

BY FREDERICK MARK GEDICKS

ORIGINALIST ROOTS OF SUBSTANTIVE DUE PROCESS

No person shall be . . .
deprived of life, liberty, or property
without due process of law.
—U.S. Constitution, Amendment V (1791)

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THE DOCTRINE OF “SUBSTANTIVE DUE PROCESS” REFERS TO THE SUPREME COURT’S LONG AND CONTROVERSIAL PRACTICE OF USING THE DUE PROCESS CLAUSES OF THE 5TH AND 14TH AMENDMENTS TO CONSTITUTIONALIZE FUNDAMENTAL RIGHTS THAT DO NOT APPEAR ANYWHERE IN THE CONSTITUTION. THE DOCTRINE DEBUTED TO MIXED REVIEWS IN CHIEF JUSTICE TANEY’S INFAMOUS *DRED SCOTT* OPINION,¹ AND CRITICISM OF IT HAS BEEN A FACT OF AMERICAN CONSTITUTIONAL LIFE EVER SINCE.

This criticism has acquired particular resonance as “originalism” has come to dominate debates about constitutional interpretation. The most widely defended version of this interpretive theory, “public-meaning originalism,” holds that the contemporary meaning of a constitutional provision is the meaning that was understood by the people who lived at the time that the provision was proposed by Congress and ratified by the states.

An entrenched conventional wisdom holds that substantive due process is inconsistent with an originalist understanding of the Due Process Clauses of both the 5th and 14th Amendments, since by their terms they appear

to protect only rights to legal process. With respect to the 5th Amendment in particular, an overwhelming scholarly consensus maintains that its Due Process Clause protects only procedural rights. Accordingly, an originalist defense of substantive due process under the 5th Amendment Due Process Clause would be significant. First, it would legitimate fundamental substantive rights that bind the federal government only by application of the doctrine of substantive due process, such as rights to “fundamental fairness” in criminal and civil proceedings,² and to equal protection of the laws.³ Second, because yet more conventional wisdom holds that the original meanings of

the 5th and 14th Amendment Due Process Clauses are identical, a originalist defense of 5th Amendment substantive due process would place the burden on opponents of the doctrine to explain how and why an understanding of the Due Process Clause that encompassed substantive due process in 1791 had vanished by the time the 14th Amendment Due Process Clause was ratified in 1868. And finally, an originalist defense of 5th Amendment substantive due process would demonstrate that originalism is consistent with the common-law judicial protection of unenumerated fundamental rights championed by constitutional liberals since the mid-20th century.

MAGNA CARTA

It is universally agreed that the concept of due process of law is rooted in a provision of Magna Carta, or the “Great Charter”:

No free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers and by the law of the land.

Later English statutes defined the “law of the land” as due process of law, or “procedure by original writ or by an indicting jury,”⁴ an equation that entered into English common law and was eventually absorbed into the English constitution.⁵

In 1628—more than 400 years after Magna Carta—Sir Edward Coke canonized the fundamental-law status of the Great Charter and the law of the land in England with his theory of higher-law constitutionalism. In Coke’s view, the English constitution did not vest sovereignty in the king but rather in the common-law and the courts.⁶ Magna Carta and common-law liberties constituted law that was higher than the actions of royalty, nobility, or Parliament, law that limited what these groups could do even by consensus.⁷ As law possessed of a more fundamental status than ordinary statutes, Magna Carta

Originally written in 1215, Magna Carta bound England’s sovereigns to the rule of law and laid the groundwork for the U.S. Constitution and Bill of Rights.



and the law of the land had a status prior to and more foundational than the actions of the king and even Parliament.⁸ This English “constitutionalization” of Magna Carta and the law of the land is evident in Coke’s confrontation with King James I over the respective jurisdictions of common law and ecclesiastical courts, in judicial opinions authored or reported by Coke—notably *Bonham’s Case* and several antimonopoly cases—and, most clearly, in Coke’s monumental *Institutes of the Law of England* published at the end of his life.⁹

AMERICAN THINKING

The drafting and ratification history of the 5th Amendment Due Process Clause discloses virtually nothing about its original public meaning. However, no legal commentator, not even Blackstone, had more influence on the American revolutionaries than Coke. Consequently, questions about due process of law and its protection of unenumerated rights were at the heart of American constitutional thinking during the Revolution and its aftermath.

