

TAKE THE FIFTH . . . PLEASE!: THE ORIGINAL INSIGNIFICANCE OF THE FIFTH AMENDMENT’S DUE  
PROCESS OF LAW CLAUSE

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*Abstract*

*The Fifth Amendment’s Due Process of Law Clause adds nothing to the Constitution’s original meaning. Every principle for limiting federal executive, judicial, and even legislative powers that can plausibly be attributed to the idea of “due process of law” – from the principle of legality forbidding executive or judicial action in the absence of law to the requirement of notice before valid judicial judgments to a limitation on arbitrary governmental action that today goes under the heading of “substantive due process” -- is already contained in the text and structure of the Constitution of 1788. The Fifth Amendment Due Process of Law Clause confirms those principles but does not create them. Accordingly, originalist attention should be focused on the Constitution itself, not on the “exclamation point” added to it in 1791*

*This article defends those claims and also briefly explains why and how modern doctrine has moved from this substantively-oriented account of limitations on governmental powers to a focus on executive and judicial procedures. That shift results largely from doctrine under the Fourteenth Amendment’s Due Process of Law Clause. The limitations on federal power built into the Constitution of 1788 obviously do not apply to state governments, so attributing the Fifth Amendment’s meaning to the Fourteenth Amendment makes little sense (though if that really is what the original meaning of the Fourteenth Amendment does, that is just life). A proceduralist account has some grounding in the Fourteenth Amendment, but it is a large mistake to read that account back into the Fifth Amendment.*

*The bottom lines are that the Fifth Amendment’s Due Process of Law Clause (1) is much more about substance than about procedure and (2) is basically irrelevant to the Constitution’s original meaning.*

The Due Process of Law Clauses of the Fifth and Fourteenth Amendments appear to pose some vexing interpretative problems for originalists.<sup>1</sup> Initially, there is the question whether the

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two clauses, enacted 77 years apart, have the same meaning or whether each provision calls for a distinct interpretative exercise.<sup>2</sup> Focusing solely for the moment on the text of the Fifth Amendment’s Due Process of Law Clause, which says that no person shall “be deprived of life, liberty, or property, without due process of law,”<sup>3</sup> there are seemingly tricky questions about the meaning of the phrase “life, liberty, or property.” Does the word “life” bear the relatively expansive meaning given by William Blackstone of “a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation”<sup>4</sup> or does it implicate only capital punishment or other existence-ending governmental actions? Does “liberty” mean anything more than freedom of locomotion<sup>5</sup> and, if so, how much more? Does “property” refer to land, to land plus chattels, to all interests recognized as property by general common law in

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<sup>1</sup> They may well pose vexing interpretative problems for non-originalists as well, depending on the content of the non-originalist theory, but those problems are not my concern here.

<sup>2</sup> Compare Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (suggesting that substantive due process might be a plausible interpretation of the Fourteenth Amendment but is not a plausible interpretation of the Fifth Amendment) with Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1777-78 (2012) (arguing that “there is nothing in the legislative or ratification history of the Fourteenth Amendment to suggest that it was understood to operate against states any differently than due process clauses had since the early days of the Republic”). The Supreme Court once intimated that there might be differences in the meanings of the two provisions, *see French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901) (“[w]hile the language of those amendments is the same, yet, as they were ingrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper”), but immediately backed off from any implications of that suggestion. *See id.* at 329 (“we . . . shall proceed, in the present case, on the assumption that the legal import of the phrase ‘due process of law’ is the same in both amendments. Certainly, it cannot be supposed that by the 14th Amendment it was intended to impose on the states, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal government, in a similar exercise of power, by the 5th Amendment.”). In order to address this question adequately, one would need to determine, inter alia, whether amendments to the Constitution should be understood in light of the same interpretative norms and baselines as guide interpretation of the original Constitution, and that is emphatically a topic for another day.

<sup>3</sup> U.S. CONST. Amend. V.

<sup>4</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125 (1765).

<sup>5</sup> *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2632-33 (2015) (Thomas, J., dissenting) (finding that a historic reading makes it “hard to see how the ‘liberty’ protected by the [Fifth Amendment’s Due Process] Clause could be interpreted to include anything broader than freedom from physical restraint”).

1791, or to interests that can include expectations of future government benefits?<sup>6</sup> There are also apparently perplexing questions about the meaning of the phrase “without due process of law.” Does “due process of law” invoke only long-established prohibitions on rights-affecting executive or judicial action undertaken without legal authority<sup>7</sup> and/or without proper form,<sup>8</sup> or does it mean whatever procedures are fair under all of the facts and circumstances of a particular case,<sup>9</sup> the product of some kind of narrow utilitarian calculus,<sup>10</sup> or something more substantive that serves as a font of protection against even prospective legislation?<sup>11</sup> One might also wonder what it means to be “deprived” of life, liberty, or property. Does this term connote some kind of intentionality or will mere negligence suffice for a deprivation?<sup>12</sup> Finally, one might ask who or what counts as a “person” protected by the clause. Does that term extend to juridical persons such as corporations and/or to human beings who are not fully born?<sup>13</sup>

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<sup>6</sup> See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1982) (explaining, in the context of the Fourteenth Amendment, that constitutional “property” interests can include expectations of receipt of future benefits in some cases).

<sup>7</sup> See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856); GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 841-42 (7<sup>th</sup> ed., 2016).

<sup>8</sup> See Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process*, 19 AM. J. LEG. HIST. 265 (1975).

<sup>9</sup> See Gary Lawson, Katharine A. Ferguson & Guillermo Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: *Rediscovering the Penn Central and Mathews v. Eldridge Frameworks*, 81 NOTRE DAME L. REV. 1, 7-15 (2005) (describing, without endorsing, this case-law interpretation of due process of law).

<sup>10</sup> See *id.* at 15-23 (describing, without endorsing, this case-law interpretation of due process of law).

<sup>11</sup> For a compendium of the various possible meanings of “substantive” due process, see John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

<sup>12</sup> The Supreme Court, after vacillating for a few years, settled on requiring intentionality, or at least recklessness, for a constitutional deprivation. See *Daniels v. Williams*, 474 U.S. 327 (1986).

<sup>13</sup> Assuming that the Fifth and Fourteenth Amendments have the same meaning in this regard, current law says “yes” to corporations, see *Santa Clara County v. So. Pac. R. Co.*, 118 U.S. 394 (1886), and “not really” to the unborn. See *Roe v. Wade*, 410 U.S. 113, 158 (1973). This article takes no position on either conclusion. For a thoughtful article exploring the latter issue, see Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. LJ. 13 (2013).

These questions are vitally important for anyone interested in real-world doctrine. They might well be important for understanding the original interpretative meaning<sup>14</sup> of the Due Process of Law Clause of the Fourteenth Amendment. But to ask those questions in the context of the Fifth Amendment's Due Process of Law Clause is fruitless, for the simple reason that the clause itself is irrelevant to the Constitution's original interpretative meaning.<sup>15</sup> The Fifth Amendment's Due Process of Law Clause adds nothing to (and subtracts nothing from) the meaning of the Constitution of 1788. It emphasizes certain features of the national government, but it does not establish or alter those features. As with most provisions of the Bill of Rights, it is an "exclamation point"<sup>16</sup> that highlights certain legal norms but does not create them.

