Constitution in 1788, that state's constitution already contained a clause along the lines of Magna Carta: "no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers."<sup>17</sup> Additionally, New York had enacted a statutory bill of rights in 1787, in order to supplement the "law of the land" clause in the state's constitution. New York's statutory bill of rights declared, among other things, that "no person shall be put to answer without presentment before justices, or matter of record, or *due process of law according to the law of the land*."<sup>18</sup> If there was a conflict between a process that a judge

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or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land." Magna Carta, Chapter 39 (1215) (emphasis added) *quoted in* Pacific Mutual v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring in the judgment). Magna Carta was written in Latin, and "vel" has sometimes been translated as "or" (e.g. in *Haslip*), and sometimes as "and." *See, e.g.,* Duncan v. Louisiana, 391 U.S. 145, 169 (1968) (Black, J., concurring). New York's constitutional convention of 1777 addressed this issue: Gilbert Livingston successfully proposed a clause along the lines of Magna Carta, which was then amended to change "and the judgment of his peers" to read "or the judgment of his peers." *See* CHARLES Z. LINCOLN, 1 CONSTITUTIONAL HISTORY OF NEW YORK 522 (1906). Livingston is also mentioned *infra* note 113.

17. N.Y. CONST. of 1777, art. XIII. New York's constitution also made the common law "subject, nevertheless, to such alterations and provisions as the legislature of this State may, from time to time, make concerning the same." N.Y. CONST. of 1777, art. XXXV. *See also* N.Y. CONST. of 1777, art. XLI ("any new court or courts . . . shall proceed according to the course of the common law"). *See generally supra* note 16 (controversy about "and" versus "or" in Magna Carta).

18. 2 Laws of N.Y. 344, 345, 10th Sess., ch. 1, §4 (1787) (repealed 1828) *reprinted in* CHARLES Z. LINCOLN, 1 CONSTITUTIONAL HISTORY OF NEW YORK 728-732 (1906) (emphasis added). New York's statutory bill of rights included *four* due process clauses, providing as follows:

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

subjectivistically felt was due, and a process that the law of the land said was due, then a New York judge was obliged to obey the law of the land, and there is no indication that any other standard was used to determine what process was “due” in New York during the 1780s.

When New Yorkers ratified the U.S. Constitution, their ratification convention declared that the proposed Due Process Clause would be “consistent with the said [federal] constitution,” including the Supremacy Clause.<sup>19</sup> Of course, the Supremacy Clause made federal positive law the supreme “law of the land”<sup>20</sup> — supreme even over state law codifying natural justice. The New York convention thus meant for judges to construe “due process” consistently with what positive law said was due.

Like New York, Virginia knew that the “law of the land” would be subject to the Supremacy Clause. Virginia had ratified the Constitution while requesting that it be amended so that “no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.”<sup>21</sup> The

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no citizen of this State shall be taken or imprisoned for any offence upon petition or suggestion unless it be by indictment or presentment of good and lawful men of the same neighborhood where such deeds be done, in due manner or by *due process of law*. IV. That no person shall be put to answer without presentment before justices, or matter of record, or *due process of law according to the law of the land* and if any thing be done to the contrary it shall be void in law and holden for error. V. That no person, of what estate or condition soever shall be taken or imprisoned, or disinherited or put to death without being brought to answer by *due process of law*, and that no person shall be put out of his or her franchise or freehold or lose his or her life or limb, or goods and chattels, unless he or she be duly brought to answer and be forejudged of the same by due course of law and if any thing be done contrary to the same it shall be void in law and holden for none.

*Id.* Notice that a “person” meant a person of any condition, and was distinguished from a “citizen” (the Fourteenth Amendment of the U.S. Constitution makes this same distinction). The lead author of this New York bill of rights was Samuel Jones. Jones’ name is now used (believe it or not) as slang for an “addiction.” Ed Boland, *FYI*, N.Y. Times, March 17, 2002 at 2 (in “The City” section).

19. See *supra* note 10 (quoting New York ratification resolution).

20. The Supremacy Clause says: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. Art. VI, cl. 2. See generally Letters from the Federal Farmer to the Republican, IV (October 12, 1787) reprinted in 2 THE COMPLETE ANTI-FEDERALIST 246 (Herbert J. Storing, ed., Univ. of Chicago Press 1981) (“the laws of the United States . . . will be also supreme laws, and wherever they shall be incompatible with those customs, rights, laws or constitutions heretofore established, they will also entirely abolish them and do them away”).

21. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION 268, 379 (Johnson Reprint Corp. 1894). Compare this with the language proposed by the New York ratification convention, quoted *supra* note 10. Here is a brief chronology of some important events related to the Due Process

phrase "due process of law" proposed by New York is entirely consistent with the phrase "law of the land" that had earlier been proposed by Virginia, and there is no evidence that New York changed Virginia's phraseology for any momentous reason.<sup>22</sup>

In 1789, "due" process meant process due according to the law of the land, and the Supreme Court has agreed to that proposition on the authority of Sir Edward Coke, whose writings were very familiar to the ratifying states, and who asserted that a process agreeable to the law of the land would be "due" process.<sup>23</sup> The Due Process Clause of the U.S. Constitution stands in contrast to a document like the Massachusetts Body of Liberties, enacted in 1641, which began with the following preamble:

The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for as *due* to every man in his place and proportion without impeachment and Infringement hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths.<sup>24</sup>

That Massachusetts document spoke of liberties that were due to

Clause: Virginia's ratification convention proposed a "law of the land" clause on June 27, 1788; New York's ratification convention proposed "due process" language on July 26, 1788; North Carolina's ratification convention endorsed Virginia's language on August 2, 1788; Madison proposed "due process" language on June 8, 1789. Congress proposed the Due Process Clause to the states on September 25, 1789. *See infra* note 130 (quoting the preamble that Congress sent along with the proposed amendments). The Due Process Clause was ultimately ratified on December 15, 1791.

22. On the contrary, New York merely wanted to avoid tampering with language of Magna Carta: "To have taken the clause, 'law of the land,' without its immediate context [in Magna Carta], might possibly have given rise to doubts . . ." *Murray*, 59 U.S. at 276. Truncating Magna Carta's language, as proposed by Virginia (i.e. omitting the "judgment of his peers"), would have especially bothered those New Yorkers who believed that the omitted language was meant to further protect individual rights. *See generally supra* note 16 (debate about "and" versus "or").

23. *See supra* note 5 and accompanying text (Justice Black arguing that "due process" is equivalent to "law of the land"); *supra* note 7 (Justice Scalia saying same thing).

There are certain general principles well settled . . . which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta.

*Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875) ("Due process of law is process due according to the law of the land."). *See also infra* note 38 and accompanying text (the Court saying the same thing in *Murray*). *See generally infra* note 59 (Coke defining "law of the land").

24. The Body of Liberties of the Massachusetts Collonie in New England (1641) *reprinted in* 5 THE FOUNDERS' CONSTITUTION 46 (Philip B. Kurland & Ralph Lerner eds., Univ. of Chicago Press 1987) (emphasis added).

every man according to humanity, civility, and Christianity. In contrast, the federal Due Process Clause secures protections that are due to every person according to the law of the land, and the Constitution recognizes no law higher than the supreme law of the land; were it otherwise, there would be no legislative control over the most vital aspects of the justice system, except at the pleasure of the Supreme Court.

John Marshall (the fourth Chief Justice of the U.S.) emphasized the importance of legislative control over judicial process:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details. To determine the character of the power given to the Courts by the *Process Act*, we must inquire into its extent.<sup>25</sup>

Thus, the courts in Marshall's day filled up the details regarding process, while legislatures dealt with the more important policy aspects. The Supreme Court's present subjectivistic doctrine of substantive due process has reversed that constitutional arrangement.

For centuries in England, processes that were required by positive law were inherently considered "due," unless negated by a superior (e.g. later) statute.<sup>26</sup> There is no evidence that any English statute guaranteeing "due process" was ever deemed to override a pre-existing statute. The Fifth Amendment adopted England's objectivistic use of the word "due."

Alexander Hamilton explained that New York's constitution, including its "law of the land" clause, did not confer enforceable

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25. *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (emphasis added). *See supra* note 7 (regarding the *Process Act*). Chief Justice Marshall explained that Congress in 1789 did not view the word "process" as being limited merely to writs emanating from a court: "The term is applicable to writs and executions, but it is also applicable to every step taken in a cause." *Wayman*, 23 U.S. at 27. The *Process Act* was again discussed by the Court later the same year. *See Bank of the United States v. Halstead*, 23 U.S. 51 (1825).

26. James Madison explained as follows:

Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed.

1 ANNALS OF CONG. 453 (Joseph Gales ed., 1789) (speech of James Madison introducing Bill of Rights). It is virtually undisputed that the numerous guarantees of "due process" enacted throughout English history imposed no restraint on Parliament, and furthermore repealed no prior provisions of law. *See generally infra* note 59 (the King's Bench explaining the meaning of "due process").

protection for various other rights secured by the U.S. Constitution: “[t]he establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and of titles of nobility, to which we have no corresponding provisions in our [state] constitution, are perhaps greater securities to liberty and republicanism than any it contains.”<sup>27</sup> Habeas corpus is a procedural rather than a substantive right, and yet Hamilton said that even that procedural right was not secured by the “law of the land” clause in New York’s constitution.<sup>28</sup> Likewise, during the Constitutional Convention in Philadelphia, Hugh Williamson of North Carolina explained that the ex post facto clause in his state’s constitution was helpful so that “the Judges can take hold of it.”<sup>29</sup> Williamson thus believed that the “law of the land” clause of his state constitution was insufficient for judicially striking down ex post facto laws.<sup>30</sup> Historical

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27. THE FEDERALIST No. 84, at 441 (Alexander Hamilton) (William Brock ed., 1992).

28. See *supra* note 17 and accompanying text (recitation of New York’s “law of the land” clause).

29. “Such a prohibitory clause is in the Constitution of N. Carolina, and tho it has been violated, it has done good there & may do good here, *because the Judges can take hold of it.*” 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., Yale Univ. Press 1927) (1911) (emphasis added). Here are excerpts from North Carolina’s constitution of 1776:

XII. That no freeman ought to be taken, imprisoned, or disseized of his freehold liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land. . . . XIV. That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. . . . XXIV. That retrospective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made.

N.C. CONST. of 1776, art. XII, XIV & XXIV. Article XIV was the subject of one of the nation’s first cases of judicial review. See *Bayard v. Singleton*, 1 N.C. 5, 7 (1787).

30. Madison said that ex post facto laws were voided by the “spirit and scope” of state constitutions. See THE FEDERALIST No. 44, at 229 (James Madison) (William Brock ed., 1992). But, he suggested that such vague prohibitions would not be judicially enforceable. See 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789) (courts will “resist every encroachment upon rights expressly stipulated for in the Constitution”). Hamilton likewise explained that specified exceptions to legislative authority, such as ex post facto laws, are essential to a limited Constitution. See THE FEDERALIST No. 78, at 399 (Alexander Hamilton) (William Brock ed., 1992). See also *Hurtado v. California*, 110 U.S. 516, 531 (1884) (“bills of attainder, ex post facto laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land”); *Calder v. Bull*, 3 U.S. 386, 398 (1798) (“some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that . . . any Court of Justice would possess a power to declare it so”) (Iredell, J., concurring). In *Calder*, Justice Chase criticized legislative acts that violate natural justice: “An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.” *Id.* at 388 (Chase, J., concurring). Chase failed to recognize that the Constitution itself calls ex post facto acts “laws.” U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1. Justices Chase, Iredell, and Patterson agreed that Connecticut had acted within its power, but Patterson was even more revolted by the legislation

evidence like this confirms the objectivistic meaning of the Due Process Clause, even if that meaning was not already apparent from the text of the U.S. Constitution.

The Presentment Clause of the U.S. Constitution<sup>31</sup> describes what “shall be a law,” and the Supremacy Clause says that such laws shall be the supreme “law of the land” if made pursuant to the Constitution.<sup>32</sup> These provisions of the Constitution amount to a functional definition of “law,” and should preempt any attempt by courts to assert that particular legislation is somehow not good enough to be a “law.” Neither the Presentment Clause nor the Supremacy Clause contains any significant limitation upon the kinds of laws that Congress can make, provided that those laws conform to the rest of the Constitution. Congress has always been able to pass laws unrelated to the general community, including “private bills” benefiting specific individuals. Likewise, by ratifying the Fugitive Slave Clause of the Constitution, even the most anti-slavery states acknowledged that the oppressive slavery statutes of the southern states were “laws,” and that the requirement to return fugitive slaves was the “law of the land.”<sup>33</sup> James Wilson reconfirmed the straightforward objectivistic meaning of the phrase “law of the land” when he lamented that, “the most formidable Enemy to private Liberty, is, at this moment, the Law of the Land.”<sup>34</sup>

There is further historical evidence reconfirming the objectivistic interpretation of the word “due” in the federal Due Process Clause. For example, in 1788, the Antifederalist faction opposed ratification of the Constitution and demanded assurances of a strong bill of rights. The

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than Chase, believing that it violated “the fundamental principles of the social compact.” *Calder*, 3 U.S. at 397

31. U.S. CONST. art. I, § 7, cl. 2.

32. U.S. CONST. art. VI, cl. 2. *Cf. infra* note 40 and accompanying text (Hamilton asserting that the law of the land would not include an act of legislature).