NATURAL RIGHTS

The colonists could not rely directly on Coke’s higher-law constitutionalism because revolt necessarily entailed withdrawal from the English constitutional system that higher-law constitutionalism sustained. Thus, the Declaration of Independence opened with a declaration of natural rights rather than fundamental customary rights of English common law. But in short order it moved to a long list of common law grievances, including indefinite dissolution of colonial legislatures, veto of an independent colonial judiciary, maintenance of standing armies in the colonies, quartering of troops in the colonists’ homes, embargoing colonial trade, imposing of taxes without colonial representation in Parliament, and depriving colonists of trial by jury. The Declaration even accused the king of combining with Parliament to subject the colonies “to a jurisdiction foreign to *our constitution* and unacknowledged by *our laws*,” thereby implying the existence of an unwritten colonial constitution analogous to the unwritten English one, and echoing higher-law constitutional arguments about natural and customary rights that were then widespread among the colonists.¹⁰

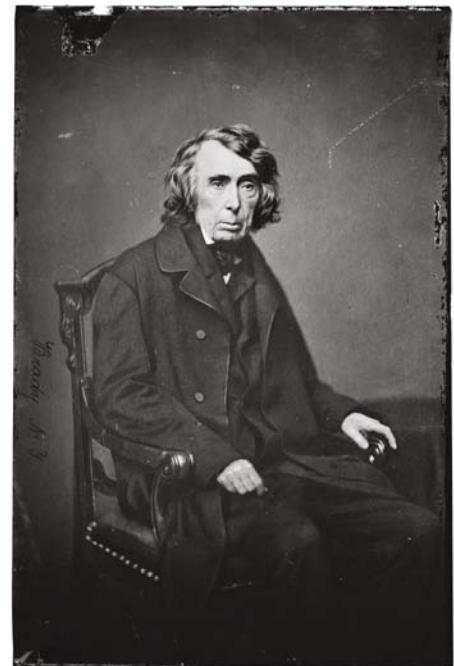
In short, the Declaration’s basic argument—that Britain’s violation of natural and customary rights justified revolution—fit neatly with Coke’s 17th-century notion that the law of the land and due process of law limited the actions of both king and Parliament.

HIGHER-LAW CONSTITUTIONALISM

That revolutionary Americans carried higher-law constitutionalism into independence is reflected in post-independence state constitutions and judicial decisions. Because natural and customary rights were believed to exist independent of any writing, it was not necessary to enumerate them in a constitutional text or otherwise to enact them into positive law in order for them to limit the actions of the newly framed state governments.¹¹ This distinction is evident in the language used in the written constitutions enacted by about half of the states following independence, which “created” the frames of state government but merely “declared” or “guaranteed” natural and customary rights. Maryland, Massachusetts, North Carolina, Pennsylvania, Vermont, and Virginia maintained this distinction from the start, while Delaware, New Hampshire, and Kentucky (upon its admission) followed suit within a generation.