This claim should not be at all startling. The Federalists in 1787 consistently maintained that a bill of rights more extensive than the one found in Article 1, section 9 of the original constitutional text was unnecessary and would only give rise to false implications about the scope of national power, because the Constitution of 1788 gave institutions of the national government no power to violate the various rights specified in the amendments.<sup>17</sup> To them, the Bill of Rights was redundant of limitations on national powers already found in the text and

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<sup>14</sup> Cf. Frank H. Easterbrook, *Substance and Due Process*, 1982 S. CT. REV. 85, 99 (describing the Fifth Amendment's Due Process of Law Clause as irrelevant and trivial, but for somewhat different reasons than are outlined here). By "interpretative" meaning I mean the communicative content of the words used in the text. Legal actors often employ the word "meaning" in very different senses to describe, for example, the effect that those words are or should be given in adjudicative actions, which may be only contingently, if at all, related to the words' communicative meaning. On the difference between interpretative, or communicative, meaning and adjudicative, or normative, meaning, see Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. -- (2017) (forthcoming).

<sup>15</sup> The adjective "original" in the context of interpretative, or communicative, meaning is redundant, and I will henceforth ordinarily omit it unless it is necessary for clarity. See Gary Lawson, *Reflections of an Empirical Reader (or, Could Fleming Be Right This Time?)*, 96 B.U. L. REV. 1457, -- (2016).

<sup>16</sup> See Gary Lawson, *The Bill of Rights as an Exclamation Point*, 33 U. RICHMOND L. REV. 511 (1999).

<sup>17</sup> 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, 635-36 (2009); Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 477-79 (2008).

structure of the Constitution. To be sure, a great many Antifederalists strongly disagreed, and ultimately disagreed successfully, about the need for a more robust bill of rights, but their insistence on the importance of an additional bill of rights was based largely on an exaggerated view of the power of Congress under the Necessary and Proper Clause that does not withstand close scrutiny.<sup>18</sup> The Antifederalists were right about a great many things, quite possibly including the wisdom of having a national government in the first place, but the Federalists were right about this one.<sup>19</sup>

While the first two amendments in the bill of rights proposed by the first Congress, neither of which secured the necessary votes for ratification in 1791, would have made substantive changes to the Constitution,<sup>20</sup> and there are certain features of the enacted 1791 Bill of Rights that arguably refine or clarify the pre-existing legal order to some degree<sup>21</sup> and/or extend some prohibitions on national power to the governance of federal territories,<sup>22</sup> the ratification of the Bill of Rights made very few alterations in the legal landscape. Outside of

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<sup>18</sup> See GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* (2010) (describing various strands of thought on the Necessary and Proper Clause, all of which converge on the idea that the clause is a limited rather than unlimited grant of power).

<sup>19</sup> See *Legal Tender Cases*, 79 U.S. 457, 534-35 (1870) (vindicating the Federalists' fears about false implications of federal power that might be drawn from a bill of rights).

<sup>20</sup> The original proposed second amendment, postponing the effectiveness of any congressional pay raise until after the next election, failed to secure enough votes for ratification in 1791 but was ratified as the Twenty-Seventh Amendment in 1992. See U.S. CONST. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."). The original proposed first amendment contained a complicated formula for altering the size of congressional districts; it failed to pass by one vote. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 14-17 (1998).

<sup>21</sup> The Sixth and Seventh Amendments arguably add a measure of specificity to pre-existing norms regarding jury trials. See Lawson, *supra* note 17, at 489-90.

<sup>22</sup> The enacted First Amendment (the original proposed third amendment), for example, prevents Congress from passing laws respecting establishments of religion in federally governed territory. See U.S. CONST. amend. I. Prior to December 15, 1791, Congress could presumably have used its powers under the Territories Clause or the District Clause, which are the powers of a general rather than limited government, to establish religion in federal territory. That power vanished when the First Amendment became law.

federally governed territory or the District of Columbia,<sup>23</sup> virtually nothing that was constitutional on December 14, 1791 suddenly became unconstitutional on December 15, 1791. That is particularly true with respect to the Fifth Amendment’s Due Process of Law Clause. That clause simply reflects ideas that were already fully incorporated into the constitutional text of 1788.

A principal vehicle for incorporating those ideas of due process of law into the constitutional text is the scheme of separation of powers. Nathan Chapman and Mike McConnell have recently argued that ideas of separation of powers and due process of law grew together, so that the original-meaning content of “due process of law” is driven in considerable measure, if not wholly, by principles of separation of powers.<sup>24</sup> That is not entirely right. The ideas most centrally identified with due process of law are indeed separation-of-powers ideas, which is a principal reason why the Fifth Amendment Due Process of Law Clause itself is redundant. The proper conclusion, however, is not that one therefore should interpret the Fifth Amendment Due Process of Law Clause in light of separation of powers, but that one should not really be interpreting the Fifth Amendment Due Process of Law Clause at all. The kinds of questions catalogued at the outset of this article are quite important for understanding the Constitution’s original meaning, but the answers to those questions are found in the text and structure of the original Constitution, not in the words of the Fifth Amendment. The answers of 1788 are the same as the answers of 1791 are the same (as a matter of original meaning) as the

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<sup>23</sup> Concededly, this is a rather large area. At the time of the founding, about forty percent of the country was federally owned territory. Much of that territory, however, was sparsely populated, so the raw geographical numbers are somewhat misleading.

<sup>24</sup> See Chapman & McConnell, *supra* note 2. See also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 272 (1985) (“considerable historical evidence supports the position that ‘due process of law was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law’”).

answers of 2017. From an interpretative standpoint, originalists are well advised to spend their time and energy examining the Constitution of 1788 rather than the exclamation point added to it in 1791.

Once one focuses on the Constitution of 1788 as the proper object of interpretation, some perhaps surprising results emerge. In particular, the ideas that today go under the heading of “substantive due process” acquire a new significance for originalists, albeit in a different form and from a different source than modern proponents invoke. For those who are tempted to see a term such as “substantive due process” as an oxymoron,<sup>25</sup> one must not let familiar labels drive judgment. As Timothy Sandefur has rightly emphasized, the clauses in the Fifth and Fourteenth Amendments are not really “due process” clauses, and it is potentially seriously misleading to refer to them as such. They are “due process *of law*” clauses.<sup>26</sup> As an original matter, as we will see, due process of law is often about substance far more than it is about procedure. The same is accordingly true of the principles of lawful executive and judicial (and perhaps legislative as well) action incorporated into the original Constitution that are repeated and reflected in the Fifth Amendment’s Due Process of Law Clause.

Parts I through III of this article show how the text and structure of the Constitution of 1788 lay out norms of legality, notice, and the forms of executive and judicial action that were emphasized and reaffirmed in, but not constitutionally created by, the Fifth Amendment’s Due Process of Law Clause. Part IV briefly explores whether the original Constitution contains norms of substantive rationality, akin to “substantive due process,” that place limits on Congress.