33. *See supra* note 9 (Fugitive Slave Clause).

34. *See* Mark Hall, *James Wilson’s Law Lectures*, 128 PA. MAG. HIST. AND BIOGRAPHY 63, 71 (2004). During his lectures in 1791, Wilson also taught that citizens “are bound to transgress” a manmade law that is prohibited by natural law, and added that *judges* should also transgress those manmade laws. 1 THE WORKS OF JAMES WILSON 326-331 (Robert Green McCloskey ed., Belknap Press of Harvard Univ. Press 1967). This latter opinion of Wilson was in tension with his own words in 1787 during the Constitutional Convention: “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.” 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., Yale Univ. Press 1927) (1911). George Mason concurred that judges “could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course.” *Id.* at 78. In any event, Wilson never confused the “law of the land” with “natural law.”

Antifederalists argued that the common law rights that were recognized in the various states should be secured by a federal bill of rights "in *general* words, as in New-York [and] the Western Territory," or "[p]erhaps it would be better to enumerate the *particular* essential rights."<sup>35</sup> Regarding the Antifederalists' "general" proposal, New York's constitution allowed legislative modification of the common law, as did the Northwest Ordinance,<sup>36</sup> and so common law did not control legislatures in New York or in the Western Territory, but rather provided default rights absent further legislative action. The Antifederalists thus seem to have been suggesting that the federal Constitution should generally guarantee common law rights subject to modification by Congress, rather than in a way that would control Congress. In any event, the Antifederalists admitted that the "law of the land" clause (which New York's constitution borrowed from Magna Carta) secured a "particular" right rather than a "general" right, and so there is scant reason to believe that they intended for the Due Process Clause to embrace any "general" right, much less a general right that would control Congress. The Antifederalists simply understood the "law of the land" clause to require that a person's life, liberty, and estate would be preserved by a known law applied by a known judge, instead of being preserved by natural law.<sup>37</sup> The New Yorkers who demanded the federal

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35. Letters from the Federal Farmer to the Republican, XVI (January 20, 1788) *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 327 (Herbert J. Storing, ed., Univ. of Chicago Press 1981) (emphasis added). The Federal Farmer was not contemplating adherence to ancient common law, but rather was referring to the common law that was "used and established in the said states." *Id.* Unlike the Fifth Amendment, the Seventh does explicitly "preserve" parts of ancient common law. U.S. CONST. amend. VII. The Federal Farmer was a pseudonym for Melancton Smith. *See infra* note 130.

36. *See* THE FEDERALIST No. 84, at 441 (Alexander Hamilton) (William Brock ed., 1992) (May 28, 1788) ("to the pretended establishment of the common and state law by the [New York] constitution, I answer, that they are expressly made subject 'to such alterations and provisions as the legislature shall from time to time make concerning the same'"). *See also supra* note 17 and accompanying text (quoting New York constitution). Nathan Dane wrote the Northwest Ordinance which guaranteed "judicial proceedings according to the course of the common law." *See* Northwest Ordinance of 1787, Art. II, 1 stat. 52 (1789) (the Ordinance also included a "law of the land" clause). However, Dane did not believe that common law would restrain legislatures. *See generally* Nathan Dane, 6 GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW §182 art. 5, 230 (Cummings, Hilliard & Co. 1823) (when "a statute makes an offence, and is silent as to the mode of trial, it shall be by jury, according to the course of the common law").

37. *See* Letters from the Federal Farmer to the Republican, XVI (January 20, 1788) *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 327-328 (Herbert J. Storing, ed., Univ. of Chicago Press 1981). The Federal Farmer described the "law of the land" clause by referring to the following statement of the great political theorist John Locke:

The great and chief end . . . of men uniting into commonwealths, and putting themselves under government, is the preservation of their [lives, liberties, and estates]. To which in the state of Nature there are many things wanting. First, there wants an established,

Due Process Clause never dreamed that it would make natural law binding upon them.

The Supreme Court has long recognized the connection between due process and Magna Carta: “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. Lord Coke, in his commentary on those words, says they mean due process of law.”<sup>38</sup> Some scholars believe that Lord Coke may have been incorrect when he said that “by the law of the land” means the same thing as “by due process of law,”<sup>39</sup> and likewise there was some disagreement in February of 1787 as to the meaning of the phrase “law of the land,” judging from a speech of Alexander Hamilton in the New York Assembly:

[The state constitution says] no man shall be disfranchised or deprived of any right he enjoys under the constitution, but by the law of the land, or the judgment of his peers. *Some gentlemen hold that the law of the land will include an act of the legislature.* But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the [state] constitution, the [statutory] bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by due process of law, or the judgment of his peers. The

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settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them: for though the law of Nature be plain and intelligible to all rational creatures; yet men being biassed by their interest . . . are not apt to allow of it as a law binding to them in the application of it to their particular cases. Secondly, in the state of Nature, there wants a known and indifferent judge, with authority to determine all differences according to the established law.

JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (1689), §§ 123-125 (titled “Of the Ends of Political Society and Government”). Locke’s requirement of an established, settled, and known law is met by making natural law secondary to positive law. Locke’s requirement of common consent is met by democratic lawmaking instead of judicial lawmaking. Locke and his followers wrote elsewhere of their aversion to extemporaneous arbitrary legislative decrees; the Framers of the U.S. Constitution addressed such concerns by, for example, adopting bicameralism and creating a presidential veto, both of which promote legislative deliberation and stability. Some of the Framers of the Bill of Rights probably would have ranked Locke’s “great and chief end” a bit lower in the scheme of things, but in any event they saw Locke’s “end” as central to the Due Process Clause.

38. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855) (citation omitted). The *Murray* Court also offered a persuasive explanation of why the language of the Due Process Clause differs from that of Magna Carta. *Id.*

39. Ralph U. Witten, *Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 CREIGHTON L. REV. 735, 741 (1981).

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.<sup>40</sup>

Any confusion about the meaning of the phrase "law of the land" was resolved in the federal context, because the Supremacy Clause establishes that the law of the land does include legislative acts.

Disagreements about the meaning of the phrase "law of the land" in state constitutions persisted long after the federal Constitution was ratified. For example, in 1819, the New Hampshire courts scoffed at the subjectivistic notion that an unenumerated right "can be protected from the operation of a law of the land, by a clause in the [state] constitution, declaring that it shall not be taken away, but by the law of the land."<sup>41</sup> Daniel Webster countered that not all legislative acts in New Hampshire had the necessary qualities of "law."<sup>42</sup> Despite such controversies at the

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40. ALEXANDER HAMILTON, Remarks on an Act for Regulating Elections (1787), *reprinted in* 4 PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett ed., Columbia Univ. Press 1962) (1979) (emphasis added) (speech in legislature on February 6, 1787 urging that a proposed law would violate due process). As to whether the phrase "law of the land" includes legislative acts, the prevailing view in 1787 was that it did. *See supra* note 14 (Blackstone); *infra* note 59 (Coke). Even if Hamilton's minority view was taken as correct, he attributed a limited meaning to this phrase "law of the land." *See* text accompanying note 27 *supra*. As to the phrase "due process," Hamilton did not argue that the state bill of rights called for any particular process, as long as *some* judicial proceeding occurred. Dictionaries confirm that "process" referred to "all the proceedings in any action." GILES JACOB, A NEW LAW DICTIONARY (1756). Notice that New York's bill of rights used the phrase "but by due process," whereas the phrase "without due process" in the U.S. Constitution does not necessarily require *any* process if none is due (analogously, many towns have ordinances penalizing construction "without required permits," but that does not mean permits are required for *all* construction). *See generally* McKesson v. Florida, 496 U.S. 18, 37 (1990) ("a State need not provide predeprivation process for the exaction of taxes"). New York proposed the "but by" language for the federal Bill of Rights, but Madison preferred the more flexible "without" language. *See supra* note 10.

41. Dartmouth College v. Woodward, 1 N.H. 111, 129 (1817).

42. The case was appealed to the U.S. Supreme Court which decided it on other grounds. *See* Dartmouth v. Woodward, 17 U.S. 518, 715 (1819). Daniel Webster's argument to the Court relied upon Blackstone, albeit selectively. *See id.* at 580-581. *See generally supra* note 14 and accompanying text (Blackstone's thoughts about the "law of the land" which Webster omitted). Webster argued for a confining definition of "law," by assuming that Blackstone's definition of "municipal law" applied to all law:

Municipal law . . . is properly defined to be "a rule of civil conduct prescribed by the Supreme power in a state commanding *what is right*, and prohibiting *what is wrong*."

Let us endeavor to explain its several properties, as they arise out of this definition. And, first, it is a rule; not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform and universal.

WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 44 (Univ. of Chicago Press 1979) (facsimile of the first edition of 1765-1769). Webster only mentioned the last of these three sentences to the Court. *See Dartmouth*, 17 U.S. at 580. Taking Webster's argument to its conclusion would empower the judiciary to have the final say regarding (as Blackstone put it) "what

state level, those questions were answered in the context of the U.S. Constitution by the convention in Philadelphia in the summer of 1787, which decided what shall be a law and what shall be the supreme law of the land. The Due Process Clause is consistent with that functional definition of “law” in the original unamended Constitution.

As mentioned in the Introduction, the meaning of the word “due” in the Due Process Clause can be independently confirmed by another line of reasoning, if we consider the relationship of that Clause to slavery. It is important to understand that the Fifth Amendment covered any “person,” including slaves.<sup>43</sup> A slave was entitled to Fifth and Sixth Amendment rights in federal criminal trials, and had legal rights in state courts throughout the antebellum South.<sup>44</sup> On its face, the Fifth Amendment covered all persons including slaves, whereas some of the other amendments did not.<sup>45</sup> Salmon P. Chase (later the sixth Chief

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is right” and “what is wrong.” Webster later acknowledged that the law of the land does not inherently protect fundamental rights; he opposed slavery but believed that draconian laws for returning fugitive slaves were the “law of the land.” *See* CONG. GLOBE, 31st Cong., 1st Sess. 476-484 (1850).

43. *See infra* note 45.

44. In much of the old South, slaves had a legal right to counsel, freedom from double jeopardy, trial by jury in graver cases, and the right to grand jury indictment. THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 268-269 (Univ. of Ga. Press 1999) (1858). The Supreme Court in *Dred Scott* wrongly declared that slaves were not “persons” within the meaning of the Fifth and Sixth Amendments. *Dred Scott v. Sandford*, 60 U.S. 393, 411 (1856) (slaves not “embraced in any of the other provisions of the Constitution” except those directly related to slavery). This was doubtless a ploy so that Chief Justice Taney could then overextend the concept of due process without confronting the paradox that fugitive slaves were entitled to due process like everyone else. *See generally infra* note 57 (Taney employing substantive due process). Slave offenses were sometimes tried in special courts employing summary procedures, and of course slavery was a cruel form of oppression, but slaves had some legal rights, including the federal constitutional rights accorded to all other “persons.” *See generally infra* note 46 (status of slavery laws in 1787).

45. The Fugitive Slave Clause described a slave as a “person.” *See supra* note 9 (reciting that clause). Other clauses consistently classified slaves as “persons.” *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves as three-fifths); U.S. CONST. art. I, § 9, cl. 1 (addressing “importation” of slaves). In contrast to the right of due process, slaves lacked other rights possessed by “the people.” *See generally* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[B]y contrast with the Fifth and Sixth Amendments, [the Fourth] extends its reach only to ‘the people’”). Of course, “the people” of the United States are its citizens, so the Fourth Amendment only applied to citizens. As James Wilson explained, “it was necessary to observe the twofold relation in which the people would stand. 1. as Citizens of the Genl. Govt. 2. as Citizens of their particular State. The Genl. Govt. was meant for them in the first capacity: the State Govts. in the second.” 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 405 (Max Farrand ed., Yale Univ. Press 1927) (1911). The Framers of the Fourteenth Amendment agreed with Wilson that the “people of the United States” and “citizens” are synonymous. *See* AKHIL AMAR, THE BILL OF RIGHTS 171 (Yale Univ. Press 1998). *See generally Dred Scott*, 60 U.S. at 587 (“not only slaves, but free persons of color, born in some of the States, are not citizens”) (Curtis, J., dissenting); *supra* note 18 (New York’s bill of rights distinguishing between citizens and persons).

Justice of the U.S.) put it this way: “It is vain to say that the fugitive is not a person, for the claim to him can be maintained only on the ground that he is a person. It is vain to say that the [Fifth] [A]mendment did not regard fugitives from service as persons within its intendment.”<sup>46</sup> Justice John McLean summed up the situation in 1841: “The Constitution treats slaves as persons.”<sup>47</sup> That Chase and McLean were right is evidenced by the words of the leading Federalist in the New York ratification convention: Alexander Hamilton plainly and clearly said that slaves “are men, though degraded to the condition of slavery. They are persons known to the municipal laws of the states which they inhabit, as well as to the laws of nature.”<sup>48</sup> While slaves were typically considered to be outside of the political community, they were not legally considered to be outside the community of persons.<sup>49</sup> Plainly, the Fifth Amendment was meant to cover slaves, even though the Fugitive Slave Clause

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46. SALMON P. CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT, SUBMITTED TO THE SUPREME COURT OF THE UNITED STATES, AT THE DECEMBER TERM, 1846, IN THE CASE OF WHARTON JONES VS. JOHN VANZANDT 89 (1847). *See generally* Jones v. Van Zandt, 46 U.S. 215 (1847). The Virginia ratification convention proposed a federal bill of rights that protected “freemen,” but the New York ratification convention changed “freemen” to “person” in its proposed due process clause. *See supra* note 10 (ratification by New York); note 21 (ratification by Virginia). The Virginia ratification convention used the word “freemen” in various of the other proposed amendments as well, but that word was ultimately not used in the U.S. Constitution; this word (“freeman”) was only marginally less odious to the Framers than the word “slave.” *See* 4 JONATHAN ELLIOTT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 176 (1836) (James Iredell explaining that “[t]he northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned” in the Constitution) (original emphasis).

