

# Oklahoma Law Review

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Volume 60 | Number 1

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2007

## Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation...and Parking Tickets

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### Recommended Citation

Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation...and Parking Tickets*, 60 OKLA. L. REV. 1 (2007), <https://digitalcommons.law.ou.edu/olr/vol60/iss1/1>

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# OKLAHOMA LAW REVIEW

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VOLUME 60

SPRING 2007

NUMBER 1

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## DOES DUE PROCESS HAVE AN ORIGINAL MEANING? ON ORIGINALISM, DUE PROCESS, PROCEDURAL INNOVATION . . . AND PARKING TICKETS

LAWRENCE ROSENTHAL\*

Originalism — the view that constitutional provisions should be interpreted as they were “understood at the time of the law’s enactment”<sup>1</sup> — is ascendant. The reasons for its success are not hard to fathom — originalism is said to tame the monster of judicial activism by teaching that a conscientious inquiry into historical sources will yield the original meaning of constitutional text and thereby provide a reliable and objective basis for constitutional adjudication.

Even putting aside deconstructionist arguments about the indeterminate character of language, however, the claim that constitutional text has a determinate original meaning is problematic. For one thing, it does not fit with much of what we know about politics. Anyone who has actually shepherded a controversial piece of legislation through the political process knows that language sometimes is chosen precisely because of its indeterminacy. When it

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\* Associate Professor of Law, Chapman University School of Law. I am deeply appreciative to Thomas Davies, Janine Kim, Donald Kochan, Celestine McConville, Matt Parlow, and David Strauss for their insightful comments and willingness to listen to me ramble. All remaining errors are mine alone. Thanks are also owed to Andrew Bugman, Rebecca Meyer, Mike Riddell, and the Chapman University School of Law library staff for highly capable research assistance.

1. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990). This definition will suffice for purposes of the present project, but I do not mean to overlook the many differences among originalists. For a particularly helpful discussion of the various flavors of originalism, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1811-15 (1996). Nonoriginalism also can have a variety of meanings, but for my purposes, that term will denote a method of constitutional interpretation that does not privilege legal arrangements and understandings at the time of the framing and ratification of a constitutional provision.

comes to crafting constitutional text, highly general and ambiguous text may be better able to obtain the requisite supermajority support than a more specific proposal because it means, if not all things to all people, many things to most. If so, then there may be little in the way of original meaning to guide interpretation of such text. Instead, interpretation would of necessity be nonoriginalist in character.

Consider, for example, the Constitution's two Due Process Clauses. The Fifth and Fourteenth Amendments prohibit the deprivation of life, liberty, or property without due process of law, but when it comes to what types of "procedures" are "due," almost no one embraces originalist methods of interpretation. The absence of originalism in the arena of procedural due process, this Article will argue, is no accident. An inquiry into the original understanding of due process demonstrates that the original meaning of this constitutional command — and perhaps many others — is nonoriginalist. The two Due Process Clauses, this Article argues, function as delegations of authority to the courts to create a common law of due process rather than to replicate an "original meaning."

The discussion below unfolds in four parts. Part I surveys the rise of public-meaning originalism — the view that constitutional provisions should be construed in light of their generally understood meaning at the time of their enactment — and its effort to anchor constitutional interpretation in historical analysis by interpreting open-ended constitutional provisions in light of the legal rights that were commonly recognized at the time of the framing. Part II then applies public-meaning originalism to arguments about the constitutionality of procedural innovation under the Due Process Clauses. It begins by considering a specific type of procedural innovation — municipal systems for the administrative adjudication of parking tickets. Part II describes these systems of administrative adjudication and demonstrates their incompatibility with an originalist view of the Due Process Clause. Part II concludes by observing that an originalist view of procedural due process would necessarily condemn any innovation in civil or criminal procedure that would infringe upon procedural rights recognized at the framing. Next, Part III considers whether due process is properly understood, even on originalist terms, as a prohibition on procedural innovation. Part III observes that the original understanding of due process was remarkably diffuse and concludes that the Due Process Clauses were not framed in originalist terms. Instead, they are best understood as a mandate for the courts to evolve a common law governing the manner in which persons may be deprived of life, liberty, or property, rather than leaving that question to the mercies of majoritarian institutions. Finally, Part IV acknowledges that there are reasons for restraint when construing the Due Process Clauses, but they are prudential in character, and not rooted in the original meaning of due process.

### I. The Rise of Public-Meaning Originalism

Originalism has enjoyed a reversal of fortune. A generation ago, when the United States Supreme Court recognized a constitutional right to abortion under the Fourteenth Amendment's Due Process Clause,<sup>2</sup> originalism's only appearance came in then-Justice Rehnquist's dissenting opinion, which argued that the Court's construction of the Fourteenth Amendment was surely in error because the Amendment's Framers did not intend to recognize a right to abortion.<sup>3</sup> That method of constitutional interpretation was evidently thought to be so implausible that it was not deemed worthy of comment by any other member of the Court.<sup>4</sup>

Today, in contrast, two members of the Court are avowed originalists,<sup>5</sup> and at their confirmation hearings, the two most recent additions to the Court evinced considerable sympathy with originalist interpretation.<sup>6</sup> Originalist methods of constitutional interpretation are also increasingly appearing in majority opinions.<sup>7</sup> For example, originalism has revolutionized much of

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2. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

3. See *Roe v. Wade*, 410 U.S. 113, 174-77 (1973) (Rehnquist, J., dissenting). On Justice (later Chief Justice) Rehnquist's brand of originalism, see Harry M. Clor, *Chief Justice Rehnquist and the Balances of Constitutional Democracy*, 25 RUTGERS L.J. 557 (1994); Richard W. Garnett, *Chief Justice Rehnquist's Enduring, Democratic Constitution*, 29 HARV. J.L. & PUB. POL'Y 395 (2006); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

4. See *Doe v. Bolton*, 410 U.S. 179, 207-08 (1973) (Burger, C.J., concurring); *id.* at 210-18 (Douglas, J., concurring); *id.* at 221-22 (White, J., dissenting); *Roe*, 410 U.S. at 156-64; *id.* at 167-71 (Stewart, J., concurring). Justice White, who cast the other dissenting vote, had earlier embraced a decidedly nonoriginalist approach to the Due Process Clause in recognizing a constitutional right to contraception, at least in the context of marriage. See *Griswold v. Connecticut*, 381 U.S. 479, 502-07 (1965) (White, J., concurring).

5. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Clarence Thomas, *Judging*, 45 U. KAN. L. REV. 1 (1996); see also, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 358-59 (1995) (Thomas, J., concurring); *Minnesota v. Dickerson*, 508 U.S. 366, 379-80 (1993) (Scalia, J., concurring).

6. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 357 (2006) (statement of Samuel A. Alito, Jr., J., U.S. Court of Appeals for the Third Circuit, and Nominee to the U.S. Supreme Court); *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 159, 570 (2005) (statement and written response of John G. Roberts, Jr., J., U.S. Court of Appeals for the D.C. Circuit, and Nominee to the U.S. Supreme Court).

7. See, e.g., *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 364-79 (2006); *McCreary County v. ACLU*, 545 U.S. 844, 874-81 (2005); *Eldred v. Ashcroft*, 537 U.S. 186, 200-04

constitutional criminal procedure;<sup>8</sup> originalist methodology has led the Court to overhaul its jurisprudence regarding the role of judges in sentencing,<sup>9</sup> and the right of criminal defendants to confront the witnesses against them.<sup>10</sup> In the due process arena, the Court's opinions increasingly stress that substantive rights are unlikely to be protected by due process unless they are rooted in historical understandings,<sup>11</sup> although the Court still occasionally embraces nonoriginalist approaches to substantive due process.<sup>12</sup> In the academy, the rise of originalism has been even more dramatic. As Professor Barnett has observed, until recently "[t]he received wisdom among law professors [wa]s that originalism [wa]s dead, having been defeated in intellectual combat sometime in the [early] eighties," but by the dawn of the millennium, originalism had become "the prevailing approach to constitutional interpretation."<sup>13</sup> We have reached the point where even the most eminent constitutional scholars exclaim: "We are all originalists now . . . ."<sup>14</sup>

The explanation for this shift is not difficult to discern. In the 1970s and 1980s, the advocates of originalism advanced a form of intentionalism; they argued that the Constitution should be construed according to the intentions of

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(2003); *Utah v. Evans*, 536 U.S. 452, 474-77 (2002).

8. For an empirical inquiry into the impact of originalism on the Supreme Court's jurisprudence in criminal cases, see Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043 (2006).

9. See *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004). On the significance of these cases, see, for example, Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615 (2006); J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the Blakely Revolution*, 2006 U. ILL. L. REV. 301.

10. See *Crawford v. Washington*, 541 U.S. 36, 42-56 (2004). On the impact of *Crawford*, see, for example, John C. Latimer, *Confrontation After Crawford: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327 (2006); Symposium, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1 (2005).

11. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720-22 (1997); *Reno v. Flores*, 507 U.S. 292, 302-03 (1993); *Collins v. City of Harker Heights*, 503 U.S. 115, 125-28 (1992).

12. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

13. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611, 613 (1999); accord, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 68 (1996); Martin S. Flaherty, *The Better Angels of Self-Government*, 71 FORDHAM L. REV. 1773, 1774 (2003); Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 677, 695-97 (2000); Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 558 (1997) (reviewing A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION]).

14. Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION, *supra* note 13, at 65, 67.

those who framed its text.<sup>15</sup> This original-intention method met with two powerful objections. First, the difficulties of ascertaining the intentions of the multitude of individuals involved in the framing and ratification of constitutional provisions — individuals who often held disparate or even contradictory views about these provisions — are formidable.<sup>16</sup> Second, there is considerable evidence that the Constitution's Framers believed that legal texts should be construed without regard to the underlying intentions of the drafters.<sup>17</sup> Although there were a number of efforts to rebut these attacks,<sup>18</sup> by the 1990s originalists had largely acknowledged the force of these objections and embraced the view that the Constitution should be construed in light of the generally understood meaning of its text at the time it was adopted rather than by reference to the likely intentions of the drafters or ratifiers.<sup>19</sup> Thus, public meaning originalism,

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15. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363-72 (1977); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Edwin Meese III, *Interpreting the Constitution*, in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13-21 (Jack N. Rakove ed., 1990); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988).

16. See, e.g., DANIEL A. FARBER & SUSANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 14-25 (2002); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 284-398 (1988); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456-74 (1984); Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 30-36 (1995); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-22 (1980); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587 (1997); Marc V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793-804 (1983).

17. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 340-65 (1996); Hans W. Baade, "*Original Intent*" in *Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1006-62 (1991); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

18. See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 88-99, 106-09 (1999); Raoul Berger, *The Founders' Views--According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 236-84 (1988); Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77 (1988); Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43 (1987); William J. Michael, *The Original Understanding of Original Intent: A Textual Analysis*, 26 OHIO N.U.L. REV. 201 (2000).

19. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92-117 (2004); GREGORY BASSHAM, *ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY* 67-90 (1992); BORK, *supra* note 1, at 143-51;

by not treating the subjective intentions of those involved in the framing and ratification as controlling, but instead looking to objective evidence about the meaning of various terms at the time of adoption, makes a claim to have elided the objections to original-meaning originalism.

The case for originalism is perhaps best summarized by its most prominent advocate, Justice Scalia:

The principal theoretical defect of nonoriginalism . . . is its incompatibility with the very principle that legitimizes judicial review of constitutionality. . . . [T]he Constitution, though it has an effect superior to other laws, is in its nature the sort of “law” that is the business of the courts — an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a “law,” but a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than the legislature? One simply cannot say, regarding *that* sort of novel enactment, that “[i]t is emphatically the province and duty of the judicial department” to determine its content. Quite to the contrary, the legislature would seem a much more appropriate expositor of social values, and *its* determination that a statute is compatible with the Constitution should, as in England, prevail.<sup>20</sup>

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RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 19-31 (1985); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? 28-53 (1994); WHITTINGTON, *supra* note 18, at 160-212; Baade, *supra* note 17, at 1103-07; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 550-60 (1994); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution”*, 72 IOWA L. REV. 1177, 1186-259 (1987); Charles Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751, 756-60 (1987); Kay, *supra* note 18, at 229-36; Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1127-48 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269 (1997); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988); Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION, *supra* note 13, at 3, 38-41; Saikrishna B. Prakash, *Unoriginalism’s Law Without Meaning*, 15 CONST. COMMENT. 529 (1998) (reviewing RAKOVE, *supra* note 17). For a recent argument in support of this view, see Lawrence B. Solum, *Constitutional Texting*, 44 SAN DIEGO L. REV. 123 (2007).

20. Scalia, *supra* note 5, at 854 (second alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). He adds:

I take the need for theoretical legitimacy seriously, and even if one assumes (as

Thus, although Justice Scalia acknowledges that “it is often exceedingly difficult to plumb the original understanding of an ancient text,”<sup>21</sup> he nevertheless endorses originalism because it minimizes “the main danger in judicial interpretation of the Constitution . . . that the judges will mistake their own predilections for the law.”<sup>22</sup>

The appeal of originalism is hard to deny. As originalists point out, the point of a written constitution seems to inhere in creating fixed rules that are enforceable as positive law and therefore a more reliable safeguard for liberty than a common law constitution that is subject to the tempers of times and the inclinations of the judiciary.<sup>23</sup> Moreover, to use Justice Scalia’s words, treating the Constitution as an evolving statement of aspirations “is preeminently a common-law way of making law, and not the way of construing a democratically adopted text.”<sup>24</sup> Crucially, although Justice Scalia acknowledges that the Constitution contains much that is “abstract and general rather than specific and concrete,” he adds that “[t]he context suggests that the abstract and general terms, like the concrete and particular ones, are meant to nail down current rights, rather than aspire to future ones — that they are abstract and general references to *extant* rights and freedoms possessed under the then-current regime.”<sup>25</sup> This approach, accordingly, restrains judicial decisionmaking by linking constitutional protection to those rights recognized at the time of the framing — as Akhil Amar has put it, Justice Scalia’s originalism is “frozen in

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many nonoriginalists do not even bother to do) that the Constitution was originally *meant* to expound evolving rather than permanent values, . . . I see no basis for believing that supervision of the evolution would have been committed to the courts.

*Id.* at 862.

21. *Id.* at 856.

22. *Id.* at 863.

23. See, e.g., BARNETT, *supra* note 19, at 100-09; BASSHAM, *supra* note 19, at 92-94; PERRY, *supra* note 19, at 31-38; WHITTINGTON, *supra* note 18, at 50-61; Kay, *supra* note 18, at 289-92.

24. Scalia, *supra* note 19, at 40.

25. Antonin Scalia, *Response, in A MATTER OF INTERPRETATION*, *supra* note 13, at 129, 135. To be sure, it is possible to mount an originalist attack against Justice Scalia’s reliance on practices extant at the time of the framing on the ground that constitutional text is binding with respect to only its original meaning and not its originally intended applications. See, e.g., Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591-617 (1998); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 279-83 (2002); Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1292-1300 (2007). Whatever the merit of this observation as a general matter, however, it has far less force when it comes to procedural due process. When it comes to what “process” is thought to be “due,” conceptions of procedural rights at the time of the framing would seem to be particularly strong evidence of original meaning.



1791 or 1868 amber.”<sup>26</sup> Still, as James Ryan recently observed, “a compelling and popular alternative theory has yet to emerge from the academy or from sitting judges as a serious competitor to originalism.”<sup>27</sup>

To be sure, public-meaning originalism has its critics. Nonoriginalists deny that rebranded originalism can overcome the difficulties with ascertaining original meaning, and they question the legitimacy and utility of shackling constitutional law to the wishes of the dead hands that drafted constitutional texts and embraced their original meaning long ago.<sup>28</sup> Indeed, the distinction between public-meaning originalism and original-intention originalism is frequently indistinct. The advocates of public-meaning originalism often find themselves relying on evidence of the Framers’ beliefs that did not make their way into any constitutional text.<sup>29</sup> By privileging the statements of thoughts of

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26. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 818 (1994).

27. James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1625 (2006) (reviewing STEPHEN G. BRYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)).