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<sup>25</sup> See Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENTARY 253 (2016) (collecting references).

<sup>26</sup> See, e.g., Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 286 (2012).

The answer, perhaps surprisingly from an originalist perspective, is yes, because of basic principles of fiduciary law that serve as background interpretative norms for the Constitution. If the Fifth Amendment's Due Process of Law Clause is properly understood to impose substantive restraints on legislation – and this article is officially agnostic on (if unofficially skeptical about) that precise interpretative point – any such restraints merely replicate and emphasize restraints that are already built into the original Constitution.

Part V of the article, with considerably trepidation, comments on the quite different significance of the Fourteenth Amendment's Due Process of Law Clause, which is possibly far more powerful than legal doctrine has ever recognized. The Fifth Amendment's Due Process of Law Clause may be constitutionally insignificant for originalists, but the Fourteenth Amendment's Due Process of Law Clause is most decidedly significant, both doctrinally and as a matter of original meaning, though figuring out the exact original meaning is a tough nugget that I leave largely to others to crack. While it is not my mission to present an authoritative account of the original meaning of the Fourteenth Amendment Due Process of Law Clause, or anything else having to do with the Fourteenth Amendment, I offer what I hope is a fresh look at some of the key cases in the half-century following the Civil War in order to explain why modern due process doctrine, which focuses on executive and judicial hearings, looks so very different from an eighteenth-century conception of due process of law, which looks to executive and judicial (and possibly legislative) lawfulness.

My goal throughout this article is descriptive, not normative. I aim to uncover the original meaning – or, rather, non-meaning -- of the Fifth Amendment's Due Process of Law Clause, to provide a framework for exploring the original meaning of the Fourteenth Amendment's Due Process of Law Clause, and to suggest how and why doctrine has buried the

former. These last two tasks are approached gingerly and tentatively; it would require a lengthy book to sort through them properly. In particular, when it comes to the Fourteenth Amendment, I seek more to suggest lines for future inquiry than to provide clear answers.

## I. The Law of the Land as the Law of Legality

What would be the significance or meaning of “due process of law” in the late eighteenth and early nineteenth centuries? For that, we must start in the thirteenth century. More precisely, we must start with what the eighteenth century thought about what the seventeenth century thought about the thirteenth century.<sup>27</sup>

Article 39 of Magna Carta in 1215 famously provided that “[n]o 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 or by the law of the land.”<sup>28</sup> The reissuance of the Great Charter in 1225 similarly provided: “No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.”<sup>29</sup> The “we” promising not to do any of these

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<sup>27</sup> Even more precisely, we need to know what the eighteenth century thought about what the seventeenth century thought about what the thirteenth century thought about the eleventh century. The words of Magna Carta that gave rise to the idea of due process of law did not spring full blown from the minds of thirteenth-century English barons (or perhaps from the mind of a thirteenth-century English king, if Article 39 of Magna Carta was really a pro-royalist provision, *see* J.C. HOLT, *MAGNA CARTA* 328-30 (2d ed., 1992)). Those words had antecedents in the law of the Holy Roman Empire of the eleventh century. *See* RODNEY L. MOTT, *DUE PROCESS OF LAW* 1-2 (1926).

<sup>28</sup> HOLT, *supra* note 27, at 461.

<sup>29</sup> 9 Hen. III, ch. 29 (1225). For those who do not trust translators, the original Latin version of the text is:

things was a very royal “we” – namely, the King. This article of Magna Carta is a disavowal of royal, or executive, authority; “here the King acknowledged that his mere dictates are not the law.”<sup>30</sup> To be sure, one must be careful not to read modern notions of separated governmental powers, including categories such as “executive” and “judicial,” into a thirteenth-century instrument. The thirteenth century did not sharply differentiate executive from judicial power. Even seventeenth-century thinkers like John Locke thought of judicial power as an aspect of executive power. And even a distinction between executive and legislative power was hazy at best at the time of Magna Carta.<sup>31</sup> Still, the object of the provision was limitations on the power of the King. That is not a small point.

The interests protected by this provision were interests of property and natural liberty. The historical contours of these interests in the thirteenth century are not relevant to this inquiry. What matters is how an eighteenth-century author would use those terms, and that depends more on the seventeenth century than on the thirteenth. Sir Edward Coke defined these terms in expansive fashion, perhaps more expansively than they were intended to be read in 1215 or 1225. While disseisin literally refers only to loss of real property, Lord Coke wrote that the term intended “that lands, tenements, goods, and chattells shall not be seised into the Kings hands, contrary to this great Charter, and the Law of the Land.”<sup>32</sup> Being “ruined” or “destroyed,” said

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“Nullus liber homo *decetero* capiatur vel imprisonetur aut disseisiatur *de aliquo libero tenemento suo vel libertatibus vel liberis consuetudinibus suis*, aut utlagetur, aut exuletur aut aliquo *alio* modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre.”  
<http://oll.libertyfund.org/pages/1215-magna-carta-latin-and-english>.

<sup>30</sup> Timothy Sandefur, *Lex Terrae 800 Years On: The Magna Carta's Legacy Today*, 9 N.Y.U. J. L. & LIBERTY 759, 760 (2015).

<sup>31</sup> See MOTT, *supra* note 27, at 42-44.

<sup>32</sup> 2 THE SELECTED WRITINGS OF SIR EDWARD COKE 850 (Steve Sheppard ed. 2005).

Coke, includes being put to death.<sup>33</sup> Thus, the interests identified in this provision of Magna Carta, as understood by Coke, are very well encapsulated by the phrase “life, liberty, or property.” And Coke’s understanding is the most important element for grasping the likely eighteenth-century meaning of these terms, as it is from Coke’s understanding that people in that era primarily acquired their beliefs about the document.<sup>34</sup>

Although there is some risk of anachronism in applying a term such as “separation of powers” to Magna Carta, this article of the charter, in either of its original thirteenth-century forms, can fairly be described as a kind of separation-of-powers provision, in that it denied to the King the ability to act in the absence of law from another source when it would result in loss of property for, imprisonment of, or other criminal punishment imposed on subjects of the King. More abstractly: Executive enforcement action resulting in loss of life, liberty, or property can take place only pursuant to general norms of conduct (“the law of the land”) or after determination by an institution other than the executive (“the lawful judgment of his peers”).<sup>35</sup> Thus, “a 1368 royal commission to two men to seize and imprison another and take his goods . . . [was] held . . . void . . . because it authorized the commissioners ‘to take a man and his goods without indictment, suit of a party, or due process.’ ”<sup>36</sup>

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<sup>33</sup> See *id.* at 853.

<sup>34</sup> See MOTT, *supra* note 27, at 78 (“While it is undoubtedly true that the Institutes leave much to be desired from the point of view of historical research, it really mattered little if it were historically accurate or not. The important thing is that the Institutes were regarded as accurate and consequently had a tremendous influence upon subsequent interpretations of Magna Carta.”). For more on Coke’s influence in the eighteenth century, see *id.* at 79, 89-90; Chapman & McConnell, *supra* note 2, at 1681 (describing Coke’s influence as “unparalleled”).