Some judicial decisions and arguments of counsel following the Revolution also drew upon higher-law constitutionalism,¹² although others relied solely on constitutional texts enumerating fundamental rights.¹³ A much-contested speech by Alexander Hamilton in the late 1780s also supports the view that higher-law constitutionalism was influential in the states following independence.¹⁴

The strongest judicial statement of higher-law constitutionalism prior to 1791 is *Ham v. McLaws*.¹⁵ There, a South Carolina court considered the state’s imposition of a fine and forfeiture for illegal importation of slaves against a family that had been in transit on the high seas when the importation ban was enacted. Conceding that defendants fell within the strict letter of the statute, the court nevertheless declared that “statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles,” and held that the statute not did not



Roger B. Taney, chief justice of the U.S. Supreme Court and staunch supporter of slavery, used the Fifth Amendment’s Due Process Clause in writing the majority opinion in the infamous *Dred Scott v. Stanford* case.

apply to the defendants, reasoning that this was “consistent with justice, and the dictates of natural reason, though contrary to the strict letter of the law.”¹⁶

POWER OF THE FEDERAL JUDICIARY

The 1787 Constitution enumerated very few individual rights and liberties, and even the few it did were criticized by delegates to the Philadelphia Convention as “irrelevant and useless.”¹⁷ Even so, Antifederalists immediately made the Constitution’s lack of a national bill of rights a ratification issue. The Federalists maintained that an enumeration of natural and customary fundamental rights and liberties was unnecessary because the Constitution did not delegate to the national government any power to infringe upon such rights,¹⁸ and was dangerous because it would be impossible to enumerate all of the rights and liberties individuals held.¹⁹ Both arguments rested on two assumptions

explicitly voiced by Federalists in the ratification debates: that natural and customary rights existed independent of the federal Constitution and any other text, and that the federal judiciary would be empowered to invalidate acts of Congress or the state legislatures intruding upon such rights.²⁰ Indeed, Hamilton’s discussion of judicial power in *The Federalist* essay is permeated by the expectation that the federal courts would defend unenumerated natural and customary rights against federal encroachment.²¹



In sum, when Madison set out to draft the 5th Amendment Due Process Clause and the rest of the Bill of Rights in 1790, the higher-law constitutionalism of Coke and the English 17th century had been adopted, adapted, and embedded in American constitutional thinking. In particular, the notion of due process of law associated with the law of the land guarantee of Magna Carta was

widely understood to include a residual guarantee of substantive liberty against arbitrary actions of government, including (especially) the state legislatures.

DEFINITION OF “LAW”

Defenses of substantive due process often founder on the text: How does one get *substantive* rights from a text that seems so tightly focused on *procedure*? This very question reflects the projection by contemporary interpreters of a positivist meaning onto the term “law” in the crucial phrase “due process of law” that the framers did not share. In this positivist understanding, a law is any legislative or other governmental act that has satisfied the formal requirements for making a law. Under this reading, Congress complies with the Due Process Clause—that is, it satisfies due process of law when it deprives a person of life, liberty, or property—so long as it accomplishes the deprivation by means of a congressional act passed in accordance with the lawmaking provisions set forth in Article I of the Constitution.

By contrast, in the 1790s, classical natural law theory had long assigned normative as well as positivist content to the definition of law. To fall within the meaning of law in the classical view, a legislative or other governmental act required more than mere positivist compliance with a rule of recognition; it also needed to be just.²² Cicero, for example, maintained that an unjust statute is not a law, even though clearly adopted and accepted by the nation it governs.²³ Augustine likewise suggested that “a law that is not just is not a law.”²⁴ Aquinas formalized this view into an argument, concluding that, since law derived its essential character from its conformity to “right reason,” whose “first rule is the law of nature,” a law that violates the natural law “is no longer a law but a corruption of law.”²⁵

The classical natural law tradition was still vibrant in late-18th-century America, when the 5th Amendment was drafted and ratified, and the term “law” had not yet acquired the almost entirely positivist connotation that it carries today. To call a legislative act a law during that era did not mean that the act merely satisfied constitutional requirements for lawmaking, but rather it signified that it conformed to substantive limitations on legislative power represented by natural and customary rights. Legislative acts that

William Blackstone argued in his *Commentaries on the Laws of England* that positive law that was not in accord with natural law was no law at all.



violated these limitations would not have been considered laws, even when they satisfied the constitutional requirements for lawmaking. Such acts might have given due process, in other words, but the process owed and given would not have been a process *of law*.²⁶ Under this reading, the Due Process Clause required that a congressional deprivation of life, liberty, or property be accomplished by a law, and to be a law, a congressional act must not have exceeded the limits of legislative power marked by natural and customary rights.