28. For a sampling of the literature responding to originalism’s turn toward original meaning, see, for example, BREYER, *supra* note 27, at 115-32; RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 290-305 (1996); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 10-45 (2001); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 13-25 (2001); JED RUBENFELD, *REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW* 99-124 (2005); SUNSTEIN, *supra* note 27, at 53-78; Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1793-1812 (2007); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Philip C. Kissam, *Triangulating Constitutional Theory: Power, Time, and Everyman*, 53 BUFF. L. REV. 269 (2005); Larry Kramer, *Fidelity to History--And Through It*, 65 FORDHAM L. REV. 1627 (1997); William J. Michael, *When Originalism Fails*, 25 WHITTIER L. REV. 497 (2004); Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612 (2006); Robert L. Tsai, *Democracy’s Handmaid*, 86 B.U. L. REV. 1 (2006); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002); Daniel S. Goldberg, Comment, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463 (2002).

29. For example, one prominent advocate of public-meaning originalism, Randy Barnett, argues that the Ninth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment should be read “as establishing a general Presumption of Liberty, which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom.” BARNETT, *supra* note 19, at 259-60. Professor Barnett warns, however, that public-meaning originalism requires interpretation rooted in constitutional text rather than in what he characterizes as “underlying principles” not embodied in text. See Randy E. Barnett, *Scalia’s Infidelity: A Critique of “Faint-Hearted” Originalism*, 75 U. CIN. L. REV. 7, 19-22 (2006). This point is, of course, essential to public-meaning methodology. Yet, what the Ninth

particular Framers, however, public-meaning originalism is vulnerable to the same criticisms that felled original-intention originalism. Nor is the task of decoding original meaning a simple one. For example, as Bret Boyce has demonstrated, both judges and academics have reached wildly divergent conclusions on the original meaning of the Fourteenth Amendment.<sup>30</sup> Still, nonoriginalists have yet to respond effectively to the central originalist argument — it is difficult to understand why one would adopt a constitutional text if not to memorialize its then-understood meaning as organic law.<sup>31</sup>

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Amendment actually says is “[t]he 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. The text quite plainly does no more than delineate the effect of enumerated on unenumerated rights; it does not come close to saying that some sort of presumption operates against the government when it exercises its delegated powers. To take this view of the Ninth Amendment, accordingly, Professor Barnett is forced to rely on statements of James Madison suggesting that the Ninth Amendment limited the delegated powers of the federal government. See BARNETT, *supra* note 19, at 235-52; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 24-76 (2006). Thus, Professor Barnett’s position essentially ignores the text in favor of what he regards as persuasive evidence of original intention, even though it was the former and not the latter that was added to the Constitution by the Ninth Amendment. Similarly, for his view of the Privileges and Immunities Clause, which provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,” U.S. CONST. amend. XIV, § 1, Professor Barnett relies on statements in the legislative history of the Fourteenth Amendment to contend that the amendment protected the same rights protected by the Privileges and Immunities Clause of Article IV of the Constitution, which had been understood to protect the citizens of each state from discrimination with respect to “privileges and immunities.” See BARNETT, *supra* note 19, at 60-63, 192-95. See generally U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause of Article IV, however, had imposed an obligation on the states of nondiscrimination against the residents of other states with respect to what were thought privileges and immunities, rather than acting as a source of substantive rights. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180-81 (1868), *abrogated on other grounds* by *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533 (1944). If one were to look to original public meaning accordingly, one would read the Privileges and Immunities Clause as a nondiscrimination provision rather than a source of substantive rights. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1397-432 (1992). Thus, one can be forgiven for thinking that Professor Barnett’s methodology is far more attentive to evidence of original intentions than to constitutional text or even original public meaning. Indeed, given how freely originalists tend to veer between evidence of original meaning and evidence of original intention as shedding light on original meaning, one can argue that even the intentionalists of the 1970s and 1980s were in fact advocates of public-meaning originalism. See JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 127-32 (2005).

30. See Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909 (1998).

31. For a particularly powerful statement of this view, see Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

The debate over originalism generally discusses the Constitution as an undifferentiated whole, but not all constitutional provisions are equally amenable to an originalist construction. The Seventh Amendment, for example, provides: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”<sup>32</sup> This formulation virtually compels an inquiry into the nature of the common-law right to a jury trial at the time the Seventh Amendment was ratified. In fact, the Supreme Court has construed the Seventh Amendment in just this originalist fashion.<sup>33</sup> Other constitutional provisions employ legal terms of art, such as the prohibition on Ex Post Facto Laws<sup>34</sup> or Bills of Attainder.<sup>35</sup> It is difficult to construe these provisions with integrity except by reference to their meaning at the time they were added to the Constitution. Perhaps unsurprisingly, the Supreme Court has taken an originalist approach to these provisions as well.<sup>36</sup>

In contrast, when it comes to the procedural rights secured by due process, originalist methods of interpretation are absent. The Supreme Court’s work in that area — even when written by the Court’s originalists — breathes not a word about originalism.<sup>37</sup> Consider the recent decision in *Jones v. Flowers*,<sup>38</sup> in which the Court held that when a notice of tax foreclosure sale of a residence sent to the taxpayer’s last known address by certified mail is returned unclaimed, due process requires the taxing authority to provide some additional form of notice before proceeding with the foreclosure.<sup>39</sup> The dissenting opinion was written by Justice Thomas, one of the Court’s avowed originalists, and was joined by Justice Scalia and Justice Kennedy, but its approach was nonoriginalist; the dissent merely contended that the measures undertaken to supply notice to the taxpayer were reasonable under the circumstances.<sup>40</sup> In particular, the dissenting opinion made no reference to the procedures for giving notice in place in 1868,

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32. U.S. CONST. amend. VII.

33. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-52 (1998); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-41 (1989); *Ross v. Bernhard*, 396 U.S. 531, 533-34 (1970).

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

35. *Id.* § 9, cl. 3; *id.* § 10, cl. 1.

36. See, e.g., *Stogner v. California*, 539 U.S. 607, 611-15 (2003) (interpreting the Ex Post Facto Clause); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473-75 (1977) (construing the Bill of Attainder Clause).

37. See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Dusenberry v. United States*, 534 U.S. 161 (2002).

38. 126 S. Ct. 1708 (2006).

39. See *id.* at 1715-21.

40. See *id.* at 1721-27 (Thomas, J., dissenting).

when the Fourteenth Amendment was ratified.<sup>41</sup> Indeed, we will see that service by mail was considered ineffective in 1868,<sup>42</sup> but no member of the Court made anything of that fact. The failure to develop an originalist position on procedural due process is equally apparent among the academic expositors of originalism; I can identify no effort in the scholarly literature to develop an originalist account of procedural due process.<sup>43</sup>

This omission is perhaps unsurprising — procedural due process poses serious problems for originalism. The objections to the view that civil and criminal procedure are frozen in eighteenth- or nineteenth-century amber are more than consequentialist; they are originalist as well. Understanding due process to prohibit procedural innovation is inconsistent with longstanding legal tradition; civil and criminal procedure up to the time of the framing of the Fifth and Fourteenth Amendments' Due Process Clauses had been rife with innovation. For example, criminal procedure had undergone a virtual revolution in the centuries before the framing, as an essentially inquisitorial system in which defense counsel was virtually absent evolved into something much like the adversarial system we know today.<sup>44</sup> Civil procedure had also evolved from the intricacies of common-law pleading toward a more streamlined approach emphasizing substance over form.<sup>45</sup> The constitutional text, moreover, does not suggest the kind of frozen-in-amber approach reflected in the Seventh Amendment.<sup>46</sup> But if history is not the guide for assessing whether a procedural innovation supplies “due process,” then constitutional interpretation is no longer anchored to historical understandings; it is no longer originalist. This Article explores the relationship between originalism and procedural due process in an effort to demonstrate that an originalist view of due process is untenable. It argues that the original meaning of the two Due Process Clauses — and perhaps much of the rest of the Constitution as well — is nonoriginalist.

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41. See Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868).

42. See *infra* Part II.B.1.

43. The only possible exception of which I am aware is Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987). Eberle's account, however, fails to qualify as originalist, for reasons explored below. See *infra* note 110.

44. See JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 284-343 (2003).

45. For a summary of the dramatic evolution in civil procedure until and after the framing of the Fifth and Fourteenth Amendments, see ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 12-64 (1952).

46. The relevant historical evidence of the original meaning of the Fifth and Fourteenth Amendments and the respective due process clauses is considered *infra* Part III.A.

## *II. The Failure of Originalist Accounts of Procedural Due Process*

To demonstrate the difficulties of an originalist approach to procedural due process, this Part begins with a particularly prosaic example — the methods by which liability for vehicular parking offenses are adjudicated. The need to address the millions of vehicles found illegally parked each year in the nation's major cities has led to the emergence of an entirely new system of streamlined adjudication that manages what would otherwise be a crushing volume of litigation. While the innovative systems of administrative adjudication and enforcement of parking-ticket liability that have emerged fare well under prevailing due process jurisprudence, they are indefensible under an originalist approach — a perhaps unsurprising result given the likely inability of the Framers to envision the millions of vehicles that now clog our largest cities. Generalizing from this example, this Part then considers the implications of originalist jurisprudence for procedural innovation.

### *A. Procedural Innovation in Parking-Ticket Adjudication*

State law usually delegates to municipalities the power to regulate the parking of vehicles by municipal ordinance.<sup>47</sup> The rationale for such delegation should

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47. See ALA. CODE § 32-5-1(e) (1999); ALASKA STAT. § 28.01.010 (2004); ARIZ. REV. STAT. ANN. § 28-627(A)(1) (Supp. 2006); ARK. CODE ANN. § 27-49-106(b)(1) (Supp. 2005); CAL. VEH. CODE § 21100 (West Supp. 2007); COLO. REV. STAT. § 42-4-111(1)(a) (2006); CONN. GEN. STAT. § 14-307(a) (2007); DEL. CODE ANN. tit. 21, § 501 (2005); FLA. STAT. § 316.008(1)(a) (2006); GA. CODE ANN. § 40-6-371(a)(1) (2004); HAW. REV. STAT. § 291C-111(a) (Supp. 2005); IDAHO CODE ANN. § 49-208(1)(a) (2000); 625 ILL. COMP. STAT. 5/11-208(a)(1) (2004); IND. CODE § 9-21-1-3(a)(1) (2004); IOWA CODE § 321.236(1) (2007); KAN. STAT. ANN. § 8-2002(a)(1) (2001); KY. REV. STAT. ANN. § 189.390(5)(c) (West 2006); LA. REV. STAT. ANN. § 32:41(A)(1) (2002); ME. REV. STAT. ANN. tit. 30-A, § 3009(1)(c) (Supp. 2006); MD. CODE ANN., TRANSP. § 25-102(a)(1) (West Supp. 2006); MASS. GEN. LAWS ch. 90, § 20A (2004); MICH. COMP. LAWS ANN. § 257.606(1)(a) (West 2006); MINN. STAT. § 169.04(a)(1) (2006); MISS. CODE ANN. § 63-3-211(a)(1) (2001); MO. REV. STAT. § 49.266(1) (Supp. 2005); MONT. CODE ANN. § 61-12-101(1) (2005); NEB. REV. STAT. § 60-680(1)(a) (2004); NEV. REV. STAT. § 484.777 (2005); N.H. REV. STAT. ANN. § 265:70 (2004); N.J. STAT. ANN. § 39:4-197.2 (West 2002); N.M. STAT. § 66-7-9(a)(1) (2004); N.Y. VEH. & TRAF. LAW § 1640-a(6) (McKinney Supp. 2007); N.C. GEN. STAT. § 160A-174 (2005); N.D. CENT. CODE § 39-10-50 (1997); OHIO REV. CODE ANN. § 4511.07(A)(1) (LexisNexis 2003); 47 OKLA. STAT. § 15-102(a)(1) (Supp. 2006); OR. REV. STAT. § 810.010(4) (2005); 75 PA. CONS. STAT. § 6109(a)(1) (2004); R.I. GEN. LAWS § 31-12-12(a)(1) (2002); S.C. CODE ANN. § 56-5-710(1) (2006); S.D. CODIFIED LAWS § 9-31-1 (2004); TENN. CODE ANN. § 55-8-161 (2004); TEX. TRANSP. CODE ANN. § 542.202(a)(2) (Vernon Supp. 2006); UTAH CODE ANN. § 41-6a-208(1)(a) (Supp. 2005); VT. STAT. ANN. tit. 23, § 2201 (Supp. 2006); VA. CODE ANN. § 46.2-1220 (2005); WASH. REV. CODE § 46.61.575 (2006); W. VA. CODE § 17C-2-8(a)(1) (2004); WIS. STAT. § 346.50 (2003); WYO. STAT. ANN. § 31-5-109(a)(i) (2005).

be obvious: the need for regulation will vary with the size and density of the municipality. In a congested municipality, a lack of effective parking regulation can have an enormous impact on the quality of commercial and residential life.<sup>48</sup> In the exercise of their delegated powers, many local governments have developed innovative systems for the efficient adjudication of the enormous volume of parking ticket litigation that many of them face.

### *1. Characteristics of Parking-Enforcement Reforms*

Enforcement of parking regulations poses logistical difficulties not ordinarily present in ordinance-enforcement litigation. The first involves service. Personal service is rarely practicable; parking enforcement officials who observe an illegally parked car can hardly be expected to stake it out until the operator returns. Accordingly, state law generally authorizes a form of “tie-on” service, by which service of a parking ticket is accomplished by leaving a copy on the vehicle.<sup>49</sup> Another copy may be served by mail on the address of the registered owner identified in state records.<sup>50</sup> For similar reasons, the registered owner of the vehicle is usually deemed *prima facie* responsible when the vehicle is unlawfully parked.<sup>51</sup>

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48. See, e.g., Jacquielynn Floyd, *Ticket Masters: Parking Officers Learn to Stay Cool as Drivers Fume*, DALLAS MORNING NEWS, Mar. 8, 1998, at 1A. The survey that follows is confined to state statutes even though parking is also subject to local regulation. Due to the difficulty of undertaking a comprehensive survey of municipal ordinances, no effort has been made along those lines, but the reader can assume that in many localities, regulations similar to those discussed below have been adopted by ordinance even when not specifically authorized by applicable state statute, either pursuant to some general delegation of regulatory authority as an incident of home-rule authority.

49. See CAL. VEH. CODE § 40202(b) (West 2000); GA. CODE ANN. § 12-3-10(s)(3) (2006); HAW. REV. STAT. § 291C-167 (1993); 625 ILL. COMP. STAT. 5/11-208.3(b)(3) (Supp. 2005); KAN. STAT. ANN. § 8-2112 (2001); KY. REV. STAT. ANN. § 82.610(1) (West 2006); MD. CODE ANN., TRANSP. § 26-302(e)(1) (West 2002); MASS. GEN. LAWS ch. 90, § 20A (2004); MISS. CODE ANN. § 21-23-19 (2001); MO. REV. STAT. § 300.585 (Supp. 2005); N.J. STAT. ANN. § 39:4-139.4(b) (West 2002); N.Y. VEH. & TRAF. LAW § 238(2) (McKinney 2005); N.C. GEN. STAT. § 15A-302(d) (2005); OHIO REV. CODE ANN. § 4521.03(c) (LexisNexis 2003).

50. See ALASKA STAT. § 28.05.121 (2004); ARIZ. REV. STAT. ANN. § 28-885(A) (2004); 625 ILL. COMP. STAT. 5/11-208.3(b)(5)(i) (Supp. 2005); OR. REV. STAT. § 153.820(3) (2005).