<sup>35</sup> See Chapman & McConnell, *supra* note 2, at 1683-84. Quite possibly, the original understanding of this provision was that lawful deprivations required *both* the law of the land *and* a judgment of peers rather than either/or. See Mott, *supra* note 27, at 3 n.8. Again, however, Coke’s understanding is surely the most relevant one for understanding the federal Constitution, and the weight of scholarly authority supports reading the provision in the alternative.

<sup>36</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 136 (2014).

This principle of legality, as one might term the idea that action depriving subjects of rights requires law to validate it,<sup>37</sup> infuses the Constitution of 1788. It was there in the Constitution in the three and a half years before the Fifth Amendment was ratified, and it remains in the Constitution today.

The key feature of the American Constitution is the enumeration of limited institutional powers. The Constitution identifies institutions of the national government and then grants those institutions specific and delineated powers. “All legislative powers herein granted” are vested in Congress; the “executive Power” is vested in the President, and the “judicial Power” is vested in Article III courts.<sup>38</sup> There are some modest tweaks to this basic distribution: the President is given the legislative-like presentment and veto power,<sup>39</sup> the Congress is given the seemingly judicial power of impeachment,<sup>40</sup> the Senate shares in the executive appointment and treaty-making powers,<sup>41</sup> and the courts are permitted to receive the executive power of appointment in some cases.<sup>42</sup> But the default scheme of the Constitution is to identify distinctive powers of

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<sup>37</sup> In the Anglo-American tradition, the term “principle of legality” carries multiple meanings, ranging from the idea that criminal punishment requires pre-existing positive law, *see* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985), to the idea that statutes should not lightly be construed to derogate from the common law, *see, e.g.*, Dan Meagher, *The Principle of Legality as Clear Statement Rule: Significance and Problems*, 36 SYDNEY L. REV. 413, 413-14 (2014), to a general statement of the rule of law and the protection of fundamental common law rights. *See* Douglas E. Edin, *From Ambiguity to Legality: The Future of English Judicial Review*, 52 AM. J. COMP. LAW 383, 396-97 (2004). (I gather that in international law the term is essentially synonymous with the prohibition on ex post facto criminal laws. *See, e.g.*, John Hasnas, *Once More Unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L. J. 1, 38 (2002).) I am using the term in precisely the sense described in the text: the idea that governmental action is valid only when it is implementing lawful authority.

<sup>38</sup> U.S. CONST. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1.

<sup>39</sup> *See id.* art. I, § 7, cl. 2-3. One cannot call this power strictly “legislative” because the Article I vesting clause declares that all legislative powers are vested in Congress, which does not include the President. Accordingly, no presidential power can bear the label “legislative” within the Constitution.

<sup>40</sup> *See id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

<sup>41</sup> *See id.* art. II, § 2, cl. 2.

<sup>42</sup> *See id.*

government and to parcel out those powers to different institutions. Federal institutions can act only pursuant to the powers with which they are vested and any powers that are incidental to those expressly granted powers.<sup>43</sup>

This scheme places a great deal of weight on the appropriate definitions of legislative, executive, and judicial power. The Constitution contains no express definitions of those terms. Nor can one readily find canonical definitions in founding-era materials. Indeed, as James Madison put it:

Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces – the legislative, executive, and judiciary . . . . Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.<sup>44</sup>

That adept-puzzling obscurity, however, did not stop Madison from categorically declaring that various powers of government are “in their nature . . . legislative, executive, or judiciary.”<sup>45</sup> Nor did it stop John Adams from stating that the “three branches of power have an unalterable foundation in nature; that they exist in every society natural and artificial . . . ; that the legislative and executive authorities are naturally distinct; and that liberty and the laws depend entirely on a

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<sup>43</sup> The scope of those incidental powers is a topic for another time. The question, for example, whether there are powers ancillary to the case-deciding power that necessarily vest in the federal courts is daunting. See Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 353-66 (2006)); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1500-11 (2000); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 843-66 (2001). For a treatment of incidental legislative powers, see GARY LAWSON & GUY I. SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION – (2017).

<sup>44</sup> THE FEDERALIST No. 37 (James Madison).

<sup>45</sup> *Id.* No. 48 (James Madison).

separation of them in the frame of government . . . .”<sup>46</sup> Nor did it prevent many state constitutions of the founding era from including separation-of-powers clauses that expressly distinguished, again without express definitions, the legislative from the executive from the judicial powers.<sup>47</sup> Nor did it prevent the United States Constitution from basing its entire scheme of governance on the distinctions among those powers. However difficult it may be at the margins to distinguish those categories of power from each other, the founding generation assumed that there was a fact of the matter about those distinctions and that one could discern that fact in at least a large range of cases. The communicative meaning of the Constitution of 1788 cannot be ascertained without reference to some such distinction, even if legal scholars or political scientists (adept or otherwise) find the distinction unhelpful or confusing. That is why Chief Justice John Marshall could say, without embarrassment: “The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . .”<sup>48</sup> That is why Alexander Hamilton could say of the federal judiciary that it “has neither FORCE [the executive power of enforcement] nor WILL [the legislative power to prescribe norms], but merely judgment.”<sup>49</sup> There is a core set of functions allocated to each power. This core is sufficient to generate the principle of legality within the context of the Constitution.

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<sup>46</sup> 4 THE WORKS OF JOHN ADAMS 579 (Charles Francis Adams ed., 1851).

<sup>47</sup> See, e.g., MASS. CONST. OF 1780, pt. 1, art. XXX (“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”).

<sup>48</sup> Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

<sup>49</sup> THE FEDERALIST No. 78 (Alexander Hamilton).

Whatever doubts there may be at the margins of the various powers, the legislative power is the power to prescribe norms for the governance of society. That power operates against a baseline of customs and practice, which one might call general law; the legislative power, within its enumerated scope, can clarify, qualify, or alter the general law. Hence, as Marshall straightforwardly noted, “the legislature makes . . . the law.” The “essential”<sup>50</sup> function of the executive power, as the name suggests, is to execute the laws. Sai Prakash’s and Steve Calabresi’s encyclopedic accounts of executive power under the Constitution demonstrate at least this much.<sup>51</sup> Similarly, the essence of judicial power is the power (and duty) to resolve disputes within the court’s jurisdiction according to governing law.<sup>52</sup> In the words of James Wilson: “The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.”<sup>53</sup>

The principle of legality flows naturally from these allocations of power. There must be law for the executive to execute. There must be law for the judiciary to construe and apply. That law can come from statutes or from the general law,<sup>54</sup> but law there must be. Execution,

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<sup>50</sup> See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701.

<sup>51</sup> See SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L. J. 541 (1994); Prakash, *supra* note 30.

<sup>52</sup> See PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY passim* (2008).

<sup>53</sup> 1 THE WORKS OF JAMES WILSON 296 (Robert G. McCloskey ed., 1967). There are surprisingly few other words from the founding era describing the judicial power. See James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696 (1998) (spending a great many pages finding surprisingly few words on the subject). Nonetheless, Wilson’s brief but potent account aptly sums up centuries of Anglo-American tradition. See HAMBURGER, *supra* note 36, at 146-47.