There is substantial evidence that late-18th-century American lawyers read the Due Process Clause in this manner. Legal dictionaries from the late-18th century repeat Aquinas' argument nearly *verbatim*.²⁷ Echoing Aquinas, and notwithstanding his ideas about parliamentary supremacy, Blackstone similarly concluded that there is no obligation to obey human laws that violate the natural law, since such laws have no validity or force.²⁸ And even in England, members of the parliamentary Whig opposition argued that the more extreme acts passed by Parliament to punish colonial intransigence were not law even though properly enacted.²⁹

The classical understanding of law is implicit in the ubiquitous language of nullity and voidness that runs throughout late-18th-century judicial decisions and arguments of counsel involving legislative acts held to have violated natural or customary rights.³⁰ Then, as now, a void law had no existence; it made sense to think of it as never having been a law at all. This understanding was sometimes even made explicit.

For example, the classical theory's normative definition of "law" is expressly invoked in *Van Horn's Lessee v. Dorrance*, a case involving a boundary dispute between Pennsylvania and Connecticut that the states settled by legislatively vesting title to disputed property in certain claimants at the expense of others. Justice Paterson charged the jury that the legislature's act of "divesting one citizen of his freehold, and vesting it in another, without a just compensation" was "void" because it violated natural and customary rights. This meant, he explained, that the settlement act "never had constitutional existence; it is a dead letter, and of no more virtue or avail, than if it never had been made."³¹

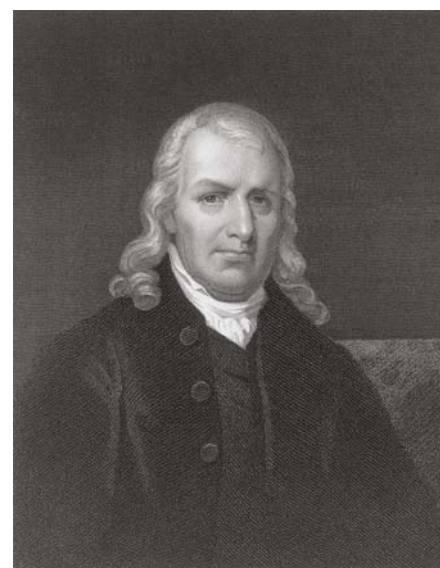
The classical view is also explicit in *Marbury v. Madison*, in which Chief Justice

Marshall famously held that "an act of the legislature, repugnant to the constitution, is void." In considering whether courts are bound to enforce an unconstitutional law, Marshall expressly assumes that a legislative act found to be void because of its inconsistency with the constitution, is not really a law: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, *though it be not law*, does it constitute a rule as operative *as if it was a law*?"³²

Finally, the classical understanding of law is clearly evident in state judicial condemnations of the positivist construction of law in late-18th-century decisions construing the meaning of the law of the land. These decisions are illustrative of the original meaning of the Due Process Clause, because late-18th-century Americans understood the meanings of due process of law and the law of the land to be virtually identical.³³ Two judges in *Zylstra v. Corporation of Charleston* emphatically held that a city charter that permitted the levying of fines without trial by jury could not be considered part of the law of the land even if authorized by the legislature:

*How then can a law be valid, which constrains a citizen to submit his person and his property, to a tribunal that proceeds to give judgment on both, without the intervention of a jury? Does [sic] these words of the constitution "or by the law of the land," authorize it? Do they mean any law which may be passed, directing a different mode of trial? Such a construction would be incompatible with the declaration of this privilege; it would be taking away all the security which that intended to give it; it would do more, it would be making the constitution itself authorize the means of destroying a right which it afterwards declares shall be inviolably preserved. For if a law may abridge the trial by jury, it may also abolish it; and this great privilege would be held only at the will of the legislature.*³⁴