51. See, e.g., CAL. VEH. CODE § 40215 (West Supp. 2007); CONN. GEN. STAT. § 7-152b(c) (2007); DEL. CODE ANN. tit. 21, § 4181A(c)(1) (Supp. 2006); FLA. STAT. § 316.1967(1) (2006); KAN. STAT. ANN. § 8-2114(a) (2001); LA. REV. STAT. ANN. § 13:2571(B) (1999); MD. CODE ANN., TRANSP. § 26-302(b) (West 2002); MASS. GEN. LAWS ch. 90, § 20A (2004); MICH. COMP. LAWS ANN. § 257.675a (West 2001); MISS. CODE ANN. § 21-23-19 (2001); N.H. REV. STAT. ANN. § 231:132-a(I) (Supp. 2006); N.J. STAT. ANN. § 39:4-139.8(a) (West 2002); N.Y. VEH. & TRAF. LAW § 239(2)(a) (McKinney 2005); OHIO REV. CODE ANN. § 4521.03(F) (LexisNexis 2003).

Additional logistical problems face the adjudicative process. These difficulties are largely a function of staggering volume. For example, in 1988, shortly before Chicago turned to administrative adjudication, the police issued 4.2 million parking tickets.<sup>52</sup> Managing a caseload that large is a considerable challenge; enormous judicial resources are required to process that many cases. But that is not the only logistical problem that large municipalities face, as Chicago's experience illustrates. In 1988, just prior to the introduction of administrative adjudication of parking tickets, among contested cases, guilty findings issued in only 7,381 cases, while 127,849 cases either were not prosecuted or were dismissed.<sup>53</sup> The primary reason for the dismal conviction rate was that judges would insist that the ticketing official testify and on the frequent occasions on which the ticketing official did not appear, the ticket would be dismissed.<sup>54</sup> Yet testimony from the ticketing official is likely to be useless; given the volume of parking tickets, the only truthful testimony a ticketing official is likely to be able to provide is that he has no recollection of issuing the ticket but presumes that the information recorded on the ticket is accurate.<sup>55</sup>

To avoid the inefficiencies associated with the judicial process, Chicago sought and obtained a new state statute authorizing its use of administrative adjudication for parking violations.<sup>56</sup> Chicago's solution is reflective of a general trend toward nontraditional forms of adjudication for parking-ticket litigation.<sup>57</sup> Indeed, state statutes authorizing municipalities to run their own systems of administrative adjudication for parking violations are increasingly

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52. William Recktenwald, *City Writes More Tickets, but Few Pay*, CHI. TRIB., Feb. 19, 1989, at C1.

53. *Id.*; see also, e.g., Raphael Lewis, *Traffic Tickets Beaten on Appeal*, BOSTON GLOBE, Sept. 24, 2000, at B1 (stating that in Boston "[b]etween July 1, 1997, and June 30, 2000, about 90 percent of parking tickets that drivers appealed were dismissed").

54. Rogers Worthington, *Scofflaw Trackdown Going Flat Fast in City*, CHI. TRIB., Mar. 25, 1986, at C1.

55. See, e.g., Ed Will, *That's the Ticket: Excuses Start in the Referees' Court*, DENVER POST, Oct. 1, 1997, at G-01.

56. See James M. Reilly, *The Department of Administrative Hearings for the City of Chicago: A New Method of Municipal Code Enforcement*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 89 (1998).

57. See, e.g., John J. Lipinski, *Alternative Dispute Resolution for Traffic Cases*, CHI. DAILY L. BULL., Apr. 27, 1992, at 6, 6; Julie Mason, *Parking Citation Changes – Just the Ticket?*, HOUSTON CHRON., Jan. 24, 1995, at A-11; Rick McDonough, *Louisville Gets Tough on Parking Tickets: New Civil Court Tactics Include Garnished Wages and Liens*, COURIER-JOURNAL (Louisville, Ky.), Feb. 15, 1999, at 01A; Brian McGrory, *Plan Emerges to Free Courts of Ticket Load: Shift to Municipalities Offers Solution, Some Say*, BOSTON GLOBE, July 23, 1989, at 17.

common.<sup>58</sup> Under these systems of administrative adjudication, the formal rules of evidence applicable to judicial proceedings usually do not apply,<sup>59</sup> and the parking ticket itself is often treated as prima facie evidence of liability.<sup>60</sup>

The final set of logistical problems relates to the enforcement of judgments. Because parking fines are generally small, it is frequently not cost-effective to undertake traditional collection efforts. But if the public were to realize that parking fines are rarely collected, the entire regulatory system would eventually collapse.<sup>61</sup> Again, Chicago's experience is illustrative; in 1988, while 4.2 million parking tickets issued, 3.5 million summonses also issued because outstanding tickets had not been paid.<sup>62</sup> And, of course, the summonses consumed additional resources, as they had to be served and the violator somehow induced to pay the outstanding fine. As a result, municipalities have turned to novel "self-help" enforcement measures. Statutory reforms have authorized municipalities to immobilize, or "boot," and subsequently tow and impound vehicles that have accumulated a specified number of unpaid parking tickets.<sup>63</sup> The vehicle owner's vehicle registration or driver's license may be

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58. See ALASKA STAT. § 28.05.141 (2004); CAL. VEH. CODE § 40215 (West Supp. 2007); CONN. GEN. STAT. § 7-152b(a) (2007); DEL. CODE ANN. tit. 21, § 807 (2005); FLA. STAT. § 316.008(2) (2006); GA. CODE ANN. § 40-13-50 (2004); 625 ILL. COMP. STAT. 5/11-208.3(a) (Supp. 2005); IOWA CODE § 805.13 (2007); KY. REV. STAT. ANN. § 82.620 (West 2006); LA. REV. STAT. ANN. § 13:2571 (1999); MASS. GEN. LAWS ch. 90, § 20A (2004); MO. REV. STAT. § 479.011(1) (Supp. 2005); N.J. STAT. ANN. § 39:5-2 (West 2002); N.Y. VEH. & TRAF. LAW § 235(1) (McKinney 2005); N.C. GEN. STAT. § 160A-175 (2005); OR. REV. STAT. § 153.820 (2005); 75 PA. CONS. STAT. § 6102 (2004); R.I. GEN. LAWS § 31-41.1-6 (Supp. 2005); S.C. CODE ANN. § 1-23-380 (Supp. 2006); TEX. TRANSP. CODE ANN. § 682.003 (Vernon Supp. 2006); VT. STAT. ANN. tit. 23, § 1742 (1999); VA. CODE ANN. § 10.1-104 (2006); WIS. STAT. § 345.28 (2003).

59. See 625 ILL. COMP. STAT. 5/11-208.3(b)(4) (Supp. 2005); LA. REV. STAT. ANN. § 13:2571(D) (1999); N.Y. VEH. & TRAF. LAW § 240(2)(c) (McKinney 2005); OR. REV. STAT. § 153.820(4) (2005); 2 PA. CONS. STAT. § 554 (1988).

60. See CAL. VEH. CODE § 40215(c)(5) (West Supp. 2007); CONN. GEN. STAT. § 7-152b(e) (2007); DEL. CODE ANN. tit. 21, § 712 (2005); 625 ILL. COMP. STAT. 5/11-208.3(b)(3) (Supp. 2005); IOWA CODE § 805.6(1)(a) (2007); KY. REV. STAT. ANN. § 82.610(3) (West 2006); MD. CODE ANN., TRANSP. § 26-303(b)(2) (West 2002); MASS. GEN. LAWS ch. 90, § 20A (2004); MICH. COMP. LAWS ANN. § 257.675a (West 2001); MO. REV. STAT. § 479.011(3) (Supp. 2005); N.J. STAT. ANN. § 39:4-139.4(d) (West 2002); N.M. STAT. § 66-8-131 (2004); N.Y. VEH. & TRAF. LAW § 238(1) (McKinney 2005); OHIO REV. CODE ANN. § 4521.03(D) (LexisNexis 2003); TEX. TRANSP. CODE ANN. § 682.006(b) (Vernon 1999); VT. STAT. ANN. tit. 4, § 1106(b) (2005); VA. CODE ANN. § 10.1-104 (2006); WIS. STAT. § 345.28(5)(c)(1) (2003).

61. See, e.g., McDonough, *supra* note 57.

62. Recktenwald, *supra* note 52.

63. See, e.g., CAL. VEH. CODE § 22651.7(a) (West Supp. 2007); 625 ILL. COMP. STAT. ANN. 5/11-208.3(c) (Supp. 2005); MD. CODE ANN., TRANSP. § 27-111 (West 2002); MASS. GEN. LAWS ch. 90, § 20A (2004); R.I. GEN. LAWS § 31-12-12 (2002); VT. STAT. ANN. tit. 23, §



suspended as well.<sup>64</sup> Booting in particular has vastly improved the rate at which municipalities collect parking fines.<sup>65</sup>

## 2. *Constitutionality of Parking-Enforcement Reforms*

The new systems of parking enforcement fare reasonably well against a claim that they deprive vehicle owners of their property (vehicles, money, or driver's licenses) without due process of law.<sup>66</sup> The Due Process Clause is construed to require that the government provide "notice and opportunity for hearing appropriate to the nature of the case."<sup>67</sup> For notice to be constitutionally sufficient, it must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."<sup>68</sup> Accordingly, the actual receipt of notice is not constitutionally required as long as the means used was a reasonable one under the circumstances.<sup>69</sup> Moreover, "assessing the adequacy of a particular form of notice requires balancing the 'interest of the State' against

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1752(b) (1999); VA. CODE ANN. § 46.2-1216 (2005); WIS. STAT. § 349.137(3) (2003).

64. See, e.g., CAL. VEH. CODE § 4760(a)(1) (West 2000); IDAHO CODE ANN. §49-326 (Supp. 2006); 625 ILL. COMP. STAT. 5/6-306.5(a) (Supp. 2005); IOWA CODE § 321.210A (2007); LA. REV. STAT. ANN. § 32:393 (2002); MD. CODE ANN., TRANSP. § 26-305 (West Supp. 2006); MASS. GEN. LAWS ch. 90, § 20A (2004); N.H. REV. STAT. ANN. § 231:130-a (1993); N.J. STAT. ANN. § 39:4-139.10(b) (West 2002); N.Y. VEH. & TRAF. LAW § 235(2)(a)(2)(b) (McKinney 2005); N.D. CENT. CODE § 39-06.1-10(2) (Supp. 2005); OHIO REV. CODE ANN. § 4521.10 (LexisNexis Supp. 2006); 75 PA. CONS. STAT. § 1379(a) (Supp. 2005); S.D. CODIFIED LAWS § 32-12-49 (2004); TEX. TRANSP. CODE ANN. § 682.010(a)(4) (Vernon Supp. 2006); VT. STAT. ANN. tit. 23, § 1752 (1999).

65. See, e.g., Hugo Martin, *Parking Ticket Violators May Get "the Boot": Traffic Enforcement Team Clamps Down on Drivers with Five or More Overdue Citations Who Get 72 Hours to Pay Before a Vehicle Is Towed*, L.A. TIMES, Oct. 22, 2002, at B2; Lekan Oguntoyinbo, *Fined with Their Boots On Device Helped Collect \$8.5 Million in Tickets*, DETROIT FREE PRESS, July 3, 1996, at 3B; Sue Anne Pressley, *"The Boot": Ultimate Weapon in the Parking War*, WASH. POST, Oct. 28, 1985, at D1; Fran Spielman, *Scofflaws Face Boot at Midway: O'Hare Crackdown Nabbed Thousands with 3 Unpaid Tickets*, CHI. SUN-TIMES, Aug. 17, 2005, at 6.

66. Even the temporary deprivation of the ability to use one's vehicle is considered a deprivation of "property" within the meaning of the Due Process Clause. See *City of Los Angeles v. David*, 538 U.S. 715, 717-18 (2003) (per curiam). The suspension of a driver's license is also considered a deprivation of "property" for constitutional purposes. See *Dixon v. Love*, 431 U.S. 105, 112 (1977); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

67. *Jones v. Flowers*, 126 S. Ct. 1708, 1712 (2006) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

68. *Id.* at 1713-14 (quoting *Mullane*, 339 U.S. at 314).

69. See *Dusenberry v. United States*, 534 U.S. 161, 170 (2002). As the Court explained in *Jones*, "the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*." *Jones*, 126 S. Ct. at 1717.

‘the individual interest sought to be protected by the Fourteenth Amendment.’”<sup>70</sup> A practice of leaving a ticket on the vehicle that identifies the charge and the means by which it can be contested, and mailing an additional copy to the last known address of the registered owner, fares pretty well under these standards. While owners frequently deny that they received tickets served in this fashion, courts pragmatically reason that whoever is operating a vehicle will likely apprise the owner of the ticket.<sup>71</sup> Courts also generally consider the use of first-class mail to be a reasonable means of providing actual notice.<sup>72</sup> The combination of tie-on service and mail to apprise the owner of a pending action should therefore satisfy prevailing constitutional standards.<sup>73</sup>

The constitutional adequacy of the procedures for adjudicating and enforcing liability is assessed under a three-part test articulated in *Mathews v. Eldridge*.<sup>74</sup> Under this test, inquiry is made into the magnitude of the private interest at stake; the likelihood of error inhering in the adjudicative procedures and the value of additional procedural safeguards in reducing that error rate; and the government’s interest, including the financial and administrative burdens that would be imposed by requiring additional procedural safeguards.<sup>75</sup> This test does not mandate formal evidentiary hearings or judicial proceedings prior to the issuance of enforceable judgments. In *Eldridge*, for example, the Court upheld

70. *Jones*, 126 S. Ct. at 1715 (quoting *Mullane*, 339 U.S. at 314).

71. *See, e.g.*, *Gross v. Carter*, 265 F. Supp. 2d 995, 1001-02 (W.D. Ark. 2003); *Bricker v. Craven*, 391 F. Supp. 601, 604-05 (D. Mass. 1975); *Patterson v. Cronin*, 650 P.2d 531, 535 (Colo. 1982).

72. *See, e.g.*, *Jones*, 126 S. Ct. at 1718-19; *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799-800 (1983); *Greene v. Lindsey*, 456 U.S. 444, 455 (1982); *Schroeder v. City of New York*, 371 U.S. 208, 213-14 (1962); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956); *Mullane*, 339 U.S. at 318. *Jones* illustrates the problems that inhere in the use of registered mail. When the recipient signs a receipt there is evidence that notice was actually received, but when registered mail is returned unclaimed the government will be on notice of nondelivery without knowing the reason. *See Jones*, 126 S. Ct. at 1718-19. In this fashion, a defendant can defeat service by the mere expedient of refusing to claim a letter.

73. As the court held in *Saukstelis v. City of Chicago*, 932 F.2d 1171 (7th Cir. 1991), in which the plaintiffs challenged the constitutionality of the booting of vehicles that had accumulated more than ten unpaid parking tickets, “[t]his cascade of notices and opportunities for hearing is quite sufficient under the due process clause.” *Id.* at 1173; *accord, e.g.*, *Gardner v. City of Columbus*, 841 F.2d 1272, 1279 (6th Cir. 1988); *Rackley v. City of New York*, 186 F. Supp. 2d 466, 482-83 (S.D.N.Y. 2002); *Jaouad v. City of New York*, 4 F. Supp. 2d 311, 313 (S.D.N.Y. 1998); *Morris v. N.Y. Parking Violations Bureau*, 527 F. Supp. 724, 726-27 (S.D.N.Y. 1981).

74. 424 U.S. 319 (1976).

75. *Id.* at 334-35; *see also, e.g.*, *City of Los Angeles v. David*, 538 U.S. 715, 716-17 (2003) (per curiam); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993); *Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991).

administrative termination of disability benefits without a predeprivation evidentiary hearing on the ground that the written medical reports on which administrators relied provided a sufficiently reliable basis for determination.<sup>76</sup>

The use of administrative hearings in which the allegations in the parking ticket is given probative weight without a right to cross-examine the ticketing official should pass muster under this approach. The financial stakes in parking ticket litigation are relatively low; the increased risk of error in relying on tickets rather than live testimony subject to cross-examination is also likely to be low given the straightforward nature of illegal parking inquiry and the low probability that ticketing officials' live testimony will add anything useful; and the administrative and financial burden that would be imposed on the government by a rule requiring the presence of the ticketing officer would be great. Thus, the cost-benefit analysis demanded by *Eldridge* favors the new systems for adjudicating parking-ticket liability.<sup>77</sup> Indeed, courts usually uphold

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76. See *Eldridge*, 424 U.S. at 345-49.