<sup>54</sup> It was determined early in the nation’s history that general law, as opposed to statutory law, cannot support a federal criminal prosecution. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812). This article is agnostic on that issue as an original matter.

construal, or application without law simply lies beyond the enumerated scope of executive and judicial power whenever that execution, construal, or application deprives subjects of rights. One does not need a due process of law clause to generate this principle of legality. It follows from – or, rather, is baked into -- the nature of the powers granted to executive and judicial agents by the Constitution.

To be sure, the President has some powers that can be effectuated without reliance on law from other sources, such as the pardon power<sup>55</sup> or the power to convene Congress on special occasions.<sup>56</sup> But those powers do not involve the deprivation of legally protected rights to life, liberty, or property and thus do not implicate the principle of legality. By contrast, the President's treaty-making power, shared with the Senate, could implicate private rights (imagine, for instance, an extradition treaty or a treaty limiting shipping rights), but the treaty power, as with the legislative power, is an express power to create new norms,<sup>57</sup> which is why the Supremacy Clause lumps treaties with statutes as “the supreme Law of the Land.”<sup>58</sup> When exercising the core “executive Power” to execute the laws, the President is bound by the principle of legality. In 1788, 1789, 1790, and 1791 up through December 14, the President could not, in the execution of the laws, deprive subjects of life, liberty, or property except pursuant to

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<sup>55</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>56</sup> *Id.* art. II, § 3. The federal courts, by contrast, have no enumerated constitutional power beyond the “judicial Power” vested by Article III, save the power (which does not affect private rights) to appoint inferior officers when Congress so prescribes. *See id.* art. II, § 2, cl. 2.

<sup>57</sup> In my humble opinion, those new norms in treaties can only carry into effect other enumerated federal powers, but that is a story for another day. *See* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1.

<sup>58</sup> U.S. CONST. art. VI, cl. 3.

the law of the land or a valid court judgment. The Fifth Amendment’s Due Process of Law Clause confirmed this fact,<sup>59</sup> but it did not create or alter this fact.

Something both obvious and momentous emerges from this analysis: The principle of legality, at least in its executive guise, is substantive rather than procedural. It concerns what the “executive Power” can do, not how or by what procedures it can do it. We will have more to say about this rather large point shortly, but the next stop on the journey touches on the judicial power.

## II. Notice

The first appearance of the term “due process of law” in an English statute, from the fourteenth century, was peculiarly concerned with judicial action and required, *inter alia*, notice of suit by appropriate writ: “That no man of what Estate or Condition that he be, shall be put out of land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.”<sup>60</sup> This requirement of notice, which entails the opportunity to present a case for one’s position (“without being brought in answer”), before judicial deprivations of legally protected interests has survived to the present day.<sup>61</sup> While there can be lively dispute about what forms of notice are adequate and what steps a government must

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<sup>59</sup> See Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1042 (2011) (“the Due Process Clause . . . is essentially a restriction on what the executive branch may do in the absence of a law”).

<sup>60</sup> 28 Ed. III, ch. 3 (1354). See Jurow, *supra* note 8 (discussing the writ-based origins of due process of law).

<sup>61</sup> The interests protected under this statute, as with those identified in Magna Carta, corresponds quite well to the phrase “life, liberty, or property.”

take to provide that notice,<sup>62</sup> the bedrock requirement that some kind of notice be provided before a judicial deprivation of property or natural liberty is a basic part of American law and has spawned an entire body of jurisprudence under the Due Process of Law Clauses.<sup>63</sup>

The key point is that is a basic part of American law – so basic that it pre-dated the Fifth Amendment’s Due Process of Law Clause, is part and parcel of what it means to exercise “judicial Power,” and did not need articulation in the Fifth Amendment to be effective. In 1830, in *Hollingsworth v. Barber*,<sup>64</sup> the Supreme Court adopted the reasoning of a Kentucky circuit court that “by the general law of the land, no court is authorised to render a judgment or decree against any one or his estate, until after due notice by service of process to appear and defend. This principle is dictated by natural justice; and is only to be departed from in cases expressly warranted by law, and excepted out of the general rule.”<sup>65</sup> The permissible departures and exceptions mentioned in the decision concerned in rem proceedings in which the seizure of property was deemed (however artificially) to be constructive notice of the action and statutes providing for notice by publication in limited circumstances. In all events, some kind of notice is an essential precondition to the exercise of “judicial Power”: “the service of process, or notice, is necessary to enable a Court to exercise jurisdiction in a case; and if jurisdiction be taken where there has been no service of process, or notice, the proceeding is a nullity.”<sup>66</sup> The early cases announcing the notice requirement did not rely on the Fifth Amendment’s Due Process of Law

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<sup>62</sup> See *Jones v. Flowers*, 547 U.S. 220 (2006) (deciding, in a 5-3 decision, that the state needed to take additional steps to notify a property owner before a tax sale when mailed notice was returned unclaimed).

<sup>63</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1850).

<sup>64</sup> 29 U.S. (4 Pet.) 466 (1830).

<sup>65</sup> *Id.* at 472.

<sup>66</sup> *Lessee of Walden v. Craig’s Heirs*, 39 U.S. (14 Pet.) 147, 154 (1840).

Clause. No one, to my knowledge, has ever had the cheek to suggest that this notice requirement did not exist between June 6, 1788 and December 15, 1791. Rather, when federal courts were granted the “judicial Power” in 1788, a notice requirement came with the kitchen.<sup>67</sup> Anything about notice contained in the Fifth Amendment was redundant.

### III. Procedural Forms

Much of what we know today as due process law consists of the prescription of procedural forms for various actions by executive and judicial agents. What kinds of hearings must be held, and at what point in the legal process must they be provided, before someone may be deprived of life, liberty, or property (whatever those terms turn out to mean)? Cases on these questions fill volumes, and books and articles on the subject fill shelves. The law of “procedural due process” infuses courses in Constitutional Law, Administrative Law, Federal Courts, and Civil Procedure, among others. What does the Constitution of 1788 say about these matters?

The Constitution expressly says relatively little about the procedural forms of federal governmental action. It says a great deal about the procedures to be employed in selecting the individuals who will serve as the various agents of the federal government, but once those agents are selected, the Constitution mostly goes silent about how they must do their jobs. The big exception is the detailed specification of procedures for exercising the legislative power (and the hard-to-classify presidential presentment power that accompanies it). The Constitution says quite a bit about the hoops that one must jump through in order to produce something that can be

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<sup>67</sup> Notice is seemingly less of an issue with respect to the “executive Power.” No one expects a suspect to be given notice before the police show up to arrest him or her. *See infra --*.

called a “law.”<sup>68</sup> It says much less about the hoops that one must jump through in order to exercise the “executive Power” or the “judicial Power.” Indeed, it says essentially nothing about how the President should go about the task of law execution, beyond the procedurally unhelpful injunction to “take Care that the Laws be faithfully executed.”<sup>69</sup> The procedures for exercising judicial power are expressly constrained only by a provision for trial by jury in criminal cases<sup>70</sup> and a provision specifying a few evidentiary procedures for treason trials.<sup>71</sup> And looming over the grand silence is the provision authorizing Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>72</sup> Were all procedural questions about federal executive and judicial power thus left by the Constitution to statute?