The author of this opinion cited its reasoning in *Lindsay v. Commissioners* to invalidate a municipal taking, arguing that if "the *lex terrae* meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy that right, which the constitution had expressly declared, should be inviolably preserved," and dismissing this reading as "too absurd a con-



Justice Samuel Chase opined that the protection of natural and customary rights was the very purpose of state constitutions.

struction to be a true one."³⁵ *Trustees of the University of North Carolina v. Foy* similarly rejected the positivist construction when it invalidated a state legislature's unilateral revocation of title to property that the legislature had previously conveyed, reasoning that if the legislature was empowered to alter the law of the land at will, the protections of law of the land clauses were nonexistent.³⁶

Perhaps the clearest statement of the classical understanding of law is the oft-quoted dictum of Justice Chase in *Calder v. Bull*, a United States Supreme Court decision handed down in 1798, only seven years after ratification of the 5th Amendment.³⁷ The Court unanimously held in *Calder* that a special state statute ordering a new trial of a disputed will after the running of the statute of limitations for appeal was not *ex post facto* legislation prohibited by the Constitution. Justice Chase additionally opined that the protection of natural and customary rights was the very purpose of state constitutions, which would be subverted if state legislative power was not subject to natural and customary law limits, regardless of whether such

limits were written into the positive law of the state constitutions:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. . . .

*There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.*³⁸

As examples of acts beyond proper legislative authority, Chase suggested a law that “punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B.”³⁹

Chase then directly invokes the classical view, arguing that because such actions violate natural and customary rights, they are not truly law, even when enacted pursuant to the constitutionally prescribed procedures for law-making: “An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”⁴⁰

Justice Chase’s famous invocation of the classical understanding was directly challenged by the equally famous dictum of Justice Iredell in the same case. Citing Blackstone, Iredell argued that the only judicially enforceable limits on legislative power were those positively enacted into a constitutional text.⁴¹

The historical context of the 1790s when Justice Iredell wrote this dictum suggests that Chase’s position was the more conventional. Blackstone’s doctrine reflected the constitutionalism of parliamentary supremacy against which higher-law constitutionalism was deployed by the American revolutionaries. Post-independence state constitutions, arguments of counsel, and judicial decisions make clear that higher-law constitutionalism remained the conceptual foundation of American constitutional thinking through the

founding era. Indeed, it was precisely the anarchic consequences stemming from absolutist state legislatures that led to the Philadelphia convention.⁴² The supremacy and sovereignty of Parliament, therefore, is an unlikely constitutional authority to raise less than a generation after the Revolution was fought to vindicate its constitutional opposite.⁴³

Iredell’s position, moreover, was almost uniformly rejected by state constitutional decisions of the period, which, as we have seen, generally held that the law of the land signified natural and customary rights that constrained legislative action and could not be altered by the ordinary exercise of legislative power. In addition to its inclusion in legal dictionaries published during the late-18th century, the classical understanding of law was reflected in frequent references to voidness in constitutional decisions of that era, and was expressly invoked in the majority opinions of one state and two federal courts, including the U.S. Supreme Court. Finally, two state court *seriatim* opinions had used the classical understanding as a premise in rejecting the positivist argument that state legislatures had unrestricted power to alter the law of the land by ordinary enactment. By contrast, the only judicial authority clearly adopting the positivist construction of law argued by Justice Iredell in *Calder* is an opinion reluctantly announced in *State v. _____*,⁴⁴ which was overruled by *Foy* barely a decade later. On balance, then, the late-18th-century legal authorities strongly support the position that the conventional understanding of law in the 1790s was that of classical natural law theory.