Five of the original thirteen states—New Hampshire, Massachusetts, Connecticut, Rhode Island, Pennsylvania—initiated programs of complete emancipation before the federal Constitutional Convention met in 1787. The independent state of Vermont did likewise, and New York and New Jersey followed very soon. These states abolished the foreign and domestic slave trade. The Congress of the Confederation prohibited the introduction of slaves into the Northwest Territory.

DWIGHT DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 27 (Univ. of Mich. 1961). The history of slavery in New York during the 1780s was complex. Slavery was not banned in New York until 1799. *Id.* at 33. However, the New York legislature had voted to ban slavery in 1785, while also voting to withhold the right to vote, and on that basis the entire emancipation bill was vetoed by New York’s Council of Revision. *See* “Objections by the Council of Revision to a Bill for the Gradual Abolition of Slavery, March 23, 1785” in 2 MESSAGES FROM THE GOVERNORS 237-239 (Charles Z. Lincoln ed., Albany, J.B. Lyon Company 1909).

47. Groves v. Slaughter, 40 U.S. 449, 506 (1841) (McLean, J., separate opinion). *See also Dred Scott*, 60 U.S. at 537 (“In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution.” (McLean, J., dissenting)).

48. *See supra* note 10 (quoting Hamilton’s remarks in the New York Ratification Convention).

49. *Id.*

contemplated that runaway slaves would be returned. If one takes the view that the Fugitive Slave Clause was merely an unenforceable agreement between the states, so that both Congress and the Supreme Court were mistaken when they asserted federal authority to enforce that Clause, still the Due Process Clause would have destroyed that federally sponsored agreement had due process subjectivistically protected the fundamental liberties of persons.

The Supreme Court has held that the Constitution did not save a fugitive slave who managed to escape out of his or her native state, vis a vis enforcement of the Fugitive Slave Clause, “without the adoption of which the Union could not have been formed.”<sup>50</sup> In the same vein, the leading Antifederalist in the New York ratification convention — Melancton Smith — conceded that the Constitution gave privileges “to those people who were so wicked as to keep slaves.”<sup>51</sup> The only way that the Due Process Clause can be reconciled with the Fugitive Slave Clause is by understanding that “due process” is owed according to law rather than according to subjectivistic notions of justice. Otherwise, the Due Process Clause would have amended the Fugitive Slave Clause and destroyed the Union.<sup>52</sup> The Fugitive Slave Clause remains embedded in the constitutional text, not only as a lesson in history, but also as a lesson in the meaning of the Due Process Clause.<sup>53</sup>

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50. *Prigg v. Pennsylvania*, 41 U.S. 539, 611 (1842). See generally *supra* note 9 (recitation of Fugitive Slave Clause). A “theory that declared slavery to be a violation of the due process clause of the Fifth Amendment . . . requires nothing more than a suspension of reason concerning the origin, intent, and past interpretation of the clause.” ROBERT COVER, *JUSTICE ACCUSED* 157 (Yale Univ. Press 1975). Some nineteenth century abolitionists did not believe that Congress had power to enforce the Fugitive Slave Clause: “Antislavery lawyers . . . conceived of Article IV as a directive to the states with regard to their comity obligations. The states had the obligation to determine their own institutional means to realize the constitutional objective of comity and reciprocity.” *Id.* at 162-163. This theory was never accepted by the Court with regard to the Fugitive Slave Clause. See *Prigg, supra* this note. The theory was eventually rejected completely by the Supreme Court with regard to the rest of Article IV. See *Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (Rendition Clause); *Ward v. Maryland*, 79 U.S. 418 (1870) (Privileges and Immunities Clause). Let us suppose, though, that Congress really had no power to directly enforce the Fugitive Slave Clause by passage of implementing legislation. Still, under that Clause, at least some rights of the slaveowner were self-executing. *Prigg*, 41 U.S. at 613. A federal court did not require any further legislation by Congress in order to adjudicate those self-executing rights, and the federal court would then plainly be obliged under the Constitution to help deprive the fugitive slave of his hard-won liberty. The New Yorkers who framed the federal Due Process Clause manifestly did not believe that such a deprivation of liberty would violate due process, even though they were not blind to the cruelty and injustice of that deprivation.

51. See *supra* note 10 (quoting Smith’s remarks in the New York ratification convention).

52. This rationale is unrelated to the fact that the word “due” appears in both the Fugitive Slave Clause and the Due Process Clause.

53. See generally *supra* note 9 (citing *Kozminski*). Regarding the Fugitive Slave Clause, Lincoln said, “It is scarcely questioned that this provision was intended by those who made it, for

The Fugitive Slave Clause furthermore teaches that the Framers were familiar with using the word “due” in an objectivistic manner. That clause clearly exemplifies usage of the word “due” in an objectivistic sense that involves no subjectivistic role for judges, no judicial ability to strike down statutes that are subjectivistically undue, and no incorporation of natural rights or moral rights.<sup>54</sup> This is not to disparage natural rights or moral rights, but rather is to emphasize that the Framers did not use the word “due” in a way that referred to those rights.

In summary, the phrase “due process” had — and has — a precise meaning. Due process of law refers to legal proceedings that are owed according to law. Not surprisingly, then, the word “due” in the Fifth and Fourteenth Amendments has the same objectivistic meaning as in the original Constitution. The subjectivistic interpretation of the Due Process Clause is completely at odds with the text, structure, and history of the Constitution.

### III. DEVELOPMENT OF A SUBJECTIVISTIC DUE PROCESS WAS A MISTAKE

In 1855, the Court delivered its first major decision regarding the Due Process Clause. In *Murray’s Lessee v. Hoboken Land*, the Court indicated that the “law of the land” — and thus due process — generally implies and includes not only conformity with the rest of the Constitution but also implies and includes various rights of an accused person such as “regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.” The *Murray* Court did not explain how it would go about picking which additional unenumerated rights would be components of the due process requirement, but the Court did describe a valid exception to that

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the reclaiming of what we call fugitive slaves; and the intention of the law-giver is the law.” Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, H. DOC. NO. 93-208 at 120 (1989).

54. See *supra* note 9 (recitation of Fugitive Slave Clause). The Fugitive Slave Clause was approved unanimously on August 29, 1787 by the constitutional convention. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 446 (Max Farrand ed., Yale Univ. Press 1937) (1911). The northern states went out of their way on September 15, 1787 to eliminate any language that would hint slavery might be a natural or moral right. *Id.* at 628 (“the term ‘legally’ was struck out, and ‘under the laws thereof’ inserted after the word ‘State,’ in compliance with the wish of some who thought the term ‘legal’ equivocal, and favoring the idea that slavery was legal in a moral view”). Although times can blind us to certain truths, the immorality of slavery was well-recognized by many of the states ratifying the Due Process Clause, and those states did not believe that the word “due” implied such morality. See generally *infra* notes 114 and 115 with accompanying text (regarding morality).

requirement, depending upon whether the process is longstanding and was brought from England to America.<sup>55</sup> The *Murray* Court held that the statute in question fell within its historical transatlantic exception, and therefore the Court did not require a trial under the circumstances of that case.<sup>56</sup>

The *Murray* analysis was discarded several months later by the Court in *Dred Scott*,<sup>57</sup> in a generally infamous opinion delivered by

55. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277, 280 (1855). *Murray* reflected the procedural understanding of "process" that predominated during the 1850s, in the context of individual rights (or possibly *Murray* merely reflected the procedural nature of the question that was at issue in that case). See JOHN BOUVIER, A LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION (7th ed. 1857) (defining "process" as the "means or method of accomplishing a thing"); 4 COMPLETE WORKS OF ABRAHAM LINCOLN 211 (John G. Nicolay & John Hay eds., Lincoln Memorial Univ. 1894) ("The Constitution itself impliedly admits that a person may be deprived of property by 'due process of law'"). Cf. *supra* note 7 (the word "process" in 1789 suggested substantive content). Regarding *Murray's* historical exception to the due process requirement, this exception was patterned after the Court's treatment of other constitutional rights which, "from time immemorial, [had] been subject to certain well-recognized exceptions, arising from the necessities of the case." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897).

56. Prior to *Murray*, the Court had only briefly commented upon the words "law of the land," which were copied from Magna Carta into the Maryland Constitution:

[A]fter volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

*Bank of Columbia v. Okely*, 17 US 235, 244 (1819); cf. case cited *supra* note 41 (New Hampshire judiciary construing "law of the land" in 1817). Regarding *Okely*, the Court did not discuss Magna Carta at length or cite supporting references. *Okely* did not address whether the "law of the land" clause was intended to secure justice and private rights by requiring executive officers to follow the laws, or by also restraining legislation. The Court would later acknowledge that the greatest security for fundamental principles of liberty and justice "resides in the right of the people to make their own laws, and alter them at their pleasure." *Hurtado v. California*, 110 U.S. 516, 535 (1884). *Okely* was not cited by any justice in either *Murray* or *Dred Scott*, which were the two main due process cases leading up to the Fourteenth Amendment.

57. *Dred Scott* was the first case in which a federal court struck down a statute as violative of the Due Process Clause:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property [i.e. slaves] into a particular Territory of the United States [from a slave state], and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

*Dred Scott*, 60 U.S. 393, 450 (1857). Justice Curtis' dissent included a much longer discussion of due process than the majority offered. *Id.* at 626-627. Prior to *Dred Scott*, only a few state courts had struck down statutes using state "due process" or "law of the land" clauses. See, e.g., *Wynehamer v. People*, 13 N.Y. 378 (1856). The leading *Wynehamer* case involved a statutory prohibition on sale of alcoholic beverages already in existence at the time of the statute's passage; a majority of the state court held that "due process" was violated by forbidding sales before the existing stock was exhausted. The rationale of *Wynehamer* was subsequently rejected by the U.S. Supreme Court. See *Mugler v. Kansas*, 123 U.S. 623, 657, 669 (1887):

The single sale of which he [Mugler] was found guilty occurred . . . after the act . . .

Roger Taney, the fifth Chief Justice of the U.S. Justice Curtis, who had authored the opinion in *Murray*, wrote a long and famous dissent in *Dred Scott*, in which he too discarded his own analysis in *Murray*; his *Dred Scott* dissent addressed due process without mentioning the historic law of England, and without citing *Murray*.<sup>58</sup>

Skipping ahead a few decades, the Court revisited the *Murray* analysis in *Hurtado v. California*, and correctly explained that various court procedures such as grand jury indictment had merely been the actual existing law of the land, as opposed to having been inherent in the phrase "law of the land."<sup>59</sup> The *Hurtado* Court thus again discarded the dictum in *Murray* that had indicated the "law of the land" normally demanded allegations, answer, trial, and the like.<sup>60</sup> The *Hurtado* Court instead announced that alternative procedures may generally be acceptable, even if they lack a historical pedigree, so that future

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took effect, and was of beer manufactured before its passage. . . . The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.

*Wynehamer* was not a typical case, and state courts usually reached the opposite conclusion. See, e.g., *State v. Keeran*, 5 R.I. 497, 504-507 (1858) (rejecting a subjectivistic interpretation of Rhode Island's "law of the land" clause). See generally CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 75-142 (1930) (extensively describing antebellum jurisprudence regarding due process).

58. *Id.*

59. *Hurtado*, 110 U.S. at 516. The Court in *Murray* had said that "'due process of law' generally implies and includes actor, reus, iudex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings . . ." *Murray*, 59 U.S. at 280 (citing Lord Coke). In contrast, the Court in *Hurtado* indicated that each of the procedures cited by Lord Coke was merely, "an example and illustration of due process of law as it actually existed in cases in which it was customarily used." *Hurtado*, 110 U.S. at 523. See generally *infra* note 86 (further discussing the grand jury right). The *Hurtado* Court explained Lord Coke's actual position: "In beginning his commentary on this chapter of Magna Charta, 2 Inst. 46, Coke says . . . 'no man be taken or imprisoned but per legem terrae, that is, by the common law, statute law, or custom of England.'" *Id.* Lord Coke's position that the law of the land includes statutes is amply supported by English case law:

[I]t is objected, that by Mag. Chart. c. 29, no man ought to be taken or imprisoned, but by the law of the land. But to this I answer, that *lex terrae* is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law . . . . By the 28 Ed. 3, c. 3, there the words *lex terrae*, which are used in Mag. Char. are explained by the words, *due process of law*; and the meaning of the statute is, that all commitments must be by a legal authority. And the law of Parliament is as much a law as any; nay, if there be any superiority, this is a superior law.