Notwithstanding the apparent silence, the Constitution actually says many profound things about the proper exercise of executive and judicial power. It does so in precisely the same way that it imposes the principle of legality on executive and judicial agents: through the Article II and Article III Vesting Clauses.

Start with the procedural forms of judicial action. There was no reason for the Constitution to specify the form by which federal courts may act because that was so well understood that it was simply part of the “judicial Power” with which federal courts were vested.

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<sup>68</sup> U.S. CONST. art. I, § 7.

<sup>69</sup> *Id.* art. II, § 3.

<sup>70</sup> *Id.* art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”)

<sup>71</sup> *Id.* art. III, § 3 (“No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

<sup>72</sup> *Id.* art. I, § 8, cl. 18.

Federal courts can act only in a judicial manner, “through the traditional processes of the law, consisting of regular criminal or civil proceedings.”<sup>73</sup>

It is maddeningly hard to pin down through references to founding-era sources what these “traditional” processes of law entail. Conceptually, distinguishing judicial from executive power is notoriously difficult, if only because of the historical origins of judicial power as an aspect of executive power.<sup>74</sup> Even distinguishing judicial from legislative power is more difficult than might appear at first glance.<sup>75</sup> Historically, court systems prior to the Constitution were many and diverse, so specifying, in essentialist fashion, the particular features of a “judicial” process from pre-constitutional practice is no easy feat.

Nonetheless, the founding generation took for granted that there were established forms for the exercise of the judicial power that constituted part of the legal backdrop of the era. Consider the Judiciary Act of 1789. It went into considerable detail about the jurisdiction of the various federal courts that it established but said considerably less about the manner in which that jurisdiction would be exercised. Rather, it incorporated existing and well-understood practices as part of the background content of the judicial power. Federal courts were authorized to issue writs “agreeable to the principles and usages of law.”<sup>76</sup> They could demand the production of evidence “by the ordinary rules of processes in chancery.”<sup>77</sup> The forms of proof and evidence were to be “as of actions at common law.”<sup>78</sup> And an immediately succeeding

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<sup>73</sup> HAMBURGER, *supra* note 36, at 173.

<sup>74</sup> See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 103-06 (1995).

<sup>75</sup> See John Harrison, *Legislative Power and Judicial Power*, 31 *CONST. COMMENTARY* 295 (2016).

<sup>76</sup> An Act to establish the Judicial Courts of the United States, ch. XX, § 14, 1 Stat. 73, 82.

<sup>77</sup> *Id.* § 15, 1 Stat. at 82.

<sup>78</sup> *Id.* § 30, 1 Stat. at 88.

statute said that equity and admiralty processes were to be “according to the course of the civil law.”<sup>79</sup> In the founding era, there was no need to specify in detail precisely how federal courts were to carry out their constitutionally vested function. Everyone knew what a judicial process looked like.<sup>80</sup>

There could, of course, be minor variations in procedures among courts, but if certain essential features were not present – such as notice, a right to be heard, an independent adjudicator, principles of evidence, and (at least in common law and criminal cases) a jury – then one simply was not dealing with an exercise of the “judicial Power.” Indeed, a mass of materials in the early years of the republic equated due process of law with judicial process. A prayer for relief at the end of a court pleading asked “that justice, by due process of law, may be done, in this case”<sup>81</sup> Statutes used the phrase “due process of law” as shorthand for judicial process.<sup>82</sup> Corporate charters identified due process of law (presumably through quo warranto proceedings) as the mechanism for abrogating the charters.<sup>83</sup> There was no need for the Fifth Amendment in 1791 to tell courts that they could not deprive people of life, liberty, or property without due process of law. Due process of law just was, in an existential sense, what courts did when they were doing their jobs properly.<sup>84</sup>

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<sup>79</sup> An Act to regulate Processes in the Courts of the United States, ch. XXI, 1 Stat. 93, 94.

<sup>80</sup> See Andrew T. Hyman, *The Little Word “Due,”* 38 AKRON L. REV. 1, 3 (2005).

<sup>81</sup> See, e.g., *Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 24 (1795);

<sup>82</sup> See, e.g., *Auld v. Norwood*, 9 U.S. (5 Cranch) 361, 363 (1809) (citing a Virginia statute on fraudulent conveyances).

<sup>83</sup> See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 689 (1819).

<sup>84</sup> See HAMBURGER, *supra* note 36, at 157 (“The common law had its own ideals about the personnel, structure, and mode of proceeding of its courts – ideals that could be summed up as the due process of law.”).

That leads to what, at least from the standpoint of modern doctrine, appear to be the most difficult questions of all in this area: What happens when executive officials rather than courts are the agents of deprivation? What procedures must executive agents follow in order to deprive someone of life, liberty, or property? Surely there was not the same well-understood set of practices in the founding era that were necessary for valid exercise of the “executive Power” as there was for “judicial Power.” How would one know a procedurally appropriate executive deprivation of life, liberty or property when one saw it?

These questions, which preoccupy modern doctrine, all rest on a fundamental mistake. They assume that executive procedures determine, or are even relevant to, the lawfulness of an executive deprivation of life, liberty, or property. They do not and are not, unless valid statutes prescribe necessary procedures that must be followed. The simple fact is that executive agents cannot validly deprive someone of life, liberty, or property without legal authorization, in which case it is the law doing the depriving, or pursuant to a valid judicial order, in which case it is the judicial order that is doing the depriving. The executive power, one must recall, is an implementational power. It can only validly act to deprive subjects of rights when there is law to enforce: a valid statute, a norm from the general law, or a valid court judgment. That is the essence of the principle of legality. Executive procedures, even highly formal, court-like executive procedures, may or may not be a good idea, and they may or may not serve any number of functions, but they cannot legitimate a deprivation that is not otherwise legitimate. And an executive deprivation that is anything more than the implementation of a valid statute, general law norm, or court decision is illegitimate. Due process of law requires either legislation, general law, or a court judgment for a deprivation of protected rights. No amount of

executive procedures can substitute for these things. That is the substantive import of the principle of legality.

Because the rise (and rise) of the administrative state tends to skew thinking on these matters, for purposes of ascertaining original meaning it is important to keep clear several basic facts that make this conclusion less dramatic – or at least less dramatic to an eighteenth-century audience -- than it might seem today.

First, and most importantly, a great deal of executive action does not involve the deprivation of any subject’s life, liberty, or property and thus does not implicate the principle of legality that helps define the “executive Power.” Philip Hamburger usefully distinguishes executive action that deprives legally protected rights, or that *constrains subjects*,<sup>85</sup> from executive action that *exercises coercion* against non-subjects such as aliens,<sup>86</sup> *exercises coercion* pursuant to enforcement of statutory duties without purporting to add any independent binding authority to the statute,<sup>87</sup> *administers benefits* such as pensions or public land grants,<sup>88</sup> or engages in other activities, such as *notice-giving*, *interpretation*, or *internal executive administration*, that do not alter the legal landscape for subjects.<sup>89</sup> For all of these non-constraining, or non-rights-depriving, actions, legally required procedures are determined by statute and/or executive discretion rather than by constitutional command in all but the most

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<sup>85</sup> See HAMBURGER, *supra* note 36, at 2-5.