Against the backdrop of colonial adoption and adaptation of Coke’s higher-law constitutionalism in the pre-Revolutionary era, the drafting and ratification of the 1787 Constitution and the 1791 Due Process Clause of the 5th Amendment, together with decisions reported during the period immediately before and after ratification, provide strong evidence that due process of law was originally understood to include judicial enforcement of unenumerated natural and customary rights as limitations on congressional power, and was not limited to a mere guarantee judicial process. Whatever other criticisms might be made of substantive due process, its inconsistency with the original understanding of the 5th Amendment Due Process Clause is not one of them.

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NOTES

- 1 60 U.S. (19 How.) 393, 450 (1856).
- 2 See, e.g., *Lassiter v. Department Soc. Serv.*, 452 U.S. 18 (1981); *Estes v. State of Texas*, 381 U.S. 532 (1965).
- 3 See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954).
- 4 J.C. HOLT, *MAGNA CARTA* 10 (2nd ed. 1992); A.E. DICK HOWARD, *MAGNA CARTA* 15 (1998).
- 5 HELEN M. CAM, *MAGNA CARTA—EVENT OR DOCUMENT?* 17, 20 (1965); HOLT, *supra* note 4, at 14; HOWARD, *supra* note 4, at 24; C.H. MCLWAIN, *CONSTITUTIONALISM AND THE CHANGING WORLD* 135, 172, 174 (1939); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt.1), 42 HARV. L. REV. 149, 179 (1928); Gerald J. Postema, *Classical Common Law Jurisprudence* (pt.1), 2 OXFORD U. COMMONWEALTH L.J. 155, 155 (2002).
- 6 HOLT, *MAGNA CARTA*, *supra* note 4, at 9; JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 24, 25 (2003); Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law* (pt.2), 42 HARV. L. REV. 365, 367 (1928); Paul Raffield, *Contract, Classicism, and the Common-Weal: Coke’s Reports and the Foundations of the Modern English Constitution*, 17 L. & LIT. 69, 73, 78–79 (2005).
- 7 See FREDERICK GEORGE MARCHAM, *A CONSTITUTIONAL HISTORY OF MODERN ENGLAND, 1486 TO THE PRESENT* 122 (1960); Thomas G. Barnes, *Introduction to Coke’s “Commentary on Littleton”* (1995), in *LAW, LIBERTY AND PARLIAMENT: SELECTED ESSAYS ON THE WRITING OF SIR EDWARD COKE* 1, 21 (Allen D. Boyer ed. 2004).
- 8 See JAMES STONER, JR., *COMMON LAW AND LIBERAL THEORY: COKE, HOBBS, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 27 (1992) [hereinafter STONER, *LIBERAL THEORY*]; Corwin, “Higher Law” Background (pt.2), *supra* note 6, at 367; Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 855, 858 (1978).
- 9 See Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 601–08 (2009).