*Regina v. Paty*, 92 Eng. Rep. 232, 234 (K.B. 1704) (emphasis supplied) (Justice Powys concluding that Parliament's rules take precedence over common law). It is impossible that the term "due process" was employed by the Framers of the Fifth Amendment in a sense different from that which had been affixed to it by the common law.

60. See *Hurtado*, 110 U.S. at 537.

legislatures would not have their hands tied by previous legislatures.<sup>61</sup> *Murray* was relevant after *Hurtado* only in the sense that it (1) required that a “due” process enacted by statute must conform with all other constitutional requirements, and (2) specified a historical transatlantic exception to whatever additional due process limitation might exist — or might not exist. These were the two basic holdings of *Murray*, and the second holding was particularly unsettled in view of the attempt by Justice Curtis to modify it in his *Dred Scott* dissent, and in view of the *Hurtado* Court’s recognition that the second *Murray* holding amounted to an exception without a rule.

The *Hurtado* Court, rather than concluding that the Due Process Clause simply guarantees the totality of legal rights and proceedings that are owed according to the law of the land (i.e. according to positive law as well as compatible common law), instead went on to exalt vague principles of liberty, justice, and general constitutional law that had previously been described by the Court in an unrelated decision delivered by Justice Samuel Miller.<sup>62</sup> The *Hurtado* Court, which was reviewing a decision of the California Supreme Court, entirely overlooked Justice Miller’s caveat that the Court could not take jurisdiction of those “principles of general constitutional law . . . [unless it was] sitting in review of a Circuit Court of the United States, as [it was] in *Loan Association v. Topeka*.”<sup>63</sup> Unlike *Hurtado*, *Topeka* involved diversity of citizenship. Disregarding Miller’s warning, the *Hurtado* Court inferred from the *Topeka* case that the Court had a measure of authority to preserve nebulous “principles of liberty and justice” so as to strike down otherwise valid laws of the land.<sup>64</sup> This

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61. *Id.*

62. *Hurtado*, 110 U.S. at 536-37, citing *Loan Assoc. v. Topeka*, 87 U.S. 655, 662 (1875).

63. *Davidson v. City of New Orleans*, 96 U.S. 97, 105 (1877) (citation omitted) citing *Topeka*, 87 U.S. 655 (*Topeka* did not rely on any constitutional provision). The Supreme Court has repeatedly emphasized what it said in *Davidson*: that a holding like *Topeka*’s is inapplicable to situations like *Hurtado* where the Court is reviewing a state supreme court decision. See *Fallbrook v. Bradley*, 164 U.S. 112, 155 (1896); see also *infra* note 118 (discussing *Fletcher*). *Topeka* was based upon the Court’s diversity jurisdiction, and was entirely subject to modification by the people and supreme court of Kansas; the *Hurtado* Court overlooked this vital aspect of *Topeka*. It is doubtful whether *Topeka* itself was correctly decided, and Justice Clifford offered a persuasive dissent. *Topeka*, 87 U.S. at 667. A legitimate rationale for the *Topeka* decision would have been to say that an unjust law authorizing state-sponsored robbery, and taking from A to benefit B for strictly private purposes, is a law that forces A to serve B, thus creating involuntary servitude under color of law, in violation of the Thirteenth Amendment (note that robbery without — instead of with — state authorization has traditionally been handled by the states rather than the federal government). See generally *supra* note 9 (discussing Thirteenth Amendment).

64. See *Hurtado*, 110 U.S. at 537. See also *supra* note 63 (discussing *Topeka*). These vague principles of liberty and justice, which *Hurtado* mistakenly inferred from *Topeka*, proceeded to leap

limitlessly flexible standard, incorporated into due process jurisprudence by the *Hurtado* Court, motivated the judiciary in subsequent years to overturn countless statutes that were enacted with the precise legislative goal of advancing fundamental principles of life, liberty, and justice.

The *Hurtado* Court furthermore added another exception to due process requirements, supplementing the historical transatlantic exception already established in *Murray*, so that a state statute would be held consistent with the Due Process Clause if an identical federal statute would violate any other part of the Bill of Rights.<sup>65</sup> In other words, the *Hurtado* Court held that another part of the Bill of Rights would be superfluous if the Due Process Clause were broad enough to accomplish the same thing, and thus the *Hurtado* Court decided that California could go ahead and prosecute people by information instead of by the ancient method of grand jury indictment, because the Fourteenth Amendment contains no explicit grand jury requirement. This superfluosness exception described in *Hurtado* has since been abandoned, but *Hurtado's* mistaken reliance on *Topeka* has never been abandoned and still misdirects the Court's jurisprudence.

If ever there was a complex Supreme Court decision, *Hurtado* is it. Parts of that opinion are very well reasoned and remain good authority, but other parts are neither.

In recent decades, the historical transatlantic exception described in *Murray* has met the same demise as the superfluosness exception described in *Hurtado*, thus further increasing the Court's asserted ability to restrain legislatures and strike down statutes based upon judicially determined principles of liberty and justice. The *Murray* Court had said that a process is automatically "due" if it has an ancient English and colonial pedigree, and *Hurtado* subsequently endorsed that holding of *Murray*, but the Court nowadays has largely abandoned it. The current Court strikes down even ancient statutes that the Court deems illegitimate, irrational, or insufficiently compelling.<sup>66</sup>

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from one opinion to the next. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring, joined by Warren, C.J. & Brennan, J.) (The due process inquiry "is whether a right involved is of such a character that it cannot be denied without violating those fundamental *principles of liberty and justice* which lie at the base of all our civil and political institutions.") (internal quotations and citations omitted, emphasis added). *Hurtado* also drew inferences from *Okely* (discussed *supra* note 56), and from Daniel Webster (discussed *supra* note 42). The *Hurtado* majority, and Justice Harlan's dissent, used the phrase "principles of liberty and justice" a total of seven times, and it therefore seems unlikely that this critical phrase was used merely for rhetorical effect. Cf. Robert Reeder, *Constitutional and Extra-Constitutional Restraints*, 61 U. PA. L. REV. 441, 453 n.27 (1913) (also faulting *Hurtado's* "parity of reason" argument).

65. See *Hurtado*, 110 U.S. at 537.

66. Justice Scalia characterizes this abandonment of the ancient pedigree exception as a

The Court in *Lawrence* purported to modify the ancient pedigree concept (i.e. “we think that our laws and traditions in the past half century are of most relevance here”). But the *Lawrence* Court then proceeded to strike down ancient statutes that had been widespread within the past half century (i.e. “before 1961 all 50 States had outlawed sodomy”).<sup>67</sup>

*Murray*'s historical exception, and the superfluousness exception added by *Hurtado*, have both now been largely pushed aside, and so *Hurtado*'s mistaken inferences from *Topeka* are infecting the Court's due process jurisprudence now more than ever. Of course, even if those two exceptions had not been pushed aside, still there would be no justification for generally construing due process in a manner contrary to the Framers' clear and ordained intent. In truth, both the *Murray* historical transatlantic exception, and the *Hurtado* superfluousness exception always rested on shaky ground. Against the *Hurtado* superfluousness exception, it could be argued that the specific enumerated rights are useful in the Constitution as important examples of due process, and are therefore not pointless redundancies. Against the *Murray* historical transatlantic exception, it could be argued that the Due Process Clause does not explicitly say anything about history, and that, even if we look at the intent of the New York Antifederalists who demanded that the Clause be inserted into the Constitution, they were interested in securing common law rights that were then in use, rather than securing common law rights that were then of ancient vintage. This article does not contend that either the *Murray* historical transatlantic exception or the *Hurtado* superfluousness exception should be reinstated, but rather contends that the whole subjectivistic due process

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consequence of incorporating the Bill of Rights into the Due Process Clause. See *Pacific Mutual v. Haslip*, 499 U.S. 1, 35 (1991) (Scalia, J., concurring in the judgment) (“disregard of ‘the procedure of the ages’ for incorporation purposes has led to its disregard more generally”). Justice Scalia has also said that, “It is precisely the historical practices that define what is ‘due.’” *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in the judgment) (emphasis in original). However, Justice Scalia nevertheless has conceded that a departure from tradition may be “due” if it subjectively appears to be fundamentally fair (“‘Fundamental fairness’ analysis may appropriately be applied to departures from traditional American conceptions of due process . . .”). *Id.* Incidentally, *Hurtado*'s superfluousness exception was explicitly rejected in *Powell v. Alabama*, 287 U.S. 45, 65-66 (1932). However, *Powell* did not reject *Hurtado*'s much more irresistible conclusion that the two due process clauses have the same basic meaning.

67. *Lawrence v. Texas*, 539 U.S. 558, 571-73 (2003). The Court's stated rationale was that in 1961 the sodomy laws were incompletely enforced (unlike abortion laws). See *generally infra* note 109 (difference between legalizing a crime legislatively versus tying a legislature's hands constitutionally). Incidentally, throughout this article, the term “sodomy” is used as a legal term, in the same way it is used in *Lawrence*, and is not meant to be pejorative.

doctrine, which both of those exceptions once limited, is basically illegitimate. The subjectivistic due process doctrine should not be tamed by exceptions, or rescued by an unconvincing limitation to procedural matters only, but rather should be consigned to history.

The Supreme Court has intermittently returned to the objectivistic interpretation of the word "due" that had sporadically been acknowledged before *Hurtado*, for example in a pre-*Hurtado* opinion delivered by Morrison Waite (the seventh Chief Justice of the U.S.):

Due process is process due according to the law of the land. This process in the States is regulated by the law of the [S]tate. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, — that is to say, with the Constitution and laws of the United States made in pursuance thereof, — or with any treaty made under the authority of the United States.<sup>68</sup>

Often, however, the Court has not restrained itself, and has frequently used the Due Process Clause to strike down what are now considered the most essential types of statutes.<sup>69</sup> The Court has not devised any way to prevent this from happening again. The obvious way for the Court to prevent recurrent legislation from the bench would be by hewing to the objectivistic interpretation of "due" process that is supported by the historical record underlying the Bill of Rights, and is mandated by the very structure of the Constitution.

The objectivistic interpretation of the "Due" Process Clause does restrain Congress, as the Court in both *Murray* and *Hurtado* insisted the Clause ought to do, and in fact the Clause imposes a greater restraint on Congress than the restraint imposed by other constitutional provisions,

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68. *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875). *See also* *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (effectively employing an objectivistic interpretation of the word "due"). Justice Brandeis once famously wrote as follows: "Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring, joined by Holmes, J.). It is assumed in this article that Brandeis was correct that due process does apply to matters of substance. *See supra* note 7. However, Brandeis then made the following deduction: "Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states." *Whitney*, 274 U.S. at 373. It is this deduction, that the present article contests. *See generally infra* note 114 and accompanying text (Holmes and Brandeis taking a different view of due process in 1930, after laissez faire economics had given way to the Great Depression in 1929).

69. *See generally* *Planned Parenthood v. Casey*, 505 U.S. 833, 998 (1992) ("Both *Dred Scott* and one line of the cases resisting the New Deal rested upon the concept of 'substantive due process' that the Court praises and employs today.") (Scalia, J., concurring and dissenting, joined by Rehnquist, C.J., White, J., & Thomas, J.).

such as the Third Amendment during wartime.<sup>70</sup> To understand the restraint imposed on Congress by the objectivistic interpretation of due process, suppose for example that Congress wants to make sure accused persons are not denied Sixth Amendment compulsory process to obtain witnesses.<sup>71</sup> Congress may not remedy this type of Sixth Amendment violation by requiring reduced sentences for those prisoners erroneously deprived of their Sixth Amendment rights, nor may Congress remedy this type of violation by preserving the sentences while offering the prisoners some other compensation, or by penalizing the judge who made the error. Instead, the Due Process Clause requires that Congress must either respect all of the accused persons' process rights, or let them have their liberty. This is a real and significant restraint on Congress, and a similar restraint applies to the executive and judiciary: providing most of a person's process rights is not good enough.

Justice Joseph Bradley once said that "we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived. . . ."<sup>72</sup> Justice Bradley was correct, in the sense that a mere portion of legal process will not be allowed, when more is required by positive law. Failure to provide all process that is due may not normally be treated as harmless error, according to the Due Process Clause, and statutes may not normally treat it as such.

The Supreme Court has in recent decades added increasingly stringent due process restraints on Congress and the states, pursuant to its mistakes in *Hurtado*. With regard to procedural law, the Court has developed a test for determining what process is "due" by balancing three factors: (1) the nature and weight of the private interest affected,

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70. "It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government . . ." *Murray*, 59 U.S. at 276. See also *Hurtado*, 110 U.S. at 535 (The Due Process Clause is not "too vague and indefinite to operate as a practical restraint" on Congress.); *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877) ("[C]an a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to affirm that the prohibition to the states is to no avail . . ."). The Third Amendment states that, "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

71. The Sixth Amendment states that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend VI.

72. *Davidson*, 96 U.S. at 107 (Bradley, J., concurring). As the Court stated in *Murray*, the Due Process Clause requires that, "We must examine the constitution itself, to see whether this process be in conflict with any of its provisions." *Murray*, 59 U.S. at 277 (emphasis added). This is how the Due Process Clause restrains Congress.