77. Judge Posner has illustrated how the cost-benefit *Eldridge* test is likely to play out in the parking ticket context:

[T]he City issues 4 million parking tickets a year, of which 5 percent are challenged (200,000), a third of those in person rather than by mail and thus requiring an oral hearing (67,000). If the ticketing officer were required to attend, the number of hearings requested would undoubtedly be higher, because respondents would think it likely that the officer wouldn't show up – a frequent occurrence at hearings on moving violations. Suppose the number of hearings would be double what it is under the challenged procedures (that is, would be 134,000), but the police would show up at only half, putting us back to 67,000; and suppose that a hearing at which a police officer showed up cost him on average 2 hours away from his other work. Then this procedural safeguard for which the plaintiffs are contending would cost the City 134,000 police hours a year, the equivalent of 67 full-time police officers at 2,000 hours a year per officer. In addition, more hearing officers would be required, at some additional cost to the City, because each hearing would be longer as a result of the presence of another live witness. And all these are simply the monetary costs. Acquittals of violators due solely to the ticketing officer's failure to appear would undermine the deterrent efficacy of the parking laws and deprive the City of revenues to which it was entitled as a matter of substantive justice.

The benefits of a procedural safeguard are even trickier to estimate than the costs. The benefits depend on the harm that the safeguard will avert in cases in which it prevents an erroneous result and the likelihood that it *will* prevent an erroneous result. We know the harm here to the innocent car owner found "guilty" and forced to pay a fine: it is the fine, and it can be anywhere from \$10 to \$100, for an average of \$55. We must ask how likely it is that error would be averted if the ticketing officer were present at the hearing and therefore subject to cross-examination. Suppose that in his absence the probability of an erroneous determination that the respondent really did commit a parking violation is 5 percent, and the officer's presence would cut that probability in half, to 2.5

these systems utilizing the *Eldridge* approach to procedural due process.<sup>78</sup> While the innovations in adjudicating parking-ticket liability fare well under current due process doctrine, an originalist approach to due process would lead to quite different results.

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percent. Then the average saving to the innocent respondent from this additional procedural safeguard would be only \$1.38 (\$55 x .025)—a trivial amount.

*Van Harken v. City of Chicago*, 103 F.3d 1346, 1351-52 (7th Cir. 1997). Also instructive is *City of Los Angeles v. David*, 538 U.S. 715 (2003) (per curiam), in which the Court held that a twenty-seven-day delay in an administrative hearing following the towing of an illegally parked vehicle did not deprive the owner of the use of his vehicle without due process of law, reasoning that the risk of error in determinations about illegal parking is low and the administrative burden on the city in expediting the thousands of post-tow hearings it must conduct each year would be great. *See id.* at 718-19.

78. *See, e.g., Van Harken*, 103 F.3d at 1350-54 (rejecting claims that use of a municipal administrative agency violates due process by eliminating procedural protections utilized by courts in criminal proceedings, eliminating a right of cross-examination, and utilizing an administrative agency under the control of a municipality with a financial interest in the proceedings); *Gardner*, 841 F.2d at 1277-79 (rejecting a due process challenge to the use of municipal administration adjudication and the treatment of a ticket as prima facie evidence); *Jaouad v. City of New York*, 39 F. Supp. 2d 383, 388-89 (S.D.N.Y. 1999) (rejecting a claim of bias that was based on the fact that administrative hearing officers are employed by the city); *Pempek v. Edgar*, 603 F. Supp. 495, 498-500 (N.D. Ill. 1984) (upholding summary suspension of a driver's license when a warrant issues for ten or more unpaid parking tickets); *Van Harken v. City of Chicago*, 713 N.E.2d 754, 762-64 (Ill. App. Ct. 1999) (rejecting a due process challenge to an ordinance establishing administrative adjudication of parking or compliance violations on the ground that attendance of a ticketing official is not required and hearing officers are contractual employees of the city); *Baker v. City of Iowa City*, 260 N.W.2d 427, 431-32 (Iowa 1977) (rejecting challenge to booting for ten unpaid tickets on the ground that other measures had not proven effective to enforce parking regulations); *Bane v. City of Boston*, 396 N.E.2d 155, 156-57 (Mass. App. Ct. 1979) (upholding Boston's "tow and hold" law, under which the owner of an automobile must pay outstanding parking tickets or post a bond before seeking the release of his car, against a challenge that issuance of tickets provided insufficient predeprivation notice and opportunity for hearing); *O'Neill v. City of Philadelphia*, 711 A.2d 544, 547-48 (Pa. Commw. Ct. 1998) (rejecting a due process challenge to the transfer of parking ticket cases from judicial to administrative adjudication). *But cf. Wilson v. City of New Orleans*, 479 So. 2d 891, 899-903 (La. 1985) (requiring the provision of notice and opportunity for hearing before an impartial decisionmaker before a vehicle is placed on boot list). Due process attacks on the imposition of liability on the registered owner of a vehicle without proof that the owner had actual knowledge of the violation have similarly been rejected on the ground that it is proper to presume that the owner of a vehicle monitors the use of the property. *See, e.g., Gardner*, 841 F.2d at 1279-80; *Bricker v. Craven*, 391 F. Supp. 601, 605 (D. Mass. 1975); *City of Chicago v. Hertz Commercial Leasing Corp.*, 375 N.E.2d 1285, 1290-91 (Ill. 1978); *Iowa City v. Nolan*, 239 N.W.2d 102, 104-05 (Iowa 1976); *Commonwealth v. Minicost Car Rental, Inc.*, 242 N.E.2d 411, 412-13 (Mass. 1968); *City of Kansas City v. Hertz Corp.*, 499 S.W.2d 449, 452 (Mo. 1973); *City of Missoula v. Shea*, 661 P.2d 410, 414-15 (Mont. 1983); *City of Portland v. Kirk*, 518 P.2d 665, 668 (Or. Ct. App. 1974); *Commonwealth v. Rudinski*, 555 A.2d 931, 933-34 (Pa. Super. Ct. 1989).

*B. An Originalist Look at the New Systems of Parking-Ticket Adjudication*

Applying the originalist view that the Due Process Clause should be construed to preserve procedural rights extant at the time of framing and ratification, the new systems of parking-ticket adjudication do not fare so well.

*1. Service*

Service of process by placing a ticket on a vehicle and mailing a copy to the registered owner's address has little originalist support. Well into the twentieth century, it was thought that a defendant could be properly haled into court only when he was personally served with process or if process was left at the defendant's abode.<sup>79</sup> In fact, the first state statute authorizing service by mail was not enacted until 1917,<sup>80</sup> and the Federal Rules of Civil Procedure did not permit service by registered or certified mail until 1963 and did not permit service by ordinary mail until 1983.<sup>81</sup> As for the state of the law in 1868, New York's *Field Code*, which is generally considered to be the most advanced code of procedure extant at the time of the Fourteenth Amendment's ratification,<sup>82</sup> required personal service in order to initiate legal proceedings.<sup>83</sup> To be sure, eighteenth-century jurisdictional doctrine considered the possibility that it might be possible to locate a defendant's property but not the defendant himself; in such cases, however, in rem jurisdiction could be asserted over the property without acquiring personal jurisdiction over the defendant only if the property was seized and taken into the custody of the court.<sup>84</sup> Seizure of the property was

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79. See, e.g., 1 ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS § 3-1(1), (3) (1998); MILLAR, *supra* note 45, at 85-91. This was the common-law rule articulated by Blackstone. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*279-80.

80. See MILLAR, *supra* note 45, at 88-89. Prior to that, however, it was common to permit service on a former resident of the forum state who had left the jurisdiction since the events giving rise to the suit by publication and by mail sent to his place of residence. See *id.* at 91-94.

81. See Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1189-1212 (1987).

82. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293-98 (2d ed. 1985); MILLAR, *supra* note 45, at 171-80.

83. See COMM'RS ON PRACTICE AND PLEADING, STATE OF N.Y., THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK §§ 621, 628, at 254, 257-58 (Lawbook Exch. Ltd. 1998) (1850) [hereinafter FIELD CODE]. When the defendant could not be found and was a necessary party to litigation involving real property in New York, the court could authorize service by publication and by mailing a copy of the summons to the defendant at his residence, unless the address was not known by the plaintiff and could not be obtained with reasonable diligence. See *id.* §§ 629-31, at 258-60.

84. See MILLAR, *supra* note 45, at 481-92. Thus:

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken *where property is*

considered critical because “attachment combined with substituted service would provide greater assurance that the defendant would actually receive notice of the action than would publication alone.”<sup>85</sup> It follows that tie-on service coupled with mailing would fall well short of what was considered sufficient notice at the time of the Fourteenth Amendment’s ratification. Booting and subsequent impoundment could, in contrast, be a permissible means of asserting in rem jurisdiction; but, in modern systems of parking-law enforcement, booting and impoundment are measures undertaken to enforce an administrative judgment that eighteenth- and nineteenth-century law would deem unenforceable for lack of proper service.

## 2. Rules for Adjudication

An originalist inquiry would condemn treatment of tickets as evidence before an administrative tribunal without need of the ticketing officer’s testimony and availability for cross-examination. The nineteenth-century law of evidence recognized no exception to the rule against hearsay for the reports of law enforcement officials.<sup>86</sup> Nor were administrative tribunals utilized as a means of adjudicating an individual’s liability; in the mid-nineteenth century administrative law was still in its infancy and was confined to the use of administrative tribunals to regulate railroads and other utilities where special expertise was thought to be necessary to administer a complex regulatory scheme.<sup>87</sup> The use of administrative hearing officers employed by the same entity that was seeking to recover fines would have been thought particularly problematic. The development of an independent judiciary that enjoyed tenure

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*once brought under the control of the court by seizure or some equivalent act.*

The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale.

*Pennoyer v. Neff*, 95 U.S. 714, 727 (1877) (emphasis added), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

85. *Shaffer*, 433 U.S. at 198 n.16. In *Jones*, the Court reiterated the importance of the seizure to the exercise of jurisdiction in the absence of personal service: “[L]ibel of a ship, attachment of a chattel[,] or entry upon real estate in the name of the law’--such ‘seiz[ures]’ of property . . . ‘may reasonably be expected to come promptly to the owner’s attention.’” *Jones v. Flowers*, 126 S. Ct. 1708, 1718 (2006) (last two alterations in original) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 316 (1950)).

86. See FRIEDMAN, *supra* note 82, at 101-04, 300-01.

87. *See id.* at 329-40. By the late nineteenth century, administrative law had spread to occupational licensing, *see id.* at 340-46, still a far cry from the general use of administrative adjudication to impose liability for violating generally applicable municipal laws.

protection was thought to be an important aspect of the common law's protection of individual rights.<sup>88</sup>

### 3. *Enforcement of Judgments*

The use of self-help as a means of enforcing parking-ticket liabilities is wholly indefensible on originalist terms. In the nineteenth century, judgments were enforced only through judicial supervision of the enforcement process during which a defendant's assets were identified and then seized pursuant to court order when necessary to satisfy an outstanding judgment.<sup>89</sup> There was simply no thought of permitting judgment creditors to engage in self-help by immobilizing or otherwise seizing a judgment debtor's property.

Thus, the new systems of parking-ticket adjudication infringe upon any number of rights recognized at the time that the Fourteenth Amendment's Due Process Clause was framed and ratified. To be sure, one can claim the procedural innovations reflected in these systems with respect to service, the rules of evidence, the forum for adjudication, and the enforcement of the judgments do not unfairly prejudice the interests underlying nineteenth-century procedure. There is no method, however, to evaluate such an argument without evaluating these innovations under the *Eldridge* cost-benefit test or some other method for assessing the extent to which procedural innovations are thought to deprive a defendant of some sufficiently important procedural protection. That assessment would require exactly the sort of policy analysis of the "fairness" of a challenged statute that originalists ordinarily condemn.

### C. *Originalism and Procedural Innovation*

Parking-ticket litigation provides what is perhaps a particularly prosaic example of the problems that procedural innovation poses for an originalist interpretation of the Due Process Clause. The intersection of originalism and parking tickets, however, hardly exhausts the problems created by an originalist approach to procedural due process. Applied to procedural due process, originalism would condemn virtually any effort at procedural innovation to meet the demands that contemporary litigation places on civil and criminal procedure. Consider, for example, the innovations in the law of personal jurisdiction that have enabled the litigation process to adjust to our complex and nationalized (even internationalized) economy.

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88. See 1 BLACKSTONE, *supra* note 79, at \*257-60.

89. See MILLAR, *supra* note 45, at 419-69. Under the *Field Code*, for example, an officer of the court, the Sheriff, was responsible for collecting an unpaid fine and was authorized to imprison a recalcitrant judgment debtor, and the sheriff was himself liable to the county or city for the fine unless the judgment debtor could not be found or had been imprisoned. See FIELD CODE, *supra* note 83, §§ 1648-50, 1667, at 687-88.

The permissible methods of service have gradually liberalized, as society has come to view new technologies as providing an efficient means of transmitting information and has come to see personal service, in turn, as an inefficient method of initiating litigation.<sup>90</sup> The constitutional sanction for this liberalization has its roots in *International Shoe Co. v. Washington*,<sup>91</sup> which held that “due process requires only that in order to subject a defendant to a judgment *in personam* . . . he [must] have certain minimum contacts with [the jurisdiction] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”<sup>92</sup> As a consequence of *International Shoe*, the Court redefined the type of service that satisfied due process:

[W]e have abandoned more formalistic tests that focused on a defendant’s ‘presence’ within a State in favor of a more flexible inquiry into whether a defendant’s contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State.<sup>93</sup>

As we have seen, however, at the time of the Fourteenth Amendment’s framing, a defendant had a right not to be haled into court absent personal or at least abode service, and in rem jurisdiction could not be exercised except over property that had been seized and brought within the custody and control of the court.<sup>94</sup> Indeed, within a few years of the ratification of the Fourteenth Amendment, in *Pennoyer v. Neff*,<sup>95</sup> the Supreme Court held that due process forbids a state court from exercising jurisdiction over a nonresident defendant who had not been served in the forum state and whose property was not seized and thereby brought within the jurisdiction of the forum.<sup>96</sup>

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90. See generally Jeremy A. Colby, *You’ve Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337 (2003); Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159 (1994); John M. Murphy III, Note, *From Snail Mail to E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN’S J. LEGAL COMMENT. 73 (2004).

91. 326 U.S. 310 (1945).

92. *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)); accord *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992); *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780-81 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977).

93. *Quill Corp.*, 504 U.S. at 307.

94. See *supra* Part II.B.1.

95. 95 U.S. 714 (1877), *overruled in part by Shaffer v. Heitner*, 433 U.S. 186 (1977).

96. See *id.* at 733-36. To be sure, the Court also imported into the Due Process Clause a notion that states were forbidden to exercise any form of extraterritorial jurisdiction over nonresidents, see *id.* at 722-24, 733-34, but we have seen that in 1868, even within a state’s borders there were well-understood restrictions on the permissible methods for haling a defendant into court. Moreover, in Part III.A below, we will see that whatever else is true, the



Thus, under the legal rules in effect in 1868 that constitute the historical baseline for an originalist account of due process, there was no conception of long-arm jurisdiction or extraterritorial service effective outside of the forum state. On an originalist view which measures the Fourteenth Amendment's protections by reference to those rights recognized at the time of framing, accordingly, there is no defense for the "minimum contacts" test that supports the now-pervasive use of "long-arm" jurisdiction over defendants who have never set foot in the forum state.<sup>97</sup> Such an approach was simply unknown in 1868.

The view that courts should construe the Due Process Clause to forbid all procedural innovation that deprives a litigant of a procedural right recognized at the time of the Fourteenth Amendment's framing is so unattractive that no originalist of whom I am aware dares to embrace it. It surely is strange to think of the Due Process Clause as a guarantee that there would never be any procedural reforms in the manner by which questions of life, liberty, or property were adjudicated. Moreover, such a view is unsupported by the constitutional text. Had the Framers wished to freeze procedural law in amber, they would have used a formulation akin to that of the Seventh Amendment. Once one agrees that the Due Process Clause permits procedural innovation, however, there are immense difficulties in articulating an originalist account of procedural due process.<sup>98</sup>

These difficulties are reflected in the decision in *Burnham v. Superior Court*.<sup>99</sup> In that case, the question presented was whether due process permits a court to exercise jurisdiction over a nonresident defendant served during a

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guarantee of due process was always thought to regulate the manner in which a defendant was haled into court even when the defendant resided in the forum state.