- 10 *E.g.*, *Robin v. Hardaway*, 1 Va. (Jeff.) 109 (Va. Gen'l Ct. 1772) (case report by Thomas Jefferson summarizing George Mason's argument that "all acts of legislature apparently contrary to natural right and justice are, in our laws, and must be in the nature of things, considered as void"); *Paxton's Case* (Mass. Bay Super. Prov. Ct. 1761), reported in 1 JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BETWEEN 1761 AND 1772, at 51–57 & app. I-A at 395–405 (1865) (case report by John Adams summarizing John Otis' argument from *Bombam's Case* that "an Act against the Constitution is void; an Act against natural Equity is void; and if an Act of Parliament should be made, in the very Words of this Petition, it would be void"); see, e.g., Gedicks, *supra* note 9, at 617–18 & n. 172 (summarizing higher-law constitutional arguments by John Adams, Samuel Adams, Samuel Cook, Daniel Dulany, Benjamin Franklin, and the Massachusetts Circular Letter based on Otis's argument in *Paxton's Case*).
- 11 See Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1146 (1987); e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 188 (Leonard Levy, et. al. enlarged ed. 1992) ("Legal rights are 'those rights which we are entitled to by the eternal laws of right reason'; they exist independent of positive law, and stand as the measure of its legitimacy.") (quoting Philip Livingston).
- 12 See, e.g., *Ham v. McClaws*, 1 S.C.L. (1 Bay.) 91 (S.C. Ct. Comm. Pl. 1789); *Butler v. Craig*, 2 H. & McH. 214 (Md. Gen'l Ct. 1787); *Trevett v. Weeden* (R.I. 1786), private report reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 417, 420–21, 423 (1971); *Rutgers v. Waddington* (N.Y. City Mayor's Ct. Aug. 17, 1784) (per Duane, Mayor & C.J.), private report reprinted in 1 LAW PRACTICE OF ALEXANDER HAMILTON 392 (Julius Goebel, Jr., ed. 1964).
- 13 *Bayard v. Singleton*, 1 N.C. (Mart.) 42, 45 (N.C. Sup. Ct. L. & Eq. 1787); *Holmes v. Walton* (N.J. 1780), reported by Austin Scott, *Holmes v. Walton: The New Jersey Precedent*, 4 AM. HIST. REV. 456, 456–59 (1899), cited and described in *State v. Parkhurst*, 9 N.J.L. (4 Halst.) 427 app. (1802).
- 14 Alexander Hamilton, *Remarks on an Act for Regulating Elections*, New York Assembly (Feb. 6, 1787) (relying on Magna Carta and Coke to argue that a bill proposing to deprive British loyalists of their rights to vote and to run for office would violate due process of law guaranteed by New York's statutory bill of rights), in 4 PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett ed. 1962), reprinted in 5 THE FOUNDERS' CONSTITUTION 313 (Phillip B. Kurland & Ralph Lerner ed. 1987).
- I demonstrate in the longer article that opponents of substantive due process mistake this speech as support for their position, when it actually supports substantive due process. See Gedicks, *supra* note 9, at 630–33.
- 15 1 S.C.L. (1 Bay.) 91 (S.C. Ct. Comm. Pl. 1789).
- 16 1 S.C.L. (1 Bay.) at 91–96.
- 17 GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 536 (2nd ed. 1998).
- 18 *E.g.*, THE FEDERALIST NO. 84, at 578–79 (Alexander Hamilton) (Jacob E. Cooke ed. 1961); THE COMPLETE BILL OF RIGHTS, 742, 746 (Neil H. Cogan ed. 1997); IV DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 166–67 (Jonathan Elliot 2nd ed. 1836); see, e.g., JACK RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IN THE MAKING OF THE CONSTITUTION* 144 (1996).
- 19 *E.g.*, James Wilson and John Smilie Debate the Need for a Bill of Rights, Pennsylvania Ratifying Convention (Nov. 28, 1787), in 1 THE DEBATE ON THE CONSTITUTION 807–08 (Bernard Bailyn ed. 1993); Remarks of James Iredell at North Carolina Convention Debates (July 29, 1788), in 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 945, 949–51 (Bernard Schwartz ed. 1971); see Sherry, *supra* note 11, at 1162.