(2) the risk of an erroneous deprivation of this interest using existing procedures compared with alternative or additional procedures, and (3) the government's concern with both the interest involved and the procedures used to regulate it.<sup>73</sup> Unfortunately, the rationale of a majority (or supermajority) of the people's representatives is not even a factor here, much less a determinative factor of what procedure is "due." Likewise for substantive law, the general position of the Court is now that when a fundamental interest is at stake involving life, liberty, or property, then the state must have a "compelling" objective, and its statute must be narrowly tailored to achieve that objective. In cases involving non-fundamental interests, the state must have a "legitimate" objective, and a statute must be rationally related to achieving that objective. The Court thus determines what powers of state government are legitimate or compelling, regardless of the enumeration of powers in a state's constitution. The Court also determines what rights are fundamental, notwithstanding rights that may be enumerated in a state's constitution. In this way, the Court now decides what laws are due or undue, and what the law of the land should be.

This current interpretation of the Due Process Clause cannot be reconciled with, among other things, the first sentence of the Constitution: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."<sup>74</sup> The increasingly large assumption of power by the Supreme Court traces back to the Court's mistaken reliance in *Hurtado* upon its previous *Topeka* opinion, which had been confined to diversity cases only, and which did not even mention due process.

The Court increasingly asserts that the principles of liberty and justice espoused by elected legislators and the voting public do not comport with due process. Of course, the Court is entitled to believe that other principles are more desirable, but that is not sufficient cause for imposition of the Court's principles upon legislatures by virtue of the Due Process Clause.

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73. See, e.g., *Gilbert v. Homar*, 520 U.S. 924, 931-932 (1997) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

74. U.S. CONST. art 1, § 1. See also THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776) (blasting the King of England for "abolishing our most valuable laws"); *INS v. Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I." (footnote omitted)). It is true that the Due Process Clause could in principle have amended the first sentence of the Constitution, but the Framers of the Due Process Clause said no change in the original Constitution was needed or intended. See *supra* note 10 (quoting New York's ratification resolution).

#### IV. CONSTRUING THE WORD “DUE” IN A SUBJECTIVISTIC WAY HAS SLIPPERY CONSEQUENCES

Cases like *Lawrence v. Texas* have ostensibly not involved any struggle between different people’s individual liberties. However, in other cases, the courts have often decided whose competing substantive liberties should be supported by the government, and whose should be opposed. *Lawrence* did not pit the liberty of grandparents against the liberty of parents,<sup>75</sup> or the liberty of mothers against the liberty of fathers,<sup>76</sup> or the liberty of employees against the liberty of employers,<sup>77</sup> or the liberty of slaves against the liberty of their enslavers.<sup>78</sup> However, the *Lawrence* decision surely will be cited the next time the Court decides whose unenumerated “fundamental” rights should triumph over the liberties of others.

Liberty comes in many shapes and sizes (including Lebensraum which literally means “living space”), and the Court’s asserted ability to

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75. See *Troxel v. Granville*, 530 U.S. 57 (2000) (the state must bar grandparents’ visitation at behest of parents). Generally speaking, the Court has recognized the error in assuming “that one disposition can expand a ‘liberty’ . . . without contracting an equivalent ‘liberty’ on the other side.” *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (explaining that “[s]uch a happy choice is rarely available”). However, the Court’s recognition of competing liberty interests has not stopped it from expanding some liberties while contracting others. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 93 (1976) (“A father’s interest in having a child - perhaps his only child - may be unmatched by any other interest in his life.”) (White, J., dissenting, joined by Burger, C.J., & Rehnquist, J.). Even in a case like *Lawrence*, the rights of some people may contract as those of others expand (e.g. *Lawrence* may portend the end for laws that establish and protect a child’s legal right to preferably have both a mother and a father). Incidentally, note that the Due Process Clause does not explicitly say to whom the process is owed. See generally *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (“[J]ustice, though due to the accused, is due to the accuser also.”).

76. See, e.g., Adam Liptak, *Ex-Boyfriend Loses Bid to Halt an Abortion*, N.Y. TIMES, Aug. 6, 2002 at A10. Of course, some fathers and mothers seek abortions together. See, e.g., THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 305 (Charles Scribner’s Sons 1925) (1913) (“a physician of wealth and high standing had seduced a girl and then induced her to commit abortion—I rather lost my temper, and wrote to the individuals who had asked for the pardon, saying that I extremely regretted that it was not in my power to increase the sentence”). The Court has also invalidated legislation securing a right of law-abiding husbands to find out about abortions afterward, and thus clinics now have no duty of subsequent notification. *Planned Parenthood v. Casey*, 505 U.S. 833, 897-898 (1992). Incidentally, the prospect of a woman’s husband learning of an abortion might dissuade her from seeking it, but would not impose a prior restraint, because she would still be able to get the abortion.

77. See *Lochner v. New York*, 198 US 45, 69 (1905) (Harlan, J., dissenting) (The necessities of employees may have “compelled them to submit to such exactions as unduly taxed their strength.”) The legislation at issue in *Lochner* was intended to liberate workers, and to protect their rights from being coercively taken from them. The same can be said of other labor legislation struck down by the Court during the period leading up to the Great Depression. Surely, the right to go home after working ten long hours in a bakery is a personal liberty, and the U.S. Supreme Court deprived employees of that inalienable liberty.

78. See *Dred Scott v. Sandford*, 60 U.S. 393 (1856) *supra* note 57.

deprive some people of liberty while granting it to others is problematic, even if the Court is kindly and well-intentioned.<sup>79</sup> The plain language of the Due Process Clause does not distinguish between protected liberties and other liberties; this clause was meant to prohibit unlawful deprivation of *any* liberty. Nevertheless, the Court has implicitly established at least three classes of liberty interests: absolutely protected fundamental liberties, legislatively protectable non-fundamental liberties, and forbidden liberties (i.e. liberties that come into conflict with the absolutely protected liberties). The U.S. Supreme Court allows no legislature, no state or federal statute, and no state constitution to provide any security at all for this last class of liberties.

The slippery slope gets longer, steeper, and slipperier if we consider that the judiciary is now paving the way for striking down whatever laws it feels are fundamentally flawed, as long as the law somehow deprives a person of life, liberty, or property. There is nothing in the language or pre-constitutional history of the Due Process Clause that would limit the use of that clause to privacy-related issues.<sup>80</sup>

It is true that a citizen has a moral duty to disobey a very unjust law, and judges are indeed citizens. However, judges need not use their government offices for this purpose. The greatest acts of civil disobedience have been profoundly respectful of both the law, and of the community's will, and have attempted to nullify neither. For example, Martin Luther King eloquently wrote the following from a Birmingham jail:

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest

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79. See generally *infra* note 122 and accompanying text (remarks of Oliver Ellsworth). The abortion issue exemplifies that the Supreme Court can be just as arbitrary and legislative as Congress:

The [Roe v. Wade] opinion's author, Justice Harry A. Blackmun, said in one internal court memo that he was drawing "arbitrary" lines about the times during pregnancy when a woman could legally receive an abortion. In another memo, Justice Potter Stewart, who joined the Blackmun opinion, said the determination in the opinion about these lines was "legislative."

Bob Woodward, *The Abortion Papers*, WASHINGTON POST, January 22, 1989, at D1 (emphasis added).

80. Even if there were such a limitation, a vast number of existing laws might easily be characterized as intruding upon privacy (e.g. laws against child abuse, spousal rape, dueling, et cetera).

respect for law.<sup>81</sup>

A central problem with the Supreme Court having *carte blanche* authority to invalidate all laws that are fundamentally unfair is that federal judges do not represent the community, and can only exercise *carte blanche* power at the expense of the community's authority. By reading *carte blanche* powers into the Due Process Clause, the clause is now left with "no definite meaning"<sup>82</sup> beyond what the Supreme Court subjectivistically decides. On top of all that, the Court's ever-increasing and controversial reliance upon a misinterpretation of the Due Process Clause has set a harmful precedent that threatens the clear, ordained, and established meaning of every other provision of law, while perhaps making the Court more reluctant to assert itself in other matters where it was meant to be involved.

#### V. CONSTRUING THE WORD "DUE" IN AN OBJECTIVISTIC WAY HAS MANAGEABLE CONSEQUENCES

There would not be as great an upheaval as one might think if the Supreme Court were to return to a plausible interpretation of due process. In other words, if the Court were to acknowledge that "due

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81. MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 86 (Harper & Row 1964). The concept of civil disobedience is closely related to jury nullification. Courts have typically held that a juror's adherence to a higher law is just cause for the juror's dismissal. *See, e.g., U.S. v. Thomas* 116 F.3d 606, 617 (2d Cir. 1997). But, if the judge only finds out about the juror's nonconformist legal views after the verdict, then it's too late, because judges may not set aside a jury's verdict of not guilty. *See Sparf v. United States*, 156 U.S. 51, 105-107 (1895). Thus, jury nullification is complex. In contrast, the inability of judges to nullify statutes contrary to higher law is simple: the Constitution not only requires that judges be bound by positive law, but also requires that they swear to it. U.S. CONST. Art. VI. cl 2-3. The risk of jury nullification can be reduced by increasing the number of jurors needed to nullify. *See generally Burch v. Louisiana*, 441 U.S. 130, 136 (1979) ("a jury's verdict need not be unanimous to satisfy constitutional requirements"). Likewise, Congress can increase the number of Supreme Court justices needed to nullify a statute. *See generally Jed Shugerman, A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 971 (2003) (Congress can require a supermajority of justices to invalidate a statute.). Totally removing an issue from the jurisdiction of the federal courts would be more problematic than altering the courts' voting rules, because the judicial power extends to all cases arising under the Constitution.

82. *Davidson v. New Orleans*, 96 U.S. 97, 106 (1877) ("The party complaining here appeared, and had a full and fair hearing in the court of the first instance, and afterwards in the supreme court. If this be not due process of law, then the words can have no definite meaning as used in the constitution"). The slope gets slipperier still, inasmuch as the *Lawrence* Court offered no objective constitutional basis for confining its holding to sodomy, without extending to things like adult incest, bigamy, narcotics, bestiality, suicide, prostitution, and adultery, all of which are subjectively very different. Control of these and so many other issues now remains in the hands of the American people only at the pleasure of the high Court.

process of law" does not pledge "due laws,"<sup>83</sup> then many of the individual rights that the Court has sought to protect using the Due Process Clause would still be protected without additional constitutional amendments.

Instead of applying some or all of the Bill of Rights amendments to the states via the Due Process Clause, that can be done via the Privileges or Immunities Clause of the Fourteenth Amendment, as the Framers intended. Congressman John Bingham explained as follows:

[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed *privileges of citizens of the United States*, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.<sup>84</sup>

Bingham was the lead author of the Fourteenth Amendment, and he plainly intended for the rights that were spelled out in the Constitution to be secured by the Privileges or Immunities Clause against deprivation by the states. The explicit Due Process Clause was merely inserted into the Fourteenth Amendment to ensure that all non-citizens would receive due process alongside citizens,<sup>85</sup> just as the Due Process Clause in the Fifth

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83. See generally *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("[E]qual protection of the laws is a pledge of the protection of equal laws."). Equal protection may be impossible if laws are unequal, but due process of law can exist even when the laws are not rightful (by construing the word "due" in its objectivist sense).

84. CONG. GLOBE, 39th Cong., 1st Sess., 2542 (1866) *quoted in* *Furman v. Georgia*, 408 U.S. 238, 241 (1972) (emphasis added) (Douglas, J., concurring). On April 21, 1866 the joint committee drafting the Fourteenth Amendment explicitly rejected draft language that included a right to compensation (along the lines of the Fifth Amendment) in combination with the equal protection right. The joint committee subsequently approved language combining equal protection, due process, and privileges or immunities, but leaving out the right to just compensation. See MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 83 (Duke Univ. Press 1986). It may well have been that the joint committee viewed the initial language as being much too narrowly focused on the compensation right, and may well have wanted to accept nothing less than broader language. Thus, the joint committee's explicit rejection of a compensation right should not be construed as an indication that the Framers wanted to let the states violate that right. On the contrary, they wanted the states to respect that right. See *Adamson v. California*, 332 U.S. 46, 105-107 (1947) (Black, J., dissenting) (quoting Senator Howard's Senate speech of May 23, 1866).

85. See Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1224-1225 (1992) (extensively quoting the Framers of the Fourteenth Amendment). One could argue that the Equal Protection Clause, *supra* note 2, already extends all of the privileges and immunities of citizens (including the due process right) to aliens as well. However, it does not seem

Amendment covers both citizens and non-citizens.

The grand jury right in the Fifth Amendment has not as of yet been applied to the states by the courts, but if it was applied via the Privileges or Immunities Clause then defendants could waive that right whenever a state offers a preferable alternative method, such as prosecution by information.<sup>86</sup> There would also be no harm in applying the Seventh Amendment to the states because every state already requires juries in civil cases and, moreover, the obsolete dollar amount in the Seventh Amendment has not caused any problem in jurisdictions where it now applies (e.g. in the District of Columbia and West Virginia).<sup>87</sup> Application of the Second Amendment to the states would have an unclear effect, because the courts have not decided whether that amendment confers a citizen's right to keep and bear arms, or merely a right of state militia members to keep and bear arms.<sup>88</sup> With regard to

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reasonable to suppose that the Equal Protection Clause was meant to render completely meaningless the distinction in the Fourteenth Amendment between U.S. citizens and other persons. By requiring states to provide full Bill of Rights protections to aliens, the courts would be depriving the executive branch of critical leverage in trying to negotiate reciprocal protection for U.S. citizens abroad. Aliens were apparently meant to have partial rather than full Bill of Rights protection, as against state action. Even against federal action, aliens were not intended to have full Bill of Rights protection. *See supra* note 45 (“the people” refers only to citizens).