97. For a description of the growth of long-arm statutes, see FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 74-87 (5th ed. 2001).

98. To be sure, when the Constitution requires a particular procedure, then there is an originalist test available for assessing procedural innovation. For example, on an originalist view, the Confrontation Clause mandates a particular method by which evidence must be adduced in criminal cases, and procedural innovations must therefore be assessed with respect to their conformity with a constitutionally mandated procedure. See *Crawford v. Washington*, 541 U.S. 36, 50-56 (2004); *White v. Illinois*, 502 U.S. 346, 360-65 (1992) (Thomas, J., concurring); *Maryland v. Craig*, 497 U.S. 836, 864-67 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1015-20 (1988). The Due Process Clause, however, does not posit any particular procedure; persons must only receive that process which is "due." Since the Due Process Clauses do not identify any particular procedure as constitutionally mandated, the seemingly originalist approach to due process, as Justice Scalia has argued, is to recognize as "due process" those procedural entitlements that existed at the time of framing and ratification. See *supra* text accompanying notes 25-26.

99. 495 U.S. 604 (1990).

transient stay in the forum state.<sup>100</sup> Writing for a three-justice plurality, Justice Scalia concluded that the *International Shoe* minimum contacts test was inapplicable to personal service within the forum state because this method of service was well-accepted at the time of the Fourteenth Amendment's framing.<sup>101</sup> Thus, "jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"<sup>102</sup> Justice Scalia nevertheless defended *International Shoe* as a necessary response to "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity."<sup>103</sup> In his view:

For new procedures, hitherto unknown, the Due Process clause requires analysis to determine whether "traditional notions of fair play and substantial justice" have been offended. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.<sup>104</sup>

Accordingly, for Justice Scalia, due process originalism is a one-way ratchet; it permits innovation but shields from constitutional attack those procedures that were accepted at the framing.<sup>105</sup>

Whatever the virtues of this interpretation of the Due Process Clause, it is not originalist. There is no evidence that the original understanding of due process included an acknowledgment that something less than the physical presence of

100. *See id.* at 607-08 (plurality opinion).

101. *See id.* at 610-19.

102. *Id.* at 619.

103. *Id.* at 617.

104. *Id.* at 622 (citation omitted).

105. Justice Scalia elaborated:

[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law. . . . [That which], in substance, has been immemorially the actual law of the land . . . therefor[e] is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.

*Id.* at 619 (alterations and omissions in original) (quoting *Hurtado v. California*, 110 U.S. 516, 528-29 (1884)); *accord* *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29-31 (1991) (Scalia, J., concurring in the judgment). For a similar articulation of procedural due process by an avowed originalist, see McConnell, *supra* note 19, at 1286.

the defendant in the forum state or the seizure of its property could support the exercise of jurisdiction. To the contrary, the evidence is overwhelming that *Pennoyer v. Neff* correctly identified the prevailing understanding of the right of the nonresident defendant not to be haled into a jurisdiction where he was not physically present.<sup>106</sup> Nor is there any reason to believe that the original understanding relaxed the requirement of physical presence when considerations of transportation technology and the needs of interstate commerce were at issue; at the time of the Fourteenth Amendment's adoption, the mobility and importance of maritime commerce was presumably understood, and yet the settled rule in admiralty was that, in the absence of personal service on a ship's owner, a court could not exercise jurisdiction in an admiralty action unless the ship was seized and taken into the custody of the court.<sup>107</sup> And there is no evidence that the one-way ratchet itself reflects the original understanding; the only authority Justice Scalia cites for his view is the Supreme Court's decision in *Hurtado v. California*,<sup>108</sup> which itself cited no historical evidence to support its own view of procedural innovation.<sup>109</sup>

There is, however, a more fundamental originalist objection to the approach to procedural innovation taken by Justice Scalia in *Burnham*. The one-way ratchet reflects the view that as a result of changes in society, the meaning of due process can change — a right not to be haled into a distant forum thought to be due process at the time of the framing can be eliminated if it comes to be viewed as sufficiently inexpedient in light of contemporary economic demands. That is not originalism. Justice Scalia has himself contended that if one believes that the Constitution's meaning can change in light of changes in society, "there is really no difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous."<sup>110</sup> Justice Scalia's approach in *Burnham*, accordingly, does not

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106. See *supra* Part II.B.1.

107. See, e.g., GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 9-85, at 640 (1957). On the Framers' understanding of the importance of maritime commerce and transportation, see William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993). As we have seen, in the nineteenth century a judicial seizure of property was thought to be essential to jurisdiction since a seizure was thought highly likely to be brought to the attention of the property's owner, who would also understand that he needed to appear before the court that had custody of the property if he was to obtain its return. See *supra* notes 84-85 and accompanying text.

108. See *Haslip*, 499 U.S. at 29-32 (Scalia, J., concurring in the judgment); *Burnham*, 495 U.S. at 619.

109. See *Hurtado*, 110 U.S. at 528-29.

110. Scalia, *supra* note 5, at 862. For a somewhat more detailed explanation as to why such an approach does not qualify as originalist, see Laurence Lessig, *Fidelity in Translation*, 71

qualify as originalist on this view — once the “traditional notions of fair play and substantial justice” used to evaluate procedural innovation are no longer linked to those rights recognized at the time of framing, due process is not linked to history, but rather to the judge’s subjective sense of fairness. Thus, as applied to procedural innovation, the one-way ratchet does not use history to constrain judicial decisionmaking. It is evolutionary, and Justice Scalia has himself persuasively argued that evolutionary jurisprudence cannot be originalist.

But perhaps it is unfair to accuse originalism of lacking a persuasive account of procedural due process based on the jurisprudence of Justice Scalia. Justice Scalia admits that consequentialism infects his jurisprudence; he acknowledges that “in a crunch I may prove a faint-hearted originalist.”<sup>111</sup> Or, Justice Scalia’s acceptance of *International Shoe* may reflect no more than his deference to the precedential force of nonoriginalist decisions.<sup>112</sup> But the question remains — is

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TEX. L. REV. 1165, 1252-61 (1993). For the same reasons, the one effort to date to provide an originalist account of procedural due process is not really originalist. In his article, Edward Eberle concluded that preratification case law had established that “[d]ue process guaranteed notice, an opportunity to be heard, and a determination by a neutral decision maker according to some fair and settled course of judicial proceeding.” Eberle, *supra* note 43, at 339. This formulation, however, articulates a standard so general that it contains no meaningful difference from an ahistorical evolutionary jurisprudence tied to nothing more than an abstract notion of procedural fairness, and leaves a judge free to decide what constitutes fair notice, opportunity to be heard, and fair adjudicative procedures without regard to those procedural rights extant at the time of the framing. For a useful elaboration on the difficulties originalism faces in defining original meaning at an appropriate level of generality, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 31-64 (1991). Christopher Eisgruber has demonstrated originalism merges with nonoriginalist decisionmaking if the original understanding is defined at such a high level of generality:

Suppose that Grandpa is on his deathbed, and he whispers to Sonny, “Just promise me this Sonny: eat only healthy food.” Sonny, eager to grant this modest request, makes the promise. Grandpa dies, confidently believing (as Sonny well knows) that raw fish and red wine are bad for you and that whole milk is good for you. Now suppose Sonny becomes convinced, on the basis of subsequent scientific studies, that sushi and Chianti are part of a healthy diet but that whole milk is not. We can argue, I suppose, about whether Sonny, if he wishes to honor his promise, should eat or refuse sushi. But we should in any case be able to agree that the concept “healthy” does not become meaningless if divorced from Grandpa’s outdated beliefs about what is healthy. If Sonny decides to eat sushi, he will still be acting on the basis of a promise to eat healthy food. It would be wrong to say that Sonny had substituted a different promise, such as a promise to only eat delicious food or expensive food.

EISGRUBER, *supra* note 28, at 29. Ronald Dworkin had advanced a similar argument. See DWORKIN, *supra* note 28, at 291-94.

111. Scalia, *supra* note 5, at 864.

112. See Scalia, *supra* note 25, at 138-40. For a leading discussion of originalism’s view on adherence to nonoriginalist precedent, see Henry Paul Monaghan, *Stare Decisis and*

there a persuasive originalist account of procedural due process, and, if so, must it forbid procedural innovation? Does due-process originalism demand that we return to *Pennoyer v. Neff* and the balance of nineteenth-century procedural thinking? It is to these matters that this Article now turns.

### *III. The Nonoriginal Original Meaning of the Due Process Clause*

It remains to develop an account of the original meaning of the Due Process Clause. The account of the original meaning of due process that this Article will advance is that due process was an evolving concept rather than one with a fixed and historically determined meaning. But before I offer that account, it is worth considering the leading originalist account of due process that attempts to accommodate the need for procedural innovation.

#### *A. The Original Understanding of Due Process*

Raoul Berger has advanced an originalist account of due process that would permit procedural innovation. Berger argued that the original meaning of due process was that deprivations of life, liberty or property, must be authorized by the common law or statute.<sup>113</sup> On this view, procedural innovation is

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*Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988). Other originalists are more skeptical of adherence to nonoriginalist precedent. See, e.g., Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419 (2006).

113. See BERGER, *supra* note 15, at 193-214. For a more recent restatement of this view, see Andrew T. Hyman, *The Little Word "Due"*, 38 AKRON L. REV. 1, 10-23 (2005). Justice Thomas has come close to endorsing this position. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting). This was Justice Black's view, although he believed that the Due Process Clause also incorporated the Bill of Rights. See *In re Winship*, 397 U.S. 358, 378-84 (1970) (Black, J., dissenting). Among contemporary scholars, there is considerable support for the view that incorporation of some or all of the first eight amendments to the Constitution was intended under the Fourteenth Amendment's Privileges and Immunities Clause. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181-230 (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 57-130 (1986); Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICH. L. REV. 289 (1999). However, due process incorporation has never found support among legal scholars and the meaning of the Privileges and Immunities Clause remains contested. See, e.g., Boyce, *supra* note 30, at 987-1026. The fundamental problem with incorporation of the first eight amendments into the Fourteenth Amendment's Due Process Clause is textual. The Fourteenth Amendment's Due Process Clause tracks that of the Fifth Amendment, but the Fifth Amendment's Due Process Clause, once incorporated into the Fourteenth Amendment, makes the Fourteenth Amendment's Due Process Clause surplusage.

permissible as long as it is authorized by statute. In fact, history thoroughly undermines Berger's position. The historical evidence against Berger, moreover, suggests a quite different originalist account of due process.

### 1. *The Fifth Amendment*

Evidence of the understanding of those who crafted the Fifth Amendment's Due Process Clause is surprisingly slim.<sup>114</sup> The Due Process Clause was ratified in the form proposed by James Madison but neither Madison nor anyone else involved in the process made any substantive comments about its meaning.<sup>115</sup> Given the paucity of evidence of the original understanding, Berger was forced to rely on remarks of Alexander Hamilton to the New York legislature some three years before the Due Process Clause was presented to Congress.<sup>116</sup> Relying on the statutory Bill of Rights New York had enacted in 1787 containing the first due process clause in the United States,<sup>117</sup> Hamilton argued

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*See Adamson v. California*, 332 U.S. 46, 63-66 (1947) (Frankfurter, J., concurring). The Court has ultimately taken the view that the Fourteenth Amendment's Due Process Clause incorporates those provisions of the Bill of Rights that are thought to be fundamental, but it has made no attempt to justify that view in terms of the original meaning of due process. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968); *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965); *Malloy v. Hogan*, 378 U.S. 1, 4-11 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 340-44 (1963); *Chi. B. & Q. Ry. Co. v. City of Chicago*, 166 U.S. 226, 233-41 (1897).

114. The Fifth Amendment's Due Process Clause provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V.

115. *See* NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 337-48 (1997).

116. *See* BERGER, *supra* note 15, at 194. Berger is not the only one to seize on Hamilton's remarks. Many eminent scholars have invoked Hamilton on this score, perhaps because of the remarkable paucity of contemporaneous evidence of the original understanding of due process. *See, e.g.,* 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1103-04 (1953); Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 409-11 & n.579 (2002); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1437 (1999).

117. The New York statute read, in pertinent part, as follows:

*Second*, That no Citizen of this State shall be taken or imprisoned, or disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful Judgment of his or her Peers, or by due Process of Law.

*Third*, That no Citizen of this State shall be taken or imprisoned for any Offence, upon Petition or Suggestion, unless it be by indictment or Presentment of good and lawful Men of the same Neighbourhood where such Deeds be done, in due Manner, or by due Process of Law.

*Fourth*, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the

that “[t]he 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>118</sup>

When placed in context, however, Hamilton’s remarks are actually inconsistent with Berger’s position. Hamilton’s description of due process, invoking the work of Lord Coke, appears in the course of an argument that proposed legislation barring onetime loyalists from holding public office violated the due process clause in New York’s bill of rights on the ground that due process requires the legislature to proceed by judicial process when imposing this type of disability.<sup>119</sup> Accordingly, Hamilton was actually claiming that due process is a constraint on legislative power.<sup>120</sup> Still, the import of

Land; and if any Thing be done to the Contrary, it shall be void in Law, and holden for Error.

*Fifth*, That no Person, of what Estate or Condition soever, shall be taken, or imprisoned, or disinherited, or put to death, without being brought to answer by due Process of Law; and that no Person shall be put out of his or her Franchise or Freehold, or lose his or her Life or Limb, or Goods and Chattels, unless he or she be duly brought to answer, and be fore-judged of the same, by due Course of Law; and if any Thing be done contrary to the same, it shall be void in Law, and holden for none.

COGAN, *supra* note 115, at 353 (quoting An Act Concerning the Rights of the Citizens of This State, 1787 N.Y. Laws 5-6). While all of the other states had enacted law-of-the-land formulations prior to the ratification of the Fifth Amendment, no other state had utilized a due-process formulation. *See id.* at 349-55.

118. Alexander Hamilton, New York Assembly: Remarks on an Act Regulating Elections (Feb. 6, 1787), in 4 THE PAPERS OF ALEXANDER HAMILTON 34, 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

119. *See* Davies, *supra* note 116, at 410-14 & n.579. The complete passage in which Hamilton described his conception of due process is as follows:

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

Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?

Hamilton, *supra* note 118, at 35-36 (footnote omitted).

120. *See* Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 989-90.

Hamilton's conception for the yet-to-be-drafted federal Due Process Clause is particularly unclear. Hamilton appears to have been arguing that due process includes a prohibition on legislatively imposed punishments akin to Bills of Attainder, but that conception of due process seems to have been different than what was subsequently expressed in the federal constitution, which treated due process and bills of attainder separately.<sup>121</sup> Thus, Hamilton's remarks are an unsteady reed on which to premise an original understanding of the Fifth Amendment's Due Process Clause.

In any event, Hamilton was right to believe that Coke equated due process with Magna Carta's "law of the land" clause. Article 39 of Magna Carta provided, "No free man shall be arrested or imprisoned, or disseised or outlawed or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or the law of the land."<sup>122</sup> In the passage from Coke's treatise on which Hamilton had relied, Coke wrote:

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

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

No man be put to answer without presentment before Justices, or thing of record, or by due proces, or by writ originall, according to the old law of the Land.<sup>123</sup>

It is far from clear that this passage supports Hamilton's argument. Certainly nothing in this passage straightforwardly asserts that a legislature is not free to alter the rights or privileges of individuals.<sup>124</sup> To be sure, there is evidence that

121. Compare U.S. CONST. art. I, §§ 9-10, with *id.* amend. V.

122. RALPH V. TURNER, *MAGNA CARTA: THROUGH THE AGES* app. 231 (Harry Rothwell trans., 2003).

123. EDWARD COKE, *THE SECOND PART OF THE INSTITUTES ON THE LAWS OF ENGLAND* 50 (1642), available at [http://eebo.chadwyck.com/search/full\\_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=12388749&SEARCHCONFIG=undefined](http://eebo.chadwyck.com/search/full_rec?SOURCE=pgimages.cfg&ACTION=ByID&ID=12388749&SEARCHCONFIG=undefined). This passage makes it plain that whatever else it meant, due process regulated the manner in which a defendant was haled into court. For an account of the historical evidence on just this point, see Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975). Thus, *Pennoyer* was quite correct to read the Due Process Clause as regulating the permissible methods of service.