<sup>86</sup> See *id.* at 192-93. Nathan Chapman has recently argued that notions of due process apply fully to aliens as a matter of original meaning. See Nathan Chapman, *Due Process Abroad*, --. Nothing for this article turns on whether he is right. As with everything else pertaining to due process of law, the answer likely turns on the scope of the powers granted by the Constitution of 1788 rather than on the words of the Fifth Amendment. There is much to be said for Professor Chapman’s view that those powers are limited regardless of their objects, but that is a tale for another time.

<sup>87</sup> See *id.* at 84-85, 215-17.

<sup>88</sup> See *id.* at 193-98.

<sup>89</sup> See *id.* at 85-95.

extreme cases that implicate fiduciary principles.<sup>90</sup> Outside of a fiduciary-based zone of arbitrariness, executive agents have a wide choice of procedures when they are not constraining subjects, limited only by legislation that is “necessary and proper for carrying into Execution” federal powers. If no subjects are being deprived of life, liberty, or property, the Constitution is not much interested in what kinds of procedures executive agents employ for whatever they are doing. That is true under modern Fifth Amendment due process doctrine, which kicks in only when there is a deprivation of “life, liberty, or property,” and it was true under the original Constitution from 1788 onwards as well.

The difference between original law and modern law in this respect concerns the scope of interests whose deprivation is deemed to raise constitutional concerns. The demise of the right-privilege distinction that was formalized in *Board of Regents of State Colleges v. Roth*<sup>91</sup> heralded extension of due process of law norms to the deprivation of all sorts of things, from government jobs to welfare benefits to licenses, that would fall under the administration-of-benefits heading in earlier times.<sup>92</sup> The story of that extension is for another time,<sup>93</sup> as is any assessment of its wisdom. For present purposes, all we need to know is that, from the perspective of original meaning, executive action only raises constitutional issues (apart from violations of fiduciary duties in extreme cases) when it deprives rights -- or, to put it another way, when it constrains subjects. That is a relatively modest subset of executive action.

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<sup>90</sup> Executive agents, as with all federal governmental actors, have a fiduciary duty of care, and that duty limits the extent to which wholly arbitrary or inappropriate procedures can be employed in any tasks. See LAWSON & SEIDMAN, *supra* note 43, at --.

<sup>91</sup> 408 U.S. 564, 571-72 (1972).

<sup>92</sup> The “earlier times” persisted until the 1950s. See *Bailey v. Richardson*, 182 F.2d 46, 57 (1950), *aff’d by an equally divided Court*, 341 U.S. 918 (1951).

<sup>93</sup> For a brief introduction, see LAWSON, *supra* note 7, at 853-927.

Second, and relatedly, in the course of engaging in executive action that does not deprive rights or constrain subjects, executive actors can often employ procedures that make their activity look very similar to legislative or judicial action. They can employ adjudicative procedures in fact-finding and the application of law to fact that look very similar to court proceedings, and they can employ rulemaking procedures that make executive rule-pronouncing activity seem very much like legislation. But as long as the outputs of these proceedings do not constrain subjects, none of this matters for constitutional purposes. Whether executive action implicates the principle of legality depends upon the substance of the executive action, not on what procedures the executive agents employ.

Third, much executive action that appears to deprive people of rights or to constrain subjects actually does no such thing. Consider a prosecutor's decision to pursue criminal charges. If the defendant is charged and deprived of liberty pre-trial, it is because of legislative action that arguably makes the conduct criminal and judicial action validating the arrest. If the defendant is convicted and sent to prison, it is the product of a judicial order of conviction pursuant to the statute. If the executive agent chooses not to prosecute, that is simply a dispensation, just as a decision to prosecute does not create any new liability that did not previously exist. You are not deprived of anything because an executive agent fails to grant you a favor to which you have no legal entitlement. Put another way: There is no violation of the principle of legality when an executive agent applies the law to you. Any deprivations are not really the result of executive action, in the sense that the executive action does not itself create any of the legal norms that result in the deprivation. The executive agent merely acts in accordance with statutes (the law of the land) and judicial orders (the judgment of his peers). The principle of legality does not prevent executive actors from acting. It prevents executive

actors from depriving subjects of rights without law to back it up. The execution of valid laws or judicial orders that effect deprivations is not itself a deprivation without due process of law forbidden by the principle of legality.

Fourth, the foregoing considerations raise a question of timing in some situations. Even where deprivations are authorized by statute in principle, there are circumstances in which executive actors inevitably deprive persons of legally protected rights without a prior determination by a court that the deprivation is authorized. Consider a naval vessel on the high seas that is enforcing a wartime (or at least time-of-hostilities) embargo on shipping involving enemy ports. The officer commanding the naval vessel believes that he has found a ship in violation of the embargo. This is the late eighteenth or early nineteenth century, so timely communication from ship to shore is not an option.<sup>94</sup> Must every naval vessel come equipped with an Article III judge on board to determine the lawfulness of seizures on the spot? One can replicate the same concerns, with less dramatic effect, in more mundane settings on land. Even arrests of criminal suspects present some time lag between a deprivation of liberty and an adjudication of probable cause, much less of guilt. Do these actions violate the principle of legality?

The answer depends on whether or not the deprivation is actually authorized by statute or general law. If the naval officer seizes goods that are, in fact, unlawfully in violation of an embargo, there is no violation of the principle of legality because the officer has acted in accordance with the statute, assuming that the statute is valid and the officer complies with both the substantive and procedural terms of the statute. If a person is detained by arrest and is actually guilty of the charged crime, there is no violation of the principle of legality because the

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<sup>94</sup> The example is based on *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

deprivation is authorized by the law of the land, again assuming that the criminal statute is itself valid. And if a health inspector summarily seizes and destroys chickens in a warehouse on the ground that the chickens are in violation of valid health regulations, there is no problem if the chickens are, in fact and law, unhealthful and if the legislature had power to regulate the healthfulness of chickens.<sup>95</sup> Obviously, if the underlying statutes exceed the power of the legislature and are therefore unconstitutional, they provide no authorization for actions of enforcement. An agent who enforces an unconstitutional law acts without legal authorization and thus violates the principle of legality. But an agent who executes a constitutional law does exactly what the “executive Power” is supposed to do.

How would one determine whether those factual and legal predicates for valid executive action are present? The ordinary mechanism for obtaining that determination would be an action for damages, in a proper court, against the executive actor. Conceivably, one could try to bring an action for injunction if one knows that the deprivation is coming; and if the expected deprivation is of life or liberty, there is a chance that one will succeed in an injunction action, because the remedy at law will likely be inadequate. A tort suit by one’s surviving family is not really an adequate remedy for an unlawful execution, and a tort action for wrongful imprisonment does not quite do the trick for an unlawful detention. If the expected deprivation is of property, however, there is no obvious reason in most cases why a damages remedy is not adequate, or at least as adequate as a damages remedy is for any legal wrong,<sup>96</sup> so damages it will likely be.