86. *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995) (waiver of indictment is constitutionally permissible). The Court declined to apply the grand jury right (i.e. presentment and indictment) to the states in *Hurtado v. California*, 110 U.S. 516, 538 (1884). *Hurtado* has not been reversed. Justice Scalia has cited Joseph Story for the idea that due process requires “due presentment or indictment, and being brought in to answer thereto by due process of the common law.” *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2661 (2004) (Scalia, J., dissenting). Story was simply reporting what Lord Coke had said. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1783, p. 661 (1833); *see also supra* note 59 (pointing out that Coke has been misconstrued on this point). Mr. Hamdi was held on suspicion without criminal charges, and so the Fourth Amendment required that his continued seizure be reasonable. Normally, “it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.” 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133 (Univ. of Chicago Press 1765). Strangely, the Fourth Amendment was not mentioned in *Hamdi*.

87. Margaret L. Moses, *What the Jury Must Hear*, 68 GEO. WASH. L. REV. 183, 185 n.10 (2000) (in “the two states where the civil jury trial right is not constitutionally based, it is nonetheless provided either by statute or court rule”). The Court declined to apply the civil jury right to the states in *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875). *Walker* has not been reversed. *See generally* W. VA. CONST. art. III, § 13 (using a threshold amount of twenty dollars as in the U.S. Constitution).

88. *See United States v. Emerson*, 270 F.3d 203, 264 (5th Cir. 2001) (holding that the Second Amendment does grant an individual right to bear arms). *Contra* *Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th Cir. 2003), *cert. denied*, 124 S.Ct. 803 (2003). The Court declined to apply the Second Amendment to the states in *Presser v. Illinois*, 116 U.S. 252 (1886), and *Presser* has not been reversed, as of yet. To the extent that the Framers of the Fourteenth Amendment may have misconstrued the meaning of the Second Amendment, they clearly proposed their Privileges or Immunities Clause in 1866 so that the rights that already restrained the federal government would thenceforth restrain the states too — *not* so rights that did not really restrain the federal government

rights that the Court has applied against the government without reference to any specific enumerated right, some of those rights could also be protected based upon existing constitutional provisions, whereas others would instead have to rely upon existing federal statutes or state law, or upon new constitutional amendments.<sup>89</sup>

The long-dormant Privileges or Immunities Clause could be safely resuscitated if the courts recognize that it only encompasses those fundamental rights that already confer protection from the federal

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would restrain the states (or vice versa). In other words, the basic intention in 1866 was to defer to past and future court decisions regarding the pre-existing Constitution. *See supra* note 15 (quoting Bingham and Howard). *See also supra* note 45 (the Framers of the Fourteenth Amendment correctly construed the meaning of "the people").

89. *See Troxel v. Granville*, 530 U.S. 57, 95 (2000) ("*Pierce and Meyer*, had they been decided in recent times, may well have been grounded upon First Amendment principles") (Kennedy, J., dissenting). *Cf. Bartels v. Iowa*, 262 U.S. 404 (1923) (Holmes, J., dissenting, joined by Sutherland, J.) (companion case to *Meyer v. Nebraska*, 262 U.S. 390 (1923)). Statutes robbing from person A and giving to B would often be invalid as involuntary servitude (i.e. A involuntarily serves B). *See supra* note 63 (discussing Thirteenth Amendment). Discriminatory sodomy laws could also be invalidated — if Justice O'Connor is correct. *See supra* note 8. With respect to *Bolling v. Sharpe*, 347 U.S. 497 (1954) (due process used to desegregate schools), Congress never "required that the schools of the District of Columbia be segregated." MICHAEL W. MCCONNELL *IN WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 168 (Jack M. Balkin ed., N. Y. Univ. Press 2001). In civil cases, the prospect of a Seventh Amendment jury trial would give parties leverage to seek unenumerated procedural protections in return for waiving the jury trial right. *See supra* note 87. *See generally* *Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("the Eighth Amendment requires increased reliability of the process . . ."). Regarding contraceptives, Congress can counteract state laws adverse to interstate commerce in contraceptives (commerce in liquor is another matter, according to the Twenty-First Amendment). *See generally* *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965). The *Griswold* Court struck down a statute for violating penumbras of the Bill of Rights, especially of the Fourth Amendment, but many judges have since asserted (correctly) that the Fourth Amendment does not support the *Griswold* holding. *See Roe v. Wade*, 410 U.S. 113, 167-169 (1973) (Stewart, J., concurring) (criticizing *Griswold's* penumbra rationale); *Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (relying upon *Griswold* without mentioning its penumbra rationale). The Fourth Amendment does require much more than a valid warrant. *See generally* *United States v. Matlock*, 415 U.S. 164, 180 n.1 (1974) (Douglas, J., dissenting). Moreover, the Fourth Amendment does apply to searches without seizures, as well as to seizures without searches, and so extends to much more than privacy. But, the Fourth Amendment does not generally extend to punishments; otherwise, the Eighth Amendment would be inexplicably permissive. Thus, the Fourth Amendment is inapplicable to punishing the use of contraceptives. Abortion rights can receive some protection if the prior restraint doctrine can be invoked, so that punishment of a culpable parent would be available after the abortion, instead of (in effect) tying a mother down until birth. *See* Andrew Hyman, *Abortion and Free Speech*, FINDLAW'S WRIT (June 13, 2002), available at <http://www.abortionlaw.org> (last visited Sept. 26, 2004) ("[t]he only way the doctrine could work would be if subsequent penalties on abortion providers were to remain strictly limited . . . [because] a doctor may act as, in essence, a prior restraint if he or she fears prosecution."). The prior restraint doctrine could be applied via the Fourth Amendment, in which case tough subsequent abortion penalties could render prior restraints "unreasonable," in our present societal context. The prospect of jury nullification would not be an insurmountable obstacle to using the prior restraint doctrine in this way. *See supra* note 81.

government; as the plain language of the Clause indicates, it simply bars states from violating the privileges or immunities of citizens of the United States.<sup>90</sup> Unfortunately, recognition of this principle was jeopardized by a Supreme Court decision discussing this largely dormant clause:

Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this [Fourteenth Amendment Privileges or Immunities] Clause “is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.”<sup>91</sup>

This statement of the Court in *Saenz v. Roe* incorrectly asserted that Justice Miller had described a right conferred by the Privileges or Immunities Clause. In fact, Justice Miller wrote as follows:

One of these privileges is conferred by the very *article* under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.<sup>92</sup>

Miller used the word “article” rather than the word “clause,” and the distinction is far from trivial. Instead of referring to the Privileges or Immunities Clause, Justice Miller was actually referring to the Citizenship Clause, which specifically deals with residency issues.<sup>93</sup> If

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90. One could argue that the privileges or immunities of U.S. citizens include rights enumerated in the Constitution *plus* rights established statutorily by Congress, but actually Congress has limited powers under the Fourteenth Amendment. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (congressional power is limited to remedial legislation and may not expand the restraints imposed on states by the Fourteenth Amendment). Incidentally, although *Boerne* involved a congressional attempt to expand rather than contract the federal government’s intrusion into state governance, the Court has also held that Congress may likewise not contract the restraints that the Fourteenth Amendment imposes upon the states. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969) (“Congress is without power to . . . authorize[] the States to violate the Equal Protection Clause”).

91. *Saenz v. Roe*, 526 U.S. 489, 503 (1999) (penultimate emphasis added). Only Justices Rehnquist and Thomas dissented in *Saenz*.

92. *Slaughter-House Cases*, 83 U.S. 36, 80 (1872) (first emphasis added).

93. See *supra* note 2 (recitation of Citizenship Clause). It may be that the words of Justice Miller have been misconstrued more than those of any other judge. See *supra* notes 63 and 64 (regarding *Topeka*). The *Saenz* Court did mention the Citizenship Clause, saying that it “equates citizenship with residence.” *Saenz*, 526 U.S. at 506-507. More precisely, the Citizenship Clause equates *state* citizenship with residence, and so the Privileges or Immunities Clause (which deals with U.S. citizenship) was not really implicated by the facts of *Saenz*. It is ironic that *Saenz* mixed up articles and clauses, given that the Due Process Clause is properly construed by distinguishing “articles” from “sections.” See *infra* paragraph accompanying note 111.

the Privileges or Immunities Clause of the Fourteenth Amendment can confer new federally enforceable rights — rights that do not correspond to any of the constitutional rights already restraining federal action in Washington D.C. — then there is no limit to purported rights that can be discovered in the Privileges or Immunities Clause. It would be tragic if a proper interpretation of the Due Process Clause were to cause this other Clause to be overextended. It would be frivolous for anyone to suppose that the privileges or immunities of citizens of the United States include rights that do not restrain the federal government.

The Court in *Saenz* provided an extended discussion of the right to travel, and broke that right down into at least three different components: (1) the right of a citizen of one state to enter and leave another state, (2) the right to be treated respectfully when temporarily present in the second state, and (3) the right to become a permanent resident who is treated like other citizens of the second state.<sup>94</sup> The *Saenz* Court acknowledged that the second component is completely protected by the original Constitution.<sup>95</sup> Regarding the first component of the right to travel, the *Saenz* Court did not identify its source.<sup>96</sup> And, as mentioned, the third component of the right to travel is completely protected by the Fourteenth Amendment, as the Court said in *Slaughter-House*.<sup>97</sup>

There is no reason to now overturn the *Slaughter-House Cases*, which did not prevent application of the Bill of Rights to the states, but rather addressed whether “the state monopoly statute violated ‘the natural right of a person’ to do business and engage in his trade or vocation.”<sup>98</sup> Likewise, there is no reason for the Court to now extend the application of the Article IV Privileges and Immunities Clause, because that clause has already been correctly construed, and generally includes both the first and second components of the right to travel described in *Saenz*.<sup>99</sup>

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94. *Saenz v. Roe*, 526 U.S. at 500.

95. *Id.* at 501.

96. *Id.* at 500-01.

97. *Slaughter-House Cases*, 83 U.S. at 122.

98. *Adamson v. California*, 332 U.S. 46, 77 (1947) (Black, J., dissenting) (internal quotations omitted). *See also Slaughter-House Cases*, 83 U.S. at 122.

99. *Paul v. Virginia*, 75 U.S. 168, 180-181 (1868) (unanimously holding that the Article IV Privileges and Immunities Clause ensures that visitors to a state will be entitled to rights of state citizenship, with a right to enter and leave the state freely, but not including any further rights without “the permission, express or implied” of the state). The Article IV Privileges and Immunities Clause reads as follows: “The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” U.S. CONST. art. IV, § 2, cl. 1. *Paul’s* interpretation in 1868 of this clause has always been followed. *See Saenz v. Roe*, 526 U.S. 489, 501-502 (1999). In 1866, some Framers of the Fourteenth Amendment, such as Senator Jacob Howard, expected a

Another vehicle that determined judges might like to use for traveling to their desired results would be the Necessary and Proper Clause.<sup>100</sup> Justice Kennedy recently wrote for the Court in *Lawrence* that some state laws “once thought *necessary and proper* in fact serve only to oppress.”<sup>101</sup> If the *Lawrence* Court was suggesting that the Necessary and Proper Clause is somehow applicable to state legislation, it is difficult to imagine how that Clause could be incorporated into the Fourteenth Amendment, inasmuch as the Necessary and Proper Clause confers an additional power upon the federal government, rather than limiting federal power as the Bill of Rights does. The Necessary and Proper Clause simply adds implied powers to the express powers already enumerated.

Likewise, incorporating the Tenth Amendment<sup>102</sup> against the states would not be an adequate vehicle for determined judges either.<sup>103</sup> On its face, the Tenth Amendment simply guarantees that the federal government will not exercise nondelegated powers, and so incorporating that guarantee into the Fourteenth Amendment would require the courts to look at each state constitution in order to see what powers had or had

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different and much broader interpretation by the Court as to the “nature and extent” of unenumerated Article IV privileges and immunities, but nevertheless Howard realized that the Court’s interpretation was unclear. *See Adamson v. California*, 332 U.S. 46, 105-107 (1947) (Black, J., dissenting) (quoting Howard’s Senate speech of May 23, 1866). Senator Howard also believed that, according to settled legal doctrine in 1866, the Article IV Privileges and Immunities Clause did not affect or restrain the states, and only provided security against the United States. *Id.* Thus, Howard anticipated that the Fourteenth Amendment would “probably” apply a broad range of unenumerated rights against the states — rights which he presumed were already restraining the federal government. *Id.*

100. U.S. CONST. art. I, § 8, cl. 18 (Congress shall have power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.”). As Chief Justice Marshall put it, this Clause “purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted.” *McCulloch v. Maryland*, 17 U.S. 316, 420 (1819) *quoted in* *Printz v. United States*, 521 U.S. 898, 942 n.2 (1997) (Stevens, J., dissenting, joined by Souter, Ginsburg & Breyer, JJ.). *See generally infra* note 119 (further discussing the Necessary and Proper Clause).

101. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (emphasis added).