124. In this respect, it is worth noting that Hamilton - and the New York statute itself -



Coke's own view was that Parliament lacked such power. Sitting as a judge in *Bonham's Case*,<sup>125</sup> Coke, writing of a statute that authorized the Royal College of Physicians to fine and imprison persons practicing medicine without a license while granting it a share of all fines it imposed, stated, "when an Act of Parliament is against common right and reason, . . . the common law will . . . adjudge such Act to be void."<sup>126</sup> Based on this and similar evidence, a number of scholars have argued that Coke was understood in colonial America to endorse judicial review of statutes that infringed upon rights recognized at common law.<sup>127</sup> In contrast, Blackstone's famous treatise was clearer in expressing the view that a deprivation of life, liberty or property was permissible when authorized by either the common law or statute, but Blackstone never equated "due process" with Magna Carta's "law of the land."<sup>128</sup> Hence, the probative value of Blackstone's account for understanding the meaning of due process is also uncertain.

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departed in some respects from the passage in Coke that Hamilton had invoked. While Hamilton claimed that due process is required for the deprivation of "any right," *see supra* note 119, and the New York statute required due process before any citizen could "be taken or imprisoned, or disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed," *see supra* note 117, as we have seen, what Coke actually wrote in the passage on which Hamilton relied was that "no man be taken, imprisoned, or put out of his free-hold without proces of the Law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common law." COKE, *supra* note 123, at 50. It is far from clear that this passage would treat a prohibition on holding public office as something that triggers the obligation of due process, but Hamilton changed it to say that no one can be deprived of "any right" without due process -- a position that Coke did not take. Thus, original meaning was contestable - and manipulable by clever lawyers - even in the eighteenth century.

125. (1610) 77 Eng. Rep. 646 (C.P.).

126. *Id.* at 652.

127. *See, e.g.*, EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 40-57, 72-89 (Cornell Univ. Press 1955) (1928); Riggs, *supra* note 120, at 958-73. Even opponents of a reading of Coke's conception of due process as embracing substantive rights acknowledge that the Framers may have understood Coke differently. *See, e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96. On the influence of Coke on American legal thinking at the time of the framing of the Fifth Amendment, *see, for example*, A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 117-25 (1968); and RODNEY L. MOTT, DUE PROCESS OF LAW 87-90 (1926).

128. *See* 1 BLACKSTONE, *supra* note 79, at \*30-34. On the influence of Blackstone in America in the late eighteenth century, *see, for example*, STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 49-57 (2000); and Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

The most influential treatises of the 1820s and 1830s described due process as “the right of trial according to the process and proceedings of the common law.”<sup>129</sup> This formulation again is far from clear about whether due process limits statutory procedural innovation. In what remains the most comprehensive survey of the evidence of the original meaning of due process, Rodney Mott argued that the American colonists understood Coke and Blackstone to have offered competing accounts, and as they came to believe that Parliament had infringed upon what they thought to be their rights as Englishmen, Coke’s account of the substantive limitations on legislation became ascendant in the years leading to the Revolution.<sup>130</sup> Mott, however, ultimately punted on the original meaning of the Fifth Amendment’s Due Process Clause: “It is evident that the colonists looked upon due process of law as a guarantee which had a wide, varied, and indefinite content.”<sup>131</sup>

It is hard not to sympathize with Mott. Drawing reliable conclusions about the original meaning of the Fifth Amendment is particularly difficult because Madison employed a textual formulation — due process of law — that was relatively novel and theretofore had received no well-settled judicial construction. As one leading historian observed, “[n]o state . . . had a due process of law clause in its own constitution, and only New York had recommended such a clause in place of the more familiar ‘law of the land’ clause.”<sup>132</sup> Berger surely has the better of the argument about the meaning of due process under the English precedent. *Bonham’s Case* had produced no progeny and English courts since then had treated Parliament as the supreme authority on the constitutionality of legislation.<sup>133</sup> But for that reason, English

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129. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 567 (Melville M. Bigelow ed., 1994) (1833) (footnote omitted); accord 2 JAMES W. KENT, COMMENTARIES ON AMERICAN LAW 13-14 (O.W. Holmes, Jr. ed., Little, Brown & Co. 1873) (1826).

130. See MOTT, *supra* note 127, at 46-70, 125-39. For a more recent statement of this view, see Riggs, *supra* note 120, at 963-76.

131. MOTT, *supra* note 127, at 123.

132. LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 248 (1999).

133. See CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 32-39, 106-07 (1930); David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT’LL. 863, 888-90 (2003). Berger stressed this point. See Raoul Berger, “*Law of the Land*” Reconsidered, 74 NW. U. L. REV. 1, 5-6, 29-30 (1979). In fact, it is not even clear that Coke held the statute at issue in *Bonham’s Case* invalid; the best reading of his opinion may be merely that the statute should be narrowly construed. See Jenkins, *supra*, at 884-88. Nor did the 1354 statute that Coke invoked in his treatise as equating the law of the land guarantee with due process produce reliable guideposts for assessing the meaning of due process; as Keith Jurow has demonstrated, its language and construction make plain that it was limited to assessing the manner in which a defendant could be haled into court. See Jurow, *supra* note 123, at 266-71.

common law offered no reliable guideposts for assessing the meaning of the Fifth Amendment's Due Process Clause in a system with a written constitution which was to be treated as "the supreme [l]aw of the [l]and."<sup>134</sup> As for New York's bill of rights, the only pre-Fifth Amendment example of a due process clause, its import was far from clear. It may well be that New York's due process clause was understood to limit legislative power — if Hamilton's argument against the antiloyalist legislation is any guide — but surely it is difficult to conclude that a provision that had been adopted only in New York, and even there only as a statute that the legislature was free to repeal rather than as a constitutional limitation on legislative power, and that had barely been construed even in New York, had acquired a generally understood "original meaning" by the time of the Fifth Amendment's ratification.<sup>135</sup> The "original meaning" is even more uncertain because the Fifth Amendment linked the obligation of due process to a deprivation of "life, liberty, or property," itself a formulation that had been used in neither England nor New York.<sup>136</sup> Its meaning was even more uncertain. And since neither Madison nor anyone else involved in the drafting or ratification of the Fifth Amendment explained why it utilized New York's formulation or whether that formulation effectively differed from Magna Carta's formulation that had granted Parliament effectively unchecked

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134. U.S. CONST. art. VI, cl. 2.

135. On this point, Professor Davies argues that the original understanding was that due process was limited to matters of criminal procedure, and permitted legislative innovation only to the extent that it did not undermine what were understood to be fundamental aspects of common-law criminal procedure. See Davies, *supra* note 116, at 415-18. But he can identify no contemporaneous evidence of this understanding other than Hamilton's comments, and Hamilton never expressed an understanding of due process as limited to matters of criminal procedure — indeed, his argument against the loyalist bill suggested that he understood due process to limit even noncriminal enactments. Hamilton did not explain his conception of the manner in which due process limits legislative power; at least arguably, a whole host of regulatory statutes might be considered invalid under the broadest version of Hamilton's claim that due process prohibits a deprivation of "any right" except through criminal trial and conviction. See *supra* note 119. Moreover, Professor Davies's account does not fit very well with the text utilized in the Bill of Rights, which separately addresses a variety of specific common-law rules for criminal procedure. On this point, Professor Davies writes, "The fact that the Framers chose to give emphasis to the grand jury requirement and the protection against compelled self-accusation by stating those protections specifically in no way shows that the Framers did not understand those protections also to be included within the meaning of . . . 'due process of law.'" Davies, *supra* note 116, at 433 n.641. An interpretation that depends on the Framers' desire for surplusage on a belt-and-suspenders supposition, however, does not seem unassailable. If the original meaning of due process were truly clear, there would have been no occasion for a belt-and-suspenders approach.

136. For Magna Carta's formulation, see *supra* text accompanying note 122. For Coke's formulation, see *supra* text accompanying note 123. For the New York formulation, see *supra* note 117.

legislative power, it is especially difficult to draw reliable conclusions about the original meaning.<sup>137</sup> All we know for certain is that Madison was under considerable pressure to develop formulations that would enjoy wide support in order to defuse the growing political pressure for a new constitutional

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137. Although it cited no historical support for its position, in *Murray's Lessee v. Hoboken Land & Development Co.*, 59 U.S. (18 How.) 272 (1855), the Supreme Court attempted to explain Madison's choice:

The constitution of the United States, as adopted, contained the provision, that "the trial of all crimes, except in cases of impeachment, shall be by jury." When the fifth article of amendment containing the words now in question was made, the trial by jury in criminal cases had thus already been provided for. By the sixth and seventh articles of amendment, further special provisions were separately made for that mode of trial in civil and criminal cases. To have followed, as in the state constitutions, and in the ordinance of 1787, the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received in their true meaning.

*Id.* at 276. There is a good deal of question-begging going on here. Nothing compelled the Framers to separate the Fifth, Sixth, and Seventh Amendments. Had they wished to track *Magna Carta*, they could have simply used the familiar "judgement of his peers or by the law of the land" formulation. See *supra* text accompanying note 122. Only a bit more plausibly, Charles Miller has suggested that Madison employed the due process formulation because a law-of-the-land clause was already in the Constitution's Supremacy Clause, and its repetition might have caused confusion. See Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS 10-11 (Am. Soc'y for Political & Legal Philosophy, Nomos Series No. XVIII, J. Roland Pennock & John W. Chapman eds., 1977). This explanation, however, overlooks the fact that the due process formulation seems to have borrowed from New York's bill of rights, which was drafted prior to the federal constitution, and New York's rationale for adopting this formulation is rather mysterious, but certainly had nothing to do with the United States Constitution's Supremacy Clause. See Easterbrook, *supra* note 127, at 96-97. The most plausible explanation had been advanced by Thomas Davies, who argues that Hamilton and his allies placed a due process formulation in New York's bill of rights to make clear that the legislature was obligated to respect common-law standards for depriving persons of life, liberty, or property only by criminal prosecution, and who further infers that Madison was likely aware of this intent behind the due process formulation when he drafted what became the Fifth Amendment. See Davies, *supra* note 116, at 408-15. Still, Professor Davies does not explain how Hamilton could have thought that the New York due process clause would constrain the legislature when it was itself only a statute, and therefore subject to subsequent legislative modification. Nor does he explain why, if Hamilton intended to expand upon the protections offered by the traditional law-of-the-land formulation, he used a due process formulation that Coke had described as a synonym for the land-of-the-land clauses in *Magna Carta*, especially when, as we have seen, the weight of English authority treated both due process and the law-of-the-land clause as confining judicial, but not legislative, authority.

convention that might undo the work of the first one.<sup>138</sup> Perhaps Madison's use of a novel and as yet not fully defined formulation would help to bridge the gap between the Blackstone and Coke camps and maximize the likelihood that the Bill of Rights would achieve its political objective. No one, however, can know for sure.

## 2. *The Fourteenth Amendment*

Even if Berger's account accurately described the Fifth Amendment's Due Process Clause, it becomes far more doubtful as an account of the Fourteenth Amendment's parallel provision.

As with the Fifth Amendment's Due Process Clause, the debates in Congress and the ratifying states over the Fourteenth Amendment offer no meaningful discussion of the meaning of due process.<sup>139</sup> The debates, however, make clear the reason for this omission — it was generally understood that the courts had already articulated the parameters of due process. Representative John Bingham, presenting what would become the Fourteenth Amendment to the House of Representatives, parried inquiry into the meaning of due process thusly: “[T]he courts have settled that long ago, and the gentleman can go and read their decisions.”<sup>140</sup> Indeed, the advocates of the Fourteenth Amendment consistently argued that their proposal did no more than make existing constitutional protections enforceable against the states.<sup>141</sup> As with the Fifth Amendment, it is easy to understand why the advocates of the proposed

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138. For accounts of the process by which Madison was persuaded to drop his initial opposition to a Bill of Rights in response to antifederalist sentiments that had generated the threat of a second constitutional convention, see, for example, ROBERT A. GOLDWIN, *FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION* 57-95 (1997); RICHARD LABUNSKI, *JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS* 120-77 (2006); and Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 322-44.

139. See, e.g., HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 95-97, 140-209 (W.S. Hein 2003) (1908); MOTT, *supra* note 127, at 154-59. For a representative example of the type of unhelpful truisms to be found in the congressional debates on those relatively rare occasions on which due process was discussed, see CONG. GLOBE, 39th Cong., 1st Sess. app. at 256 (1866) (statement of Rep. Baker) (“The Constitution already declares generally that no person shall ‘be deprived of life, liberty, or property without due process of law.’ This declares particularly that no *State* shall do it . . .”).

140. CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham). On the pivotal role of Bingham in the drafting and adoption of the Fourteenth Amendment, see, for example, Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003).

141. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens); *id.* at 2542 (statement of Rep. Bingham); *id.* at 2765-66 (statement of Sen. Howard); *id.* app. at 256 (statement of Rep. Baker).

amendment proceeded as they did. The Thirty-ninth Congress was deeply divided and the task of building the requisite supermajority support for the proposed Fourteenth Amendment was not an easy one.<sup>142</sup> The claim that the proposed constitutional amendment was following an established legal standard was an effective way to parry potential opposition.

Even aside from this legislative history, an inquiry into the contours of Fifth Amendment due process jurisprudence at the time of the Fourteenth Amendment's ratification to determine its original meaning seems inescapable. The Fourteenth Amendment's Due Process Clause was framed in terms already found in the Fifth Amendment; accordingly, it should have been plain that judicial interpretations of the Fifth Amendment's parallel provision would inform the construction of the new provision. But the state of the decisional law at the time of the Fourteenth Amendment's framing provides little support for Berger's account.

Prior to 1868, the Supreme Court had addressed the meaning of due process on four occasions. The first was *Bank of Columbia v. Okely*,<sup>143</sup> in which the Court upheld a Maryland statute granting the bank a summary remedy on its notes against a due process attack based on the Maryland Constitution on the ground that the debtors had waived whatever rights they had by agreeing to the terms of the notes.<sup>144</sup> Notably, the Court did not suggest that the summary remedy was valid because it was authorized by statute; to the contrary, the Court characterized due process as "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."<sup>145</sup>

The Court did not address the federal due process clause again until *Bloomer v. McQuewan*,<sup>146</sup> when the Court construed an Act of Congress extending the term of a patent as entitling a licensee to continue to use the patented item during the extension without need of an additional license.<sup>147</sup> In dicta, the Court added, without elaboration, "The right to construct and use these planing machines, had been purchased and paid for without any limitation . . . . And a special act of Congress, passed afterwards, depriving the appellees of the right to use them, certainly could not be regarded as due process of law."<sup>148</sup>

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142. For an exceedingly helpful account of the interaction between the political divisions in the Thirty-ninth Congress and the problems of constitutional drafting, see EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS 1863-1869*, at 79-92 (1990).

143. 17 U.S. (4 Wheat.) 235 (1819).

144. *See id.* at 244-45.

145. *Id.* at 244.

146. 55 U.S. (14 How.) 539 (1852).

147. *See id.* at 550-53.

148. *Id.* at 553 (dictum).

Next, in *Murray's Lessee v. Hoboken Land & Development Co.*,<sup>149</sup> the Court upheld a federal statute authorizing the issuance of a lien on the property of federal tax collectors based on the results of an administrative audit against due process attack on the ground that, although the statute departed from the traditional common-law requirement of a trial and a jury determination, it was consistent with longstanding statutory remedies granted against tax collectors.<sup>150</sup> Thus, the Court implicitly held that the common-law incidents of due process could be altered through statutory innovation, but it nevertheless characterized the Due Process Clause as “a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process ‘due process of law’ by its mere will.”<sup>151</sup>

Finally, and most famously, in *Dred Scott v. Sandford*,<sup>152</sup> as it rejected the power of Congress to prohibit slavery in federal territories, the Court wrote, again without much in the way of elaboration,

[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 into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.<sup>153</sup>

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149. 59 U.S. (18 How.) 272 (1855).