- 20 STONER, *supra* note 8, at 199, 208; Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006); e.g., Edmund Randolph, Suggestions for the Conciliation of the Small States ¶5 (July 10, 1787), reprinted in 4 FOUNDERS' CONSTITUTION, *supra* note 14, at 597; II ELLIOT, DEBATES, *supra* note 18, at 161–62 (remarks of Theophilus Parsons).
- 21 See, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS* 112, 113 (1995); STONER, *LIBERAL THEORY*, *supra* note 8, at 204.
- 22 *E.g.*, CICERO, *DE RE PUBLIC & DE LEGIBUS* 317–19, 385 (Clinton Walker Keyes trans., 1928) (51 BCE); see SOPHIE VAN BIJSTERVELD, *THE EMPTY THRONE* 15–16, 239 (2002); Philip Soper, *In Defense of Classical Natural Law in Legal Theory: Why Unjust Law Is No Law at All*, 20 CAN. J.L. JURIS. 201, 205 (2007).
- 23 CICERO, *supra* note 22, at 385–87.
- 24 ST. AUGUSTINE, *ON FREE CHOICE OF THE WILL*, bk. i, ques. V, at 11 (Anna S. Benjamin & L.H. Hackstaff trans. 1964) (ca. 395).
- 25 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* ques. 95, art. 2, at 227–28, ques. 96, art. 4, at 122 (Fr. Laurence Shapcote trans., Daniel J. Sullivan rev. 2nd ed., 1990) (1265–74) (quoting AUGUSTINE, *supra* note 24, bk. i, ques. V, at 11); accord CICERO, *supra* note 22, at 317–19.
- 26 See, e.g., II(2) WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1151 (1978) (1953) (describing but rejecting this reading); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 525–28 (1997) (same); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in THE BILL OF RIGHTS 213, 224 (Eugene W. Hickock, Jr. ed., 1991) (describing this as a plausible, but not the most plausible, reading).
- 27 *E.g.*, "Law," in A NEW LAW DICTIONARY 405 (Giles Jacob 8th ed. 1762). The identical definition also appeared in the "corrected and greatly enlarged" American edition of Jacob's dictionary published in 1811. See 4 "Law," in THE LAW-DICTIONARY 89 (T.E. Tomlins ed., P. Byrni 1st Am. ed. 1811).
- 28 1 WILLIAM BLACKSTONE COMMENTARIES *70.
- 29 See 4 JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 29–33 (1987).
- 30 For judicial opinions, see *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 18–20 (1800); *Bowman v. Middleton*, 1 S.C. (1 Bay) 252, 254 (S.C. Comm. Pl. 1792); *Ham v. McLaws*, 1 S.C. (1 Bay) 93, 98 (S.C. Comm. Pl. 1789).
- For arguments of counsel, see *Cooper*, 4 U.S. (4 Dall.) at 16; *Trs. of the Univ. v. Foy*, 3 N.C. (2 Hayw.) 310, 325 (1804); *Robin v. Hardaway*, 1 Va. (Jeff.) 109, 114 (Va. Gen'l Ct. 1772); *Paxton's Case*, *supra* note 10, App. I-D, at 474.
- 31 *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 204, 28 F. Cas. 1012, 1015, 1018 (C.C.D. Pa. 1795).
- 32 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).
- Later in *Marbury*, however, Marshall uses the term "law" more loosely, as if it included unconstitutional as well as constitutional legislative acts. See *Id.* at 178.
- 33 *E.g.*, *Butler v. Craig*, 2 H. & McH. 214, 1787 WL 95, at *12 (Md. Gen'l 1787); see, e.g., ORTH, *supra* note 6, at 31, 100; Thomas Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 218 (1988); Wolfe, *supra* note #, at 221.
- 34 1 S.C. (1 Bay) 382, 390–91 (S.C. Ct. Comm. Pl. 1794) (per Waities, J., joined by Bay, J.).
- 35 2 S.C. (2 Bay) 38, 59 (S.C. Const. Ct. App. 1796).
- 36 5 N.C. (1 Mur.) 58, 62 (1805).
- 37 3 U.S. (3 Dall.) 386 (1798).
- 38 3 U.S. (3 Dall.) at 388.
- 39 3 U.S. (3 Dall.) at 388.
- 40 3 U.S. (3 Dall.) at 388 (emphasis added).
- 41 3 U.S. (3 Dall.) at 398–99.
- 42 See WOOD, *supra* note 17, at 319.
- 43 See Barnette, *supra* note 20, at 30 n.122.
- 44 2 N.C. 28, 29, 1 Hayw. 38, 39 (1794).

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