102. U.S. CONST. amend. X.

103. *See generally* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE LAW JOURNAL 1131, 1158 (1991) (there are “structural reasons that counsel caution in attempting to incorporate the Tenth Amendment against the states”). Incidentally, in diversity cases, the Court seems to have effectively begun applying the Tenth Amendment against the states over a century ago. *See infra* note 118 (discussion of *Fletcher v. Peck*). Applying the Tenth Amendment to the states would mean that, if a state supreme court determines the state government has not been delegated a particular power, then it must be held that the state government cannot exercise that particular power. Of course, the citizens of that state could always delegate more power.

not been delegated by the people to their respective state governments.<sup>104</sup> Incorporating the Tenth Amendment into the Fourteenth could not plausibly allow the federal courts to scour the federal Constitution for limitations on the federal government that could then be transposed against the states.

If the Court was to interpret the word "due" in an objectivistic way, as the Framers intended and as the text and structure of the Constitution compels, then doubtless some judges would urge that the Ninth Amendment be used to achieve the same ends that have been achieved using the Due Process Clause. However, the Ninth Amendment<sup>105</sup> does not create any rights that are judicially enforceable against Congress or against the state legislatures. That Amendment is a rule of construction, and the Court has never treated it as anything else. The Ninth Amendment prevents courts or other government officials from using the enumeration of rights in the first eight amendments to justify denying or narrowly construing rights listed in other laws (e.g. in state constitutions). The Ninth Amendment also prevents that enumeration in the Bill of Rights from being used in order to justify an overly broad interpretation of the powers of Congress. It is not a source of additional enforceable rights. The Court's sense of justice is not infallible, and that is why the Court's power to dispense justice was never meant to be basically unlimited, as it would be if the Ninth Amendment was used in the way that the Due Process Clause is now used.

As for the Eighth Amendment, one could argue that any

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104. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

105. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. This is a far cry from saying that no law shall infringe any right retained by the people. The Ninth Amendment is a rule of construction:

[T]he Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights. . . . I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government.

Griswold v. Connecticut, 381 U.S. 479, 490-492 (1965) (Goldberg, J., concurring, joined by Warren, C.J. & Brennan, J.). "The Ninth Amendment obviously does not create federally enforceable rights." Doe v. Bolton, 410 U.S. 179, 210 (1973) (Douglas, J., concurring). Applying the Ninth Amendment against the states would be harmless, if it is recognized as simply a rule of construction. The Court has correctly and repeatedly held that, "If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail." United Public Workers v. Mitchell, 330 U.S. 75, 96 (1947). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n.14 (2d ed. 1988) ("It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is not a source of rights as such; it is simply a rule about how to read the Constitution.").

punishment whatsoever would be cruel and unusual for the “crime” of exercising an unenumerated fundamental right. After all, the Court has interpreted the Eighth Amendment to mean that even one minute in jail would be cruel and unusual for some crimes<sup>106</sup> — with the crucial caveat that the crime must be a status crime rather than a crime involving a behavior.<sup>107</sup> Because of the behavioral nature of things like abortion and sodomy, the Court has understandably circumvented the Eighth Amendment and tried to rely on the Due Process Clause instead; the Court in *Lawrence* struck down sodomy statutes that imposed “rigorous and systematic punishment” and “consequential . . . punishment,” notwithstanding prior holdings that the Due Process Clause affords prisoners no greater protection than the Cruel and Unusual Punishment Clause.<sup>108</sup> The Supreme Court has woven a very tangled Eighth Amendment web in *Lawrence*, with misplaced reliance upon the word “due.” The web gets more tangled by examining the record of the congressional debates in 1789 regarding the proposed Eighth Amendment and Bill of Rights, where no hint can be found that the Framers viewed the Eighth Amendment (or any other amendments) as possibly overlapping with the Due Process Clause. Be that as it may, the Court has always refused to use the Eighth Amendment to legalize any volitional or behavioral crimes, and the language of the Eighth Amendment would not support such an encroachment on legislative authority (i.e. “punishment” in the true sense of the word is a penalty for an act or deed).

Recent decisions like the one in *Lawrence* may add another constituency to those that already favor misconstruing the Due Process Clause in a subjectivistic, results-based manner. Statutes were already changing in a legitimate way before the Court intervened in *Lawrence*: “The 25 States with laws prohibiting the relevant conduct referenced in *Bowers* are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”<sup>109</sup> This trend strongly suggests that the

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106. *Robinson v. California*, 370 U.S. 660, 667 (1962).

107. *Powell v. Texas*, 392 U.S. 514, 533 (1968).

108. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). The Court had previously held that “the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.” *Whitley v. Albers*, 475 U.S. 312, 327 (1985).

109. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003). In the opinion of the present author, the Texas law struck down in *Lawrence* was unwise, but at the same time it was more unwise for the Court to exercise power and jurisdiction that it does not constitutionally possess. Incidentally, note that the *Lawrence* Court failed to distinguish between states that had legalized sodomy legislatively, rather than by interpretation or amendment of state constitutions. There is a significant difference between a legislative legalization as compared to a constitutional legalization. The *Lawrence* decision is of the latter variety, but relies on the former as precedent (while also relying on things

consequences of adhering to a plausible interpretation of due process would not have the consequences some might fear. Even if those consequences were very dire, they would still be vastly outweighed by the need to preserve democracy and the rule of law.

A purely procedural meaning of “due process” can only be plausibly rejected if we construe “process” as a term of art, as intended by the First Congress.<sup>110</sup> And, if the ordained and established intent of the Framers is to be our guide for construing the word “process” (as it must be if the law is to have a deliberate meaning), then overlooking that intent becomes all the more implausible regarding the word “due.” The intended objectivistic meaning of the Due Process Clause has not been undermined or rendered inapplicable by any change that has occurred since 1789, and so respecting the intended meaning of this Clause would not mean turning back the clock to an incompatible state of affairs.

In and of itself, the Fifth Amendment did not — and does not — secure even the most fundamental free speech and assembly rights, much less unenumerated things like abortion and sodomy, and this is amply confirmed by remarks of Framers like Elbridge Gerry and Roger Sherman.<sup>111</sup> Free speech and assembly rights are protected by the First Amendment, and cannot be protected by judicial invocation of the Fifth Amendment. This is as true today as it was in 1789. The Framers

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like incomplete enforcement).

110. See generally *supra* note 7 (discussion of the Process Act passed by the First Congress).

111. Elbridge Gerry made this point during the debate over the First Amendment. See 1 ANNALS OF CONG. 760 (Joseph Gales ed. 1789) (“The people ought to be secure in the peaceable enjoyment of this [assembly] privilege, and that can *only* be done by making a declaration to that effect in the constitution.”) (emphasis added). Gerry and the First Congress rejected the notion that the assembly right could be secured or implied by the right of free speech, much less by other rights such as due process. See also *infra* note 119 (James Madison explaining that the Necessary and Proper Clause cannot be invoked by the judiciary to protect rights that were therefore instead protected by the Bill of Rights). Madison also believed that the Due Process Clause falls into a different class than rights like free speech. This is why the Bill of Rights is broken up into separate amendments. Madison wrote that rights in the Bill of Rights “will be classed according to their affinity to each other” instead of being submitted to the states “as a single act to be adopted or rejected in the gross.” Letter from James Madison to Alexander White (Aug. 24, 1789) in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287-288 (Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., 1991). In other words, the Framers plainly believed that it would be consistent for the states to reject the Eighth Amendment, for example, but ratify the Fifth. In a recently published letter, Roger Sherman confirmed that it was a deliberate choice by Congress that each amendment “*may be passed upon distinctly by the States*, and any one that is adopted by three fourths of the legislatures may become a part of the Constitution.” Letter from Roger Sherman to Simeon Baldwin (Aug. 22, 1789) reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1375 (Charlene Bickford, Kenneth R. Bowling, Helen E. Veit and William Charles DiGiacomantonio, eds., 2004) (emphasis added).

simultaneously submitted the Bill of Rights to each of the states for separate ratifications in each state, instead of in a smaller number of amendments or a single amendment (e.g. one amendment having separate sections). This means that the Framers foresaw no inconsistency in the event that the states were to reject one of the amendments but approve the rest. Therefore, when the Bill of Rights was submitted to the states for ratification, Congress could not possibly have viewed due process as offering the traditional protections of any of the other amendments. The fact that the states did not actually reject any of those Bill of Rights amendments has no bearing upon what Congress must have intended when the amendments were submitted to the states for ratification. It is very evident that the Due Process Clause excludes the enumerated fundamental rights in the other amendments of the Bill of Rights, and so it is very difficult to see how this Clause could incorporate unenumerated rights, without concocting a very implausible definition of the word “due.”

The word “due,” in the Constitution, was never meant to have an impossibly vague meaning, empowering the judiciary to leave unscathed only those taxes, those criminal prohibitions, and those civil remedies that comport with the fundamental values of the Court. Many of the Constitution’s terms are necessarily ambiguous, but it is improper to attribute to the Framers a use of the word “due” that completely eclipses the combined effect of every one of those other ambiguities. The inevitable consequence of such an attribution is to delegate basic and profound policy matters to judges, “for resolution on an ad hoc and subjective basis.”<sup>112</sup>

Many scholars and jurists of all political persuasions have expressed doubts about using the Due Process Clause to strike down substantive statutes that are subjectivistically undue, and those doubts are nothing new.<sup>113</sup> In one of his last opinions, Justice Oliver Wendell

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112. *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (the Court was criticizing statutes that are vague).

113. See, e.g., Lawrence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995). Professor Tribe’s article also defended the exclusivity of the treaty power. Tribe’s exclusivity argument is supported by compelling historical evidence. See generally, Roger Sherman, *Observations on the Alterations Proposed as Amendments to the New Federal Constitution, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788*, at 235 (Paul Leicester Ford ed., 1892) (“It is provided by the Constitution that no commercial treaty shall be made by the president without the consent of two-thirds of the senators present.”). Founders such as Gilbert Livingston also realized that Congress, in contrast to the President, would have power to make short-term treaties (a.k.a. “agreements”). As Livingston put it, “Congress cannot make a treaty for longer than it stands.” John McKesson, Notes of the

Holmes protested as follows:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions.<sup>114</sup>

The Court nowadays denies that it is trying to "mandate our own moral code,"<sup>115</sup> but nevertheless the Court is exercising *carte blanche* authority to delete parts of the states' moral codes, based on the Court's own sense of morality, while freezing in place the morals legislation of which the Court approves. Casting aside this subjectivistic practice would undoubtedly have some negative effects, but those effects would pale in comparison to the positive impact of conforming to the constitutional plan.

The Supreme Court's due process jurisprudence rests not upon any fairly interpreted constitutional text, but instead owes its existence to the doctrine of *stare decisis*:

*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. . . . This is strikingly true of cases under the *due process clause* . . . .<sup>116</sup>

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Poughkeepsie Ratification Convention (July 25, 1788) (unpublished materials available at the New York Historical Society). See generally *supra* note 16 (mentioning Livingston). See also Gilbert Livingston, Notes of the Poughkeepsie Ratification Convention (July 25, 1788) (unpublished manuscript available at the New York Public Library) ("Congress cannot make a treaty for a longer time than they stand for."). See generally Andrew Hyman, *The Unconstitutionality of Long-Term Nuclear Pacts*, 23 DENVER J. INT'L LAW & POL'Y 313 (1995) (discussing time limits on "agreements" made by Congress).

114. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting, joined by Brandeis & Stone, JJ.) (second emphasis added). See generally *supra* note 68 (an earlier opinion of Brandeis and Holmes).

115. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 850 (1992)). The Court now determines what is "due" in one state by relying upon recent policy in another state, or even recent policy in another nation if it supports the Court's opinion. See *Lawrence*, 539 U.S. at 573 (citing a decision of the European Court of Human Rights). Paradoxically, the Court does not rely upon policy of the U.S. Congress to determine what state process is "due." See *supra* note 90 (congressional power is limited to enforcement).

116. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-407, 410 (1932) (Brandeis, J.,

Many fundamental rights that have been grounded in the Due Process Clause should be more firmly grounded in other clauses of the Constitution, such as the Privileges or Immunities Clause.

## VI. CONCLUSION

Long before the Fourteenth Amendment was adopted, Chief Justice John Marshall acknowledged that the Constitution allowed each state to suppress free speech, to establish a religion, to make unreasonable searches and seizures, to inflict cruel and unusual punishments, and to take property without compensation.<sup>117</sup> Judges today are rarely called upon to make such disagreeable decisions as that one made by Marshall, because a multitude of constitutional amendments now allow federal

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dissenting) (second emphasis added) *cited in* *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833, 854-855 (1992) (declining to reconsider whether abortion is a due process right). The *Casey* Court's analysis omitted a key factor stressed by Brandeis: is it more important that the applicable rule of law be settled than that it be settled right? Is it more important that the survival of an untold number of children and mothers be determined, or that it be determined right? The question should answer itself. The phrase "stare decisis" is short for "stare decisis et non quieta movere" meaning "stand by decisions and do not move that which is quiet" (the phrase "quieta non movere" is itself a famous maxim akin to "let sleeping dogs lie"). The Court's abortion cases have provoked great disquiet, with over two-thirds of people saying abortion should be illegal months before viability, despite overall support for abortion rights. *See, e.g.*, Lydia Saad, *Roe v. Wade Has Positive Public Image*, GALLUP NEWS SERVICE, January 2003; Alissa J. Rubin, *Americans Narrowing Support for Abortion*, L.A. TIMES, June 18, 2000 at 1. Public opinion is relevant at least for determining whether the Court should reconsider an issue, which is a distinct matter from how the issue should be decided. Even if the abortion issue were quiescent, nevertheless it is *always* more important to settle matters constitutionally than to perpetuate a rule that is clearly unconstitutional. *See* U.S. CONST. Art. VI, cl. 3 (judges must "support this Constitution").