150. *See id.* at 277-85.

151. *Id.* at 276. As for the methodology to be used when assessing a procedural innovation under due process attack, the Court wrote:

To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

*Id.* at 276-77. This, of course, comes close to a view of due process as prohibiting procedural innovation. But this discussion in *Murray's Lessee* was not consistent with the approach taken in *Okely*, and as the discussion of Cooley's treatise below makes plain, it did not produce a general understanding that due process prohibits procedural innovation after the framing. Indeed, we have already seen that in *Hurtado v. California*, decided not long after the ratification of the Fourteenth Amendment, the Court vigorously rejected the claim that due process forbids procedural innovation. *See supra* note 105.

152. 60 U.S. (19 How.) 393 (1856).

153. *Id.* at 450.

In sum, by the time the Fourteenth Amendment was drafted, the Supreme Court had twice expressly rejected the view that due process was inapplicable to statutes, and it had implicitly but fairly clearly rejected that view on two other occasions as well.<sup>154</sup> Thus, the Berger view does not represent the understanding of due process by 1868, at least if the pronouncements of the Supreme Court are to be taken seriously.<sup>155</sup> At the same time, it is hard to divine very much about the nature of due process from the four available cases; the Court had discussed the concept in only skeletal terms.

The rather muddled understanding of due process is reflected in Thomas Cooley's treatise, which appeared about the time of the Fourteenth Amendment's ratification,<sup>156</sup> and which was the most influential account of

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154. It is perhaps curious that the Framers of the Fourteenth Amendment would incorporate into that amendment the very clause that had been at the root of *Dred Scott*, but the anomaly disappears when one considers that due process was a popular concept among abolitionists. Prior to the Civil War, abolitionists had argued that slavery was itself a deprivation of the liberty of slaves without due process of law, and was therefore inconsistent with the Fifth Amendment. See, e.g., CURTIS, *supra* note 113, at 42-56; HOWARD JAY GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 252-58 (1968); JACOBUS TENBROEK, EQUAL UNDER LAW 43-56 (Collier Books 1965) (1951). See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970) (describing the legal ideology of the antislavery movement).

155. Professor Harrison, in the course of the debate over substantive due process, disparages the significance of the antebellum Supreme Court decisions on due process:

As of 1868 the Supreme Court's most important discussion of due process had appeared in a procedural case, *Murray's Lessee*, and the Court's most famous venture into vested rights due process, *Dred Scott*, was loathed by the political party that was about to amend the Constitution. . . . Republicans no longer had any need to profess what may have been a forced belief that the Fifth Amendment outlawed slavery in the territories.

John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 554-55 (1997). Professor Harrison, however, uncharacteristically identifies no evidence to support his surmise about the motives of the post-war Republicans who were behind the framing of the Fourteenth Amendment. Moreover, even if the Republicans were ready to disavow their enthusiasm for due process after slavery had been abolished, they picked a strange way of doing so – utilizing in the Fourteenth Amendment the precise language that had been construed to grant substantive rights against what was thought to be legislative overreaching in *Dred Scott*. The more reasonable surmise, in my view, is that Republicans were content to grant the newly freed slaves the due process protections that had once been reserved for whites. Certainly that view is more faithful to an originalism that rejects reliance on motives and instead stresses the original public meaning of constitutional text.

156. See THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Lawbook Exchange Ltd. 1998) (1868).



constitutional law of its day.<sup>157</sup> Cooley echoed *Murray's Lessee*: “[A] legislative enactment is not necessarily the law of the land. . . . That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense.”<sup>158</sup> Instead, due process “exclude[s] arbitrary power from every branch of the government; and there would be no exclusion if such rescripts or decrees were to take effect in the form of a statute.”<sup>159</sup> As to procedural innovation, Cooley explained that the “chief restriction” imposed by due process “is that vested rights must not be disturbed,” adding that “the term ‘vested rights’ is not used in any narrow or technical sense, . . . but rather as implying a vested interest which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.”<sup>160</sup> Nevertheless, Cooley cautioned that there was no vested right to any particular remedy,<sup>161</sup> to the existing rules of evidence,<sup>162</sup> or, more generally, to “an anticipated continuance of the present general laws.”<sup>163</sup> He added that, as a vested right

rests upon equities, it has its reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.<sup>164</sup>

While some scholars claim that Cooley unambiguously endorsed a broad view of substantive due process that sharply limited legislative power to undertake procedural or substantive innovation,<sup>165</sup> one is hard-pressed to find such clarity

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157. On the importance of the Cooley treatise, see, for example, EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT* 116-18 (1948); FRIEDMAN, *supra* note 82, at 628-29; CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON ON AMERICAN CONSTITUTIONAL LAW* 27-32 (1954); BENJAMIN R. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* 18-41 (1942).

158. COOLEY, *supra* note 156, at 433 (quoting *Taylor v. Porter*, 4 Hill 140, 145 (N.Y. Sup. Ct. 1843)).

159. *Id.* at 434 (quoting *Norman v. Heist*, 5 Watts & Serg. 171, 173 (Pa. 1843)).

160. *Id.* at 357-58.

161. *See id.* at 443-45.

162. *See id.* at 452-55.

163. *Id.* at 440.

164. *Id.* at 438.

165. *See, e.g.,* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 342-44 (1999).

in his treatise. Cooley is actually quite elusive on what constitutes a vested right; about the only clear point he makes is that retroactive legislation will frequently impair vested rights, although even in that context Cooley's discussion is rife with qualifications.<sup>166</sup> Moreover, Cooley cautioned that "as changes of circumstance and of public opinion, as well as other reasons of public policy, are all the time calling for changes in the laws . . . it is apparent that many rights, privileges, and exemptions . . . and many reasonable expectations, cannot be regarded as vested rights in any legal sense."<sup>167</sup> Still, Cooley's account makes plain that at the time of the Fourteenth Amendment's framing, due process was considered fully applicable to the legislature. It makes equally clear that due process imposed no general prohibition against procedural innovation, but it did not quite give legislatures an entirely free hand either. Moreover, the concept of due process, from Magna Carta onward, had posed no obstacle to procedural innovation, which had continued apace through the framing of the Fifth and Fourteenth Amendments.<sup>168</sup>

#### *B. A Nonoriginalism for Originalists*<sup>169</sup>

By now, it should be plain that ascertaining the original meaning of the Fifth Amendment's Due Process Clause is a tricky business. Scholars have not come close to any type of consensus about whether the original understanding of due process limited legislative authority.<sup>170</sup> Berger's account seems an unlikely candidate for the original understanding; even if accurate in 1791, the antebellum precedents make plain that it was decidedly out of favor by 1868. But the antebellum precedents substituted nothing very clear for the English view of due process as inapplicable to legislation. A "frozen in amber" view is even more implausible. It is unsupported by the constitutional text, and at odds with both the tradition of procedural reform that predated the framing of both

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166. See COOLEY, *supra* note 156, at 455-73.

167. *Id.* at 358.

168. See *supra* text accompanying notes 44-45.

169. Cf. Barnett, *supra* note 13, at 611 (title).

170. Compare DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 272 (1985) (claiming that due process placed no limitation on the legislature), JOHN HART ELY, *DEMOCRACY AND DISTRUST* 14-21 (1980) (same), Easterbrook, *supra* note 127, at 95-100 (same), and Harrison, *supra* note 155, at 542-54 (same), with 2 CROSSKEY, *supra* note 116, at 1102-10 (stating that due process did limit legislative power), Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticiable*, 60 TEX. L. REV. 875, 890-96 (1982) (same), Miller, *supra* note 137, at 4-17 (same), Riggs, *supra* note 120, at 991-1004 (same), and Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 213, 220-28 (Eugene W. Hickok, Jr. ed., 1991) [hereinafter *THE BILL OF RIGHTS*] (same).

provisions and with Cooley's account, which permits, at least to some extent, procedural innovation.<sup>171</sup> Moreover, the antebellum Supreme Court cases were hardly models of clarity. *Murray's Lessee* had suggested that there would be special constitutional solicitude for legislatively endorsed innovation, at least when it reflected the law of England,<sup>172</sup> but the dicta in *Bloomer v. McQuewan* suggested that legislative innovation could run afoul of due process.<sup>173</sup> Conversely, in *Dred Scott* the Court held that legislation prohibiting slavery in federal territories violated due process, despite a long history of such legislation in both Britain and this country.<sup>174</sup> Thus, no clear approach emerges from the antebellum cases.

In short, there is not a lot of original meaning to be found in the Due Process Clauses. The concept of due process was amorphous and undeveloped until well after both clauses had been adopted. Even if Berger was right that there was a clear original understanding in 1791, by 1868 the Supreme Court had discarded it, while putting nothing readily definable in its place.

One point, however, surely comes clear from the antebellum Supreme Court cases and Cooley's account — the Due Process Clause made it the responsibility of the courts to assess the propriety of the manner in which persons are deprived of life, liberty, or property, whether by statutory or common-law procedures. Despite the vagueness of the standards to be derived from the extant precedents, it is quite clear that Bingham and the other Framers made no attempt to create their own definition of due process. Instead, the Framers relied on the then-extant constitutional common law, unsatisfactory though it was.<sup>175</sup> Moreover, in light of the primitive state of due process

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171. See *supra* text accompanying notes 156-67.

172. See *supra* text accompanying notes 149-51.

173. See *supra* text accompanying note 148.

174. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 363, 534-40 (1856) (McLean, J., dissenting); see also *id.* at 605-28 (Curtis, J., dissenting). For additional discussion of the extensive history of federal regulation of slavery in the territories prior to *Dred Scott*, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 74-187 (1978); and MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 115-53 (2006).

175. As one leading historian of the Fourteenth Amendment put it:

[I]t seems reasonable under the circumstances that the Thirty-ninth Congress, even as the First Congress before it, realized that they did not know just what due process meant; it being a technical matter of legal interpretation, they preferred to leave it to the decisions of the courts. In this way the members of Congress, knowing that there was a body of technical rules built up around the idea of "due process of law" and considering it to be a most valuable protection of the general rights of the people, decided to incorporate it into the fundamental law as a limitation on the power of the states and leave its ultimate definition and application to the future adjudication of the courts.

jurisprudence in 1868, surely the Framers could not have doubted that due process jurisprudence would continue to evolve by common-law methods.<sup>176</sup> What is more, the Framers knew that this process of common-law constitutional adjudication would continue since the federal courts would inevitably elaborate upon the newly crafted Due Process Clause under their power to hear “all [c]ases in [l]aw and [e]quity, arising under this Constitution.”<sup>177</sup> Indeed, we know from *Federalist 78* that it was the general expectation that the judiciary would operate as a countermajoritarian guarantor of the individual rights identified in the Constitution.<sup>178</sup>

On this view, the purpose of the due process guarantee was to ensure that legislative majorities did not have unfettered power to determine the manner in which persons could be deprived of life, liberty, or property. When such deprivations were at stake, due process ensured that a countermajoritarian institution would exercise review. To apply the concept of due process, courts would be required to develop a substantive account of the permissible methods by which majoritarian institutions may authorize the deprivation of life, liberty, or property, and their review would ensure that life, liberty, or property have some normative protection over and above that available by the grace of legislative majorities. This account is explicitly countermajoritarian; but surely countermajoritarianism is the essential nature of any Bill of Rights. That point is itself originalist; as James Madison explained as he put before the House of Representatives what became the Bill of Rights:

The prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the

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MOTT, *supra* note 127, at 165.

176. For a recent and powerful demonstration that at the time of the framing, the common law was understood to have dynamic and evolving content, see Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

177. U.S. CONST. art. III, § 2. For a survey of the evidence that the Framers of the original Constitution envisioned its elaboration through a process of common-law adjudication, see Powell, *supra* note 17, at 903-13.

178. In particular, I refer to the defense of judicial tenure in *Federalist No. 78*:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, at 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

executive or legislative departments of Government, but in the body of the people, operating by the majority against the minority.<sup>179</sup>

Madison added that were a Bill of Rights

incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.<sup>180</sup>

Madison's own account of the Bill of Rights accordingly rejects majoritarianism, and critically depends upon the judiciary to make the countermajoritarian guarantees of the Bill of Rights effective.

Thus, the account offered here identifies the original meaning of due process as nonoriginalist and countermajoritarian. On this view the function of the Due Process Clause was not to enshrine a fixed original understanding as organic law — the meaning of due process at the time of the framing was too amorphous to support that view — but instead to delegate to the judiciary responsibility for countermajoritarian oversight.<sup>181</sup> For this reason, the nonoriginalist conception of due process revels in countermajoritarianism.<sup>182</sup>

Admittedly, the case for an original understanding of procedural due process as evolutionary and countermajoritarian is inferential and speculative. Neither

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179. 1 ANNALS OF CONG. 454-55 (Joseph Gales ed., 1834), *reprinted in* COGAN, *supra* note 115, at 54.

180. *Id.* at 457, *reprinted in* COGAN, *supra* note 115, at 56.

181. The very amorphousness of due process in 1868 suggests a different kind of originalist critique of the position advanced here. Robert Bork has argued that the judiciary may only properly enforce those original meanings for which there is reliable evidence of agreement at the time of ratification, and accordingly, if there is no reasonably ascertainable original meaning of a constitutional provision, it cannot be enforced. *See* BORK, *supra* note 1, at 166. It is a strange sort of fidelity to original meaning, however, to claim that a constitutional provision that the Framers intended to have meaning instead be treated as surplusage. Even more important, Judge Bork ignores the possibility that for open-ended provisions such as the Due Process Clause, there may have been agreement that a countermajoritarian judiciary be permitted to develop the meaning of the constitutional provision through common-law adjudication.

182. It follows that I share Barry Friedman's misgivings about the "academic obsession" with what is thought to be the "countermajoritarian difficulty" posed by constitutional adjudication. *See* Barry Friedman, *The Birth of an Academic Obsession: The Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002). One can debate the merits of countermajoritarianism as a normative matter, but as a formalist matter, it seems to me indisputable that countermajoritarianism is embedded in the Constitution. The concerns about countermajoritarian review, in my judgment, are best addressed through a series of prudential considerations governing judicial review discussed in Part IV below.

Bingham nor any of the other proponents of the Fourteenth Amendment ever explicitly argued for an evolutionary common-law conception of due process. Of course, it might have been politically problematic to acknowledge explicitly that the Due Process Clause would grant the judiciary potentially broad authority in an ill-defined area of constitutional law.<sup>183</sup> But an evolutionary common-law conception of due process is consistent with the evolutionary nature of procedure up until the adoption of the Due Process Clause, as well as the tradition of common-law constitutional adjudication that had taken firm root by 1868.<sup>184</sup>

In contrast, there appears to be no evidence that the Due Process Clause was intended to freeze procedure in amber — that view is unsupported by the text and can be found nowhere in the congressional or ratification debates on the Fourteenth Amendment, preratification precedents, or in the writings of Cooley or other eighteenth-century commentators. Similarly, the historical evidence does not identify any type of original standard by which procedural innovation could be judged — that matter was left for future adjudication. Though the case presented here may not be unassailable, there is no originalist account of procedural due process that can boast of even this much historical support.

This account has implications for substantive due process as well.<sup>185</sup> If the original understanding of the Due Process Clause permitted the courts to take an evolutionary common-law approach when reviewing procedural legislation, then it is hard to understand why the same approach should not be used for purposes of defining those substantive rights granted by due process. After all, the substantive rights secured by due process were no better developed than its procedural component at the time of the framing; they had been outlined in only

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183. Bingham's earlier proposal for a fourteenth amendment that would grant Congress the power to enact all laws "necessary and proper" to secure the privileges and immunities of citizenship and equal protection in the rights of life, liberty, and property had been defeated because it was thought to grant Congress too much authority to interfere with existing state law, and that defeat had induced considerable caution on the part of Bingham and the other advocates of the Fourteenth Amendment. *See, e.g.*, EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 63-69 (2003).