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<sup>95</sup> The example is adapted from *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).

<sup>96</sup> See, e.g., *Cruickshank v. Bidwell*, 176 U.S. 73 (1900) (denying an injunctive remedy against a customs collector where a damage remedy was available). If the lost property is real property (rather than tea, as in *Cruickshank*), there may be reasons to doubt the efficacy of a damages remedy, which is why contracts for land are generally specifically enforceable.

Those familiar with the history of administrative law know that, until relatively recently, that was precisely the mechanism by which the legality, including the constitutional legality, of executive action was typically challenged. In *Little v. Barreme*<sup>97</sup> in 1804, for example, Captain Little seized goods on the high seas sailing from a French port pursuant to a presidential directive to naval officers to be wary of goods heading to and from France during the quasi-war of that time. Unfortunately for Captain Little, Congress had only authorized seizure of goods sailing *to*, and not *from*, French ports. Captain Little got sued, and even though he was acting under presidential orders, the statute did not actually authorize the executive action, and Captain Little accordingly faced a significant judgment for damages.<sup>98</sup>

Today, this mechanism is largely unavailable in practice because of the rise (and rise) of the doctrine of official immunity, which removes the strict liability for unlawful action that prevailed during the founding era.<sup>99</sup> For now, it is sufficient to note that the rise (and rise) of the administrative state has left many casualties in its wake, and the doctrine of executive accountability is among the many. From the standpoint of original meaning, damages actions are the vehicle for dealing with problems of timing. Executive agents can deprive without prior court determinations all they want, but they do so at their legal peril.<sup>100</sup>

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<sup>97</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>98</sup> *Id.* at 179. He was bailed out by a private bill. See Act for the Relief of George Little, ch. 4, 6 Stat. 63 (1807). This kind of indemnification was, perhaps unsurprisingly, evidently fairly common in the founding era. See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862 (2010). For more on *Little v. Barreme*, see *infra* TAN 102-03.

<sup>99</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 813-19 (1982).

<sup>100</sup> Does this mean that law enforcement officials acted at their peril if they arrested people without judicially-approved warrants? Of course it does – subject to the proviso that law enforcement officials are themselves a relatively modern development. See Jerome Hall, *Legal and Social Aspects of Arrest without a Warrant*, 49 HARV. L. REV. 566 (1936); Roger Roots, *Are Cops Constitutional?*, 11 SETON HALL CONST. L. J. 685 (2001).

Fifth, and importantly, all of the above considerations limit quite strictly the kinds of effects that one can give to executive actions in adjudicative proceedings. If an executive rule or legal interpretation is considered binding by courts, then the executive action is effecting a constraint that is not the product of pre-existing law or a valid judicial order. In that case, the executive action is invalid, and it is invalid regardless of what kinds of procedures the executive agent used to promulgate the binding rule or interpretation. The activity itself is simply beyond the scope of the “executive Power” – or, what amounts to the same thing, is a violation of the principle of legality if acting upon it results in a deprivation of life, liberty, or property. “Executive Power” is not the power to constrain subjects through the use of the right procedures. It is not the power to constrain subjects at all unless pursuant to law.<sup>101</sup>

The bottom line is that the Constitution of 1788 has very strong ideas about the nature of executive power and how it must be implemented. Those ideas are substantive, not procedural. They concern what executive power is and what executive power can do, not what kind of hearings executive agents choose to provide. To the extent that those ideas are replicated in the Fifth Amendment’s Due Process of Law Clause, that clause embodies a very strong principle of what can meaningfully be called substantive due process. Unlike modern substantive due process, it is not about limits on legislative action; it is about limits on executive action. But it is most definitely about substance.

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<sup>101</sup> Does this mean that it violates the principle of legality for courts to give deference to executive findings of fact or legal interpretations in cases in which deprivations of rights are involved? It depends on what one means by “deference.” If the term describes a legally binding effect, then the answer is quite plainly yes. The legally binding deference makes the executive action a constraining, or rights-depriving action, which has the effect of invalidating it altogether. Congress cannot change this fact by prescribing judicial deference through legislation, as it often does. Not only does such statutorily mandated deference impinge on the Article III judicial power, but it also violates the principle of legality by purporting to give constraining effect to executive action. On the other hand, if the executive action is merely taken by courts to be good evidence of a right answer that is independently derived by the courts, there is no more reason to exclude such “deference” than there would be to exclude such “deference” given to well-argued briefs or law review articles. Much of modern administrative law gives executive action the former, legally significant kind of deference, and thus much of modern administrative law violates the principle of legality. I cannot imagine that such a conclusion comes as a great surprise to anyone; that is among the least of the problems with modern administrative law.

Where this all went wrong in the case law, to the point where emphasis on the principle of legality at the expense of the forms of executive hearings and procedures may seem utterly bizarre, is a lengthy story for another time, but a few brief observations on where the key missteps might have happened are appropriate here.

The Supreme Court's first encounter with the principle of legality of which I am aware, though it did not use that terminology, was *Little v. Barreme*, and the case seemed consistent with the analysis herein. In finding that executive action contrary to law – even in time of conflict, even on the high seas on a naval vessel, and even pursuant to presidential directives – was invalid and thus provided no defense of legal authorization against a common-law damages action, Chief Justice Marshall wrote:

I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that government from

which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.<sup>102</sup>

The law is the law, and executive orders or proclamations cannot change it. So far, so good.

The next federal judicial landmark in the application of the principle of legality, with a more mixed prognosis, came more than half a century later in *Murray's Lessee v. Hoboken Land & Improvement Co.*<sup>103</sup> The case involved a statute that, upon first glance (and second glance as well), appears to be an extraordinary assertion of governmental power. The Supreme Court opinion in *Murray's Lessee* does not reproduce the text of the statute, but that text definitely bears reproduction (omitting some portions involving sureties and notice of sale that are not relevant here):

[I]f any collector of the revenue, receiver of public money, or other officer who shall have received the public money before it is paid into the treasury of the United States, shall fail to render his account, or pay over the same in the same manner, or within the time required by law, it shall be the duty of the first comptroller of the treasury to cause to be stated the account of such collector, receiver of public money, or other officer, exhibiting truly the amount due to the United States, and certify the same to the agent of the treasury, who is hereby authorized and required to issue a warrant of distress against such delinquent officer and his sureties, directed to the marshal of the district in which such

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<sup>102</sup> 6 U.S. (2 Cranch) at 179.

<sup>103</sup> 59 U.S. (18 How.) 272 (1856).

delinquent officer and his surety or sureties shall reside . . . ; therein specifying the amount with which such delinquent is chargeable, and the sums, if any, which have been paid. And the marshal authorized to execute such warrant, shall, by himself or by his deputy, proceed to levy and collect the sum remaining due, by distress and sale of the goods and chattels of such delinquent officer; having given ten days' previous notice of such intended sale . . . ; and if the goods or chattels be not sufficient to satisfy the said warrant, the same may be levied upon the person of such officer, who may be committed to prison, there to remain until discharged by due course of law . . . . And the amount due by any such officer as aforesaid, shall be, and the same is hereby declared to be, a lien upon the lands, tenements, and hereditaments of such