117. *Barron v. Baltimore*, 32 U.S. 243, 250 (1833). *Barron* was a takings case. The Court decided that the Bill of Rights did not apply to the states and therefore disclaimed jurisdiction to consider whether the taking was lawful. The Court has often shown similar restraint. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 621 (2000) ("the Fourteenth Amendment, by its very terms, prohibits only state action" said the majority opinion of William Rehnquist, the sixteenth Chief Justice of the U.S.); *Noble State Bank v. Haskell*, 219 U.S. 575, 580 (1911) ("We fully understand the . . . very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, as it is not our concern."); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842) (Justice Story's opinion striking down a Pennsylvania statute that violated the Fugitive Slave Clause). Incidentally, Justice Thomas has asserted that the First Amendment's Free Exercise Clause applies against the states via the Fourteenth Amendment, whereas the Establishment Clause does not. *See Elk Grove v. Newdow*, 124 S. Ct. 2301 (2004) (Thomas, J., concurring in the judgment). However, the location of the Establishment Clause in the First Amendment indicates otherwise. The word "establishment" connotes a beginning rather than a continuation, and so historical practices leading up to adoption of the Bill of Rights should be especially important in determining how this Clause applies to both the state and federal governments. For example, nonsectarian references to God were already an established feature of the federal government prior to adoption of the Bill of Rights. Certainly, voluntary classroom recitation of a statement like the first paragraph of the Declaration of Independence would not establish religion.

judges to strike down both state and federal laws that have particular types of flaws. But, once in a while, painful decisions have to be made. The word "due" is not a general guarantee of rightfulness, and it cannot be viewed that way without fundamentally amending our form of government.

For many centuries leading up to the American Bill of Rights, no British judge ever held that a previously enacted statute was voided by a later statutory guarantee of "due process."<sup>118</sup> This historical fact has nothing to do with the inferior role of the judiciary vis-a-vis the legislature in Britain, and has everything to do with the then-settled meaning of due process.

Federal courts in the United States have power to strike down many federal laws if judges determine that Congress has abused its broad discretion in determining what is necessary and proper,<sup>119</sup> but that

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118. See generally *supra* note 59 (a British judge explains the meaning of "due process"). The words "due process" first appeared in a statute more than 650 years ago. See Statute the First, 15 Edw. 3, cl. 2 (1341) (Eng.) reprinted in 1 STATUTES OF THE REALM 295 (William S. Hein & Co., 1993). According to that statute, Parliament allocated to itself authority for conducting certain trials, but in other cases the statute made an exception if "the laws [are] rightfully used, and by due process." *Id.* Thus, due process did not guarantee rightfulness then, and it does not guarantee rightfulness now. As everyone knows, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). However, just as importantly, it is "the peculiar province of the legislature to prescribe general rules for the government of society . . ." *Fletcher v. Peck*, 10 U.S. 87, 136 (1810). Chief Justice Marshall suggested in *Fletcher* that the Court could reject some of the powers purportedly delegated to a state legislature, but only if there had been "an intention to except." *Id.* at 139. In other words, judges cannot reject a legislature's power if the people who approved the constitution meant to vest that power in the legislature. The Marshall Court later revisited *Fletcher*, reiterating that the U.S. Constitution did *not* carve out an unwritten exception to the legislative power exercised by Georgia in the *Fletcher* case, but rather the people who adopted the Georgia constitution may have intended such an exception. See *Satterlee v. Matthewson*, 27 U.S. 380, 413-414 (1829). The relationship of *Fletcher* to *Satterlee* is similar to the relationship of *Topeka* to *Davidson*. See *supra* note 63. *Fletcher* and *Topeka* were both diversity cases; *Satterlee* and *Davidson* both emphasized that the state supreme court had not spoken in *Fletcher* and *Topeka* respectively.

119. See THE FEDERALIST No. 44, at 233 (James Madison) (William Brock ed., 1992) (the success or failure of violations of the Necessary and Proper Clause "will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers"). Nevertheless, the Framers did not believe the judiciary could take hold of the Necessary and Proper Clause so as to prevent Congress from violating free speech and other rights: "Now, may not laws be considered necessary and proper by Congress, for it is them who are to judge of the necessity and propriety to accomplish those special purposes which they may have in contemplation, which laws in themselves are neither necessary or proper?" 1 ANNALS OF CONG. 455-56 (Joseph Gales ed. 1789) (speech of James Madison introducing Bill of Rights). The courts have likewise recognized that the Necessary and Proper Clause affords considerable discretion to Congress. See *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) ("[W]e think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into

sweeping power does not apply to statutes enacted pursuant to the express powers of Congress, much less to state statutes. The Necessary and Proper Clause has never been applied against the states.

Judges also have power to mitigate and confine unjust and partial laws, by trying to construe laws in a way that comports with justice. In this way, passage of bad legislation can often be prevented, by the necessity of phrasing the bad legislation very clearly. But, if such legislation is written clearly and passed, then it generally must be honored by the courts.

The Court has unanimously acknowledged the following about its subjectivistic due process jurisprudence:

[W]e must always bear in mind that the substantive content of the [Due Process] Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments.<sup>120</sup>

This seems to be an admission by the Court that it has taken jurisdiction — without having been given it — to censor legislation of the states affecting fundamental unenumerated rights. Chief Justice Marshall did not mince words about judges who extend their own authority: “We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”<sup>121</sup> The Court’s due process jurisprudence needs a fresh and thorough reexamination, for conformity with the Constitution.

Oliver Ellsworth, who was a delegate to the constitutional convention, and a U.S. Senator when the Bill of Rights was proposed to the states for ratification (and who would later become the third Chief Justice of the U.S.) had some pertinent comments about this subject: “Liberty is a word which, according as it is used, comprehends the most good and the most evil of any in the world.”<sup>122</sup> This is why the clause in question confers no protection for liberty except where “due process of law” is absent.

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execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.”). *See generally supra* note 100.

120. *University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985) (citation omitted).

121. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). *See generally supra* note 118 (discussing Marshall’s opinion in *Fletcher*).

122. Oliver Ellsworth, *A Landholder III*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788*, at 146 (Paul Leicester Ford ed., 1892).

The Due Process Clause was not intended to be a one-way street to ever-greater personal liberty, and that interpretation is not dissimilar to the doctrine of laissez faire economics, which likewise had no basis in the Constitution. People may have a fundamental natural right to demand respect for certain conduct, but that does not make the conduct a legally enforceable due process right. By the same token, legislators may have a moral duty to abide by fundamental principles of distributive justice, such as *suum cuique* (“to each his own”), but that does not entitle the judiciary to arrest the legislative will when that principle appears to be in jeopardy.

One could argue that the word “due” should be construed as a subjectivistic requirement of fairness, rightfulness, and propriety, while the word “process” should be construed as addressing procedure rather than substance.<sup>123</sup> But we must keep in mind that other provisions of the Bill of Rights can compensate for much of the procedural protection that has been improperly inferred from the Due Process Clause.<sup>124</sup>

The reasoning in *Lawrence* is very much of the same doctrinal variety as in *Dred Scott* and *Lochner*,<sup>125</sup> even though — viewed as judicial legislation — the reasoning in *Lawrence* is far more reasonable and compassionate than that of either *Dred Scott* or *Lochner*. Unfortunately, the *Lawrence* opinion reiterated carte blanche authority to insert the Supreme Court’s sense of fairness into the prohibitions of the Due Process Clause. This alleged judicial power would have alarmed the New York Antifederalists who proposed the Due Process Clause for inclusion in the federal Constitution, and who were very wary of the judiciary:

[A prisoner may] hold his life . . . at the pleasure of the Supreme Court, to which an appeal lies, and consequently depend on the tender mercies, perhaps, of the wicked, (for judges may be wicked;) and what those tender mercies are, I need not tell you. You may read them in the history of the Star Chamber . . . .<sup>126</sup>

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123. See *supra* note 7 (view of Justice Scalia).

124. See *supra* note 89.

125. See *Lochner v. New York*, 198 U.S. 45 (1905).

126. Thomas Tredwell, 2 JONATHAN ELLIOTT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 400 (1836) (1788) (statement in New York ratifying convention). The issues that the Court deals with nowadays are just as controversial as any dealt with by the Star Chamber:

The baby’s little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby’s arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the

That wariness led the New York Antifederalists to write a Due Process Clause in which the word “due” does not give the Court carte blanche power. The Court’s power is instead supposed to be limited by positive law.

Ulysses S. Grant once said that, “I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution.”<sup>127</sup> If the Constitution is imperfect, the courts ought to trumpet that imperfection, and then executive officers will enforce it, and the people will be able to fix it by amendment. George Washington warned that circumventing the amendment procedure “in one instance may be the instrument of good, [but] it is the customary weapon by which free governments are destroyed.”<sup>128</sup> In *Lawrence v. Texas*, misconstruing the Due Process Clause may be the instrument of good in a narrow sense, but not in the wider sense. Admittedly, there is more than a little truth in the old saying that no one’s life, liberty or property are safe while the legislature is in session, but the solution is to elect better legislatures and write better constitutional amendments, rather than bestow legislative power upon unaccountable judges.

The word “due” basically means “owed.”<sup>129</sup> The federal Due Process Clause simply requires that whatever legal process is owed must be provided, and the government cannot merely provide some of that process. Unfortunately, the current prevailing judicial doctrine is that a plaintiff may be owed a process according to positive law, but must

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opening, and sucked the baby’s brains out. Now the baby went completely limp. *Stenberg v. Carhart*, 530 U.S. 914, 1007 (2000) (Thomas, J., dissenting) (quoting a nurse) (citations omitted). Other methods for aborting a fetus, even after the embryonic stage which lasts two months from conception, have also been protected by the Court using the Due Process Clause, “in the event that contraception should fail.” *See Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

127. Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, H. DOC. NO. 93-208 at 129 (1974).

128. George Washington, Farewell Address, *reprinted in* 1 COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 212 (J.D. Richardson ed., 1907) (1796). If the Due Process Clause were properly enforced, that could well galvanize support for constitutional amendments that achieve what determined judges have sought to achieve from the bench.

129. The word “due” comes from the French word for “owed.” *See supra* note 4 (Samuel Johnson’s dictionary).

The whole difficulty arises from the different senses in which the term ‘due’ is used. It is sometimes used to express the mere state of indebtedness, and then is an equivalent to owed, or owing. And it is sometimes used to [additionally] express the fact that the debt has become payable.

*United States v. State Bank of North Carolina*, 31 U.S. 29, 36 (1832). *See generally* 30A WORDS AND PHRASES, PERMANENT EDITION, 1658 TO DATE 377-378, 381-389 (1972) (“due” is synonymous with “owed”). The word “due” is to be distinguished from the word “just” used in the Takings Clause. *See* U.S. CONST. amend. V.

succumb to a contrary process owed to a defendant according to principles of natural justice. Such a doctrine cannot be legitimately squeezed or discerned from the Due Process Clause.

When the Framers made the judiciary a separate branch of government, they did not intend to elevate judge-made rules to a level of equality with positive law, much less to a superior position, and yet that is how the Due Process Clause is now being interpreted with respect to the most fundamental and important issues in American society and family life. By gradually replacing the meaning of the Due Process Clause, the judiciary is exercising judicial review of the Constitution itself, for conformity with the judiciary's own subjectivistic concept of inalienable rights and liberties.

The U.S. Constitution reflects the will of the people, as that will is expressed in the words of the document itself, and those words are meant to withstand the changing temper of the judiciary. The great principle of liberty — in both the Fifth and Fourteenth Amendments — is inextricably connected to the principle of due process, and no court has authority to sever that connection. A wise New Yorker, and primary sponsor of the Due Process Clause, warned against such encroachments upon political liberty:

[T]he people should make the laws by which they were to be governed. He who is controlled by another is a slave; and that government which is directed by the will of any one, or a few, or any number less than is the will of the community, is a government for slaves.<sup>130</sup>

The Due Process Clause requires that judicial proceedings unfold according to the law, rather than according to the judiciary's contrary opinions.

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130. Melancton Smith, 2 JONATHAN ELLIOTT, DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 227 (1836) (1788) (speech during New York ratification convention about representation in Congress). Smith was the leading Antifederalist in the New York ratification convention that proposed the Due Process Clause. Most scholars now believe that he was also the "Federal Farmer," who led the Antifederalists in the press. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 228-29 (Alfred A. Knopf 1996). The New York ratification debates and ratification convention are central to the legislative history of the Due Process Clause. When Congress submitted the Bill of Rights to the states for ratification, Congress affixed a preamble, stating as follows: "The conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added. . . ." 5 THE FOUNDERS' CONSTITUTION, *supra* note 13, at 40. New York was the only state that had expressed a desire for the "due process" language.