184. The account of procedural due process advanced here accordingly complements the account of common-law evolution of constitutional law provided by David Strauss, although I approached the matter from the standpoint of original meaning. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

185. Indeed, the antebellum Supreme Court cases offer no distinction between procedural and substantive due process. This dichotomy appears to have been invented long after 1868. For the first mention of "procedural due process" in the *United States Reports*, see *Snyder v. Massachusetts*, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting). For the first mention of "substantive due process," see *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).

the barest way in *Bloomer* and *Dred Scott*.<sup>186</sup> Additionally, Cooley's treatise, while perceiving no vested right in the continuation of present law, acknowledged rather ill-defined substantive rights protected by due process.<sup>187</sup> Moreover, if the concept of due process was intended to evolve through common-law adjudication, surely that was equally true for its procedural and substantive components.<sup>188</sup>

Indeed, the original meaning of much of the Constitution may be nonoriginalist. To take two examples from the Bill of Rights, there is extremely limited contemporaneous evidence about the Framers' understandings of the First and Fourth Amendments. As to the former, Congress rejected a version of the First Amendment that would have incorporated the common law, and framed a novel text while doing little to explicate its meaning.<sup>189</sup> As to the

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186. See *supra* text accompanying notes 148, 153.

187. See *supra* text accompanying notes 159-67.

188. The advocates of a robust doctrine of substantive due process have relied on the evidence that by 1868, due process was understood to limit legislative power and offer substantive protections to support their own claim that the Fourteenth Amendment's original understanding included robust protection against a wide array of government regulation. See, e.g., Ely, *supra* note 165, at 344-45; Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 477-88 (2005); Stephen A. Siegel, *Lochner Era Jurisprudence and American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991). To my eye, these scholars are doing quite a bit of cherry-picking of the evidence to claim that there was a settled understanding of a broad substantive due process protection against government regulation by 1868. In the lower courts, there had been a smattering of cases construing state constitutional due process clauses to protect substantive rights, but far more state courts had rejected that view. See, e.g., CORWIN, *supra* note 127, at 89-115; HAINES, *supra* note 133, at 104-16. Compare, e.g., *Wynehamer v. People*, 13 N.Y. 378 (1856) (recognizing substantive limitations on legislative power under the state's due process clause), with *State v. Keeran*, 5 R.I. 497 (1858) (rejecting substantive due process). The Supreme Court had yet to address this dispute. The closest it came to embracing substantive due process was in *Dred Scott*, and it is difficult to disentangle the due process holding in that case from the Court's holdings that African-Americans had not rights that could be protected by the federal courts, see *Dred Scott v. Sandford*, 60 U.S. (19 How.) 363, 403-06 (1856), and that Congress had no authority to regulate slavery in the territories, see *id.* at 446 – conclusions that were repudiated with the ratification of the Thirteenth and Fourteenth Amendments. Certainly nothing in *Dred Scott* spoke in any straightforward way to the scope of congressional power to regulate interstate commerce, much less state and local regulatory and police powers, which were not at issue in that case. Moreover, there was a long tradition of pervasive regulation in antebellum America, and there is precious little evidence that the Framers of the Fourteenth Amendment intended to alter that tradition, or that its ratification was understood to have circumscribed the scope of state and local regulatory power. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 51-233 (1996).

189. See, e.g., Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, in *THE BILL OF RIGHTS*, *supra* note 170, at 82-93. Although Robert Bork originally articulated his conception of originalism in the context of the First Amendment, original meaning is curiously

latter, the law of torts had traditionally regulated search and seizure, but the Framers adopted a new formulation — a requirement of probable cause for warrants and a prohibition on unreasonable search and seizure — that had no common-law antecedents and that was, again, ratified with little in the way of explication.<sup>190</sup> The original understanding of these provisions therefore likely would have included an expectation that these relatively abstract and novel formulations would be developed through common-law adjudication by a countermajoritarian institution. Indeed, when a heretofore largely unknown legal concept winds up in a written constitution accompanied by limited explication of its public meaning, against a background of common-law construction by a countermajoritarian institution, constitutional interpretation is necessarily nonoriginalist, with the text supplying only the most general parameters for decisionmaking. And we should not be surprised that the Constitution contains such provisions. Even if one dismisses the possibility that the Framers themselves desired an elastic and therefore adaptable Constitution, the political dynamics of building supermajority support for a constitutional amendment may themselves push Framers in the direction of broad and relatively vague, if benign-sounding formulations.<sup>191</sup> What better example of just this point than the guarantee of “due process”?

#### *IV. Nonoriginalism and the Prudential Virtues*

The preceding discussion has answered much but not all of the case for public-meaning originalism. Perhaps the most powerful argument remains — the claim that nonoriginalism is an invitation to judges to read their policy preferences into the law.<sup>192</sup> After all, the understanding of due process

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absent from his account. Indeed, he acknowledged that the Framers “seem to have had no coherent theory of free speech,” and thus “[w]e are . . . forced to construct our own theory of the constitutional protection of speech.” Bork, *supra* note 15, at 22. Even Judge Bork’s admirers are unable to identify historical evidence to support his account of the original understanding of the First Amendment. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307-08 (1978).

190. See, e.g., David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1776-1807 (2000).

191. John McGinnis and Michael Rappaport have recently defended originalism on the ground that laws adopted with supermajority support tend to produce socially desirable outcomes. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U.L. REV. 383, 385-91 (2007). Whatever its merits, however, this argument fails to consider the pragmatic reality that provisions adopted with supermajority support may be drafted at a high level of generality in order to build supermajority support, and for that reason may contain a relatively indeterminate original meaning.

192. See *supra* text accompanying notes 20-22.



advanced here, although consistent with the minimal standards for due process that had been articulated as of 1868, leaves a wide swath for judicial discretion. A nonoriginalist and countermajoritarian conception of due process requires the courts to develop a substantive theory to identify those questions that should not be left to majoritarian determination, and therefore grants the judiciary potentially vast authority. Still, as Professor Sager has taught us, the institutional limitations on the judiciary frequently cause it to “fail[] to enforce a provision of the Constitution to its full conceptual boundaries.”<sup>193</sup> That concept has particular utility for present purposes.

One need not be an originalist to see reason to circumscribe the scope of judicial review. Courts necessarily make decisions based on the limited information placed before them by the parties consistent with the constraints imposed by the rules of evidence; their conclusions on empirical questions are necessarily tentative and fraught with uncertainty; their ability to recognize and correct errors is limited by the doctrine of stare decisis; and all of this suggests that on any number of issues, judicial decisionmaking is likely to be inferior to that of majoritarian institutions.<sup>194</sup> Consider, for example, the asserted due process right of terminally ill patients to physician-assisted suicide at issue in *Washington v. Glucksberg*.<sup>195</sup> A nonoriginalist will not find the common law’s failure to recognize a right of terminally ill patients to assisted suicide dispositive, but even a judge whose theory of countermajoritarianism inclines her toward libertarianism respectful of an autonomous doctor-patient

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193. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); see also LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 86-128 (2004). This thesis enjoys considerable support among legal scholars. See, e.g., FALLON, *supra* note 28, at 31-34; Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1594-96 (2000); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 866-69 (1999); Robert C. Post & Reva B. Siegel, *Equal Protection Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 467-73 (2000); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 321-24 (1987).

194. As the Court has put it: “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). For an excellent summary of the advantages of majoritarian institutions and the significant risks of error in judicial decisionmaking, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 24-60 (1999). For a more detailed inquiry even more critical of judicial decisionmaking, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 153-288 (2006).

195. 521 U.S. 702 (1997).

relationship is not ready to decide the matter. The judge still must consider whether a prophylactic prohibition is justified by the risks that patients suffering from terminal illness lack the ability to make fully informed choices, or will yield to pressure from friends of family eager to be spared the emotional and financial toll of a long and likely terminal illness, as well as the difficulty in designing a regulatory system that can reliably prevent such abuses at reasonable cost.<sup>196</sup> These are difficult and largely empirical questions on which courts, at best, can reach only provisional judgments. The prudent nonoriginalist will surely hesitate before removing this issue from the legislative arena.

There are any number of nonoriginalist theories of constitutional interpretation that acknowledge the institutional strengths of majoritarian decisionmaking and the perils of countermajoritarianism. This point, for example, is central to the view of constitutional adjudication as reinforcing democratic deliberation advanced by Justice Breyer,<sup>197</sup> the utilitarian pragmatism of Judge Posner,<sup>198</sup> and the representation-reinforcing theory of John Hart Ely.<sup>199</sup> I do not mean to endorse any of these approaches; but rather only to demonstrate that there is no necessary relation between nonoriginalism and activism. Nor do I mean to suggest that these approaches are even persuasive as constitutional interpretation; to my eye, there is little in the Constitution's text or history to suggest that it was intended to do any one thing above all others — be it promoting democratic deliberation, social welfare, or evenhanded opportunities for political participation.<sup>200</sup> But on Professor Sager's view that constitutional adjudication not only concerns the interpretation of text, but also the extent to which the judiciary can prudently pursue the norms it derives from text, these approaches have much to commend them. A judge attentive to these prudential virtues, moreover, will see in the occasion of judicial review no license to write his own policy preferences into constitutional law. Indeed, there is plenty of evidence that nonoriginalist due process jurisprudence has been attentive to just this concern.

To take an example related to the parking-ticket context, we have seen that the cost-benefit approach of *Mathews v. Eldridge* is thoroughly nonoriginalist — a historically-based understanding of due process would not

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196. See *id.* at 782-89 (Souter, J., concurring).

197. See BREYER, *supra* note 27, at 118-32.

198. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26-37 (1990).

199. See ELY, *supra* note 170, at 73-104.

200. For some powerful elaborations on this point, see, for example, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006); and Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

tolerate the gaping exception to the historically accepted rule against hearsay that was blessed in that case<sup>201</sup> — but it is also the approach least likely to inject the judge’s own values into an assessment of constitutional judgments about procedure. An approach that attached some sort of intrinsic value to specified procedural safeguards would effectively require the taxpayers to shoulder the cost of those procedural safeguards that pricked the Court’s conscience.<sup>202</sup> Instead of externalizing the costs of its conscience onto the taxpayers, the Court has chosen to require only cost-justified investments in procedural regularity — an approach akin to the time-tested Hand formula for negligence transposed to the realm of procedural due process.<sup>203</sup> Whatever the criticisms of *Mathews v. Eldridge*, it is difficult to argue that the Court has merely imposed its policy preferences on the Due Process Clause.<sup>204</sup>

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201. See *supra* Part II.A.2.

202. Jerry Mashaw, for example, has criticized *Eldridge* on the ground that when the government fails to hear out a claimant, the resulting “lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.” Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976); see also Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 657-70 (2000). But imposing a requirement of hearings also diverts scarce resources from the provision of government services and renders governmental welfare programs a less efficient means of aiding the needy, a result which is also likely to sap political support for such programs. Mashaw balances these competing claims in favor of the provision of evidentiary hearings, but surely he can fairly be accused of reading his own policy preferences into the Constitution.

203. I refer, of course, to Learned Hand’s explication of the tort of negligence as turning on whether the cost of the injury multiplied by the likelihood that it would occur exceeds the cost that the defendant would have had to incur to avoid the loss. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). The Hand formula reflects nearly a consensus view of the outcome of centuries of evolution in the common law of torts. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135-73 (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.1 (4th ed. 1992).

204. For a defense of the much-criticized *Eldridge*, see Gary Lawson, Katharine Ferguson & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: *Rediscovering the Mathews v. Eldridge and Penn Central Frameworks*, 81 NOTRE DAME L. REV. 1, 21-24 (2005). In contrast, in the area of criminal procedure, the Court has rejected *Eldridge* and adopted a test that pays heavy deference to tradition. See *Medina v. California*, 505 U.S. 437, 442-46 (1992). If anything, that approach reflects a good deal more judicial ideology because of its conservative bias. The Court, however, is far from consistent on this point; it used the Due Process Clause to impose a duty on prosecutors to disclose exculpatory evidence to the accused in *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequently broadened that duty to require prosecutors to identify and disclose exculpatory information in the hands of the police and other investigators, see *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), even though prosecutors had never been placed under any type of duty of disclosure historically. See LANGBEIN, *supra* note 44, at 283-343; Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J.

Thus, at least in the due process context, the nonoriginalist answers the charge of judicial activism by observing that an overt concern with the virtues of prudence is far more likely to discipline judicial decisionmaking than a search for an illusory precision through a futile historical inquiry into the original meaning of due process. When history is as imprecise as in the historical meaning of due process, it can little serve to constrain the discretion of judges or enforce a principled boundary between the realms of politics and constitutional law.<sup>205</sup> Of course, prudence will frequently argue in favor of long-established legal regimes because of the risks always associated with nonmajoritarian change, but there will be occasions on which a court can satisfy itself that those risks are acceptable. For example, the Supreme Court used the Due Process Clause to revolutionize criminal procedure by imposing an obligation on prosecutors to identify and disclose exculpatory evidence,<sup>206</sup> but no one argues that this reform has produced mischief, perhaps because, like *Mathews v. Eldridge*, it is largely directed at producing a more reliable adjudicative process.

More generally, we have seen that hostility to procedural innovation is not characteristic of the common law, nor is there any evidence that such hostility was at the root of seventeenth or eighteenth-century understandings of due process. Perhaps, in the context of procedural due process, relevant judicial expertise is relatively great because of the judiciary's familiarity with procedural devices that facilitate adjudicative factfinding. Therefore, the counsel of prudence argues with somewhat lesser force for judicial restraint in procedural issues than in any number of substantive due process contexts that demand what amounts to legislative factfinding, such as the asserted right to assisted suicide.<sup>207</sup> A jurisprudence that is attentive to the limits of judicial expertise, rather than one based on an illusory original meaning, is likely to better serve the advocates of judicial restraint.

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865, 865-67, 893-99 (1968). For additional discussion of due process doctrine in the criminal context, see Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

205. Cf. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 UCLA L. REV. 217 (2004) (using citation patterns in federalism cases to demonstrate that originalism fails to constrain judicial discretion).

206. See *supra* note 204.

207. For the seminal work articulating the distinction between legislative and adjudicative factfinding, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07, 423-25 (1942). The distinction is widely accepted, although its precise formulation and application is debated. See, e.g., John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 482-91 (1986); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113-16 (1988).

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I conclude with an admission of failure — I do not claim to have discovered the original meaning of due process. In my view, the historical evidence shows that the original understanding of due process was murky and incomplete. In this, however, I am in good company. Learned Hand wrote that the Due Process Clauses are drawn “in such sweeping terms that their history does not elucidate their contents.”<sup>208</sup> Arthur Sutherland wrote that “no one knows precisely what the words ‘due process of law’ meant to the draftsmen of the fifth amendment, and no one knows what these words meant to the draftsmen of the fourteenth amendment.”<sup>209</sup> Perhaps it is time to give these admissions their due.

It is well and good to debate the theoretical merits of originalism, but when the evidence of original meaning of a particular constitutional text is unsatisfactory, the message of history is that the original meaning simply provides no reliable guide for decisionmaking. I do not claim that the original meaning of all of the Constitution is indeterminate — but the original meaning of the Due Process Clauses certainly is. An indeterminate original meaning, moreover, surely is a greater invitation to judicial subjectivity than an alternative interpretative strategy that stresses prudential virtues. What is more, an indeterminate original meaning may well betoken an original understanding that such an indeterminate (but perhaps for that reason politically unobjectionable) text would be fleshed out through common-law adjudication. Common-law adjudication, in turn, is evolutionary in character; the common law has never been frozen in amber. The history of procedure is particularly illuminating on this subject — the common law’s history is replete with procedural innovation, and it seems highly unlikely that the twin Due Process Clauses were intended to bring that evolution to an end. The lesson of history, I submit, is that the original meaning of due process is nonoriginalist.

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208. LEARNED HAND, *THE BILL OF RIGHTS* 30 (1958).

209. Arthur E. Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 286 (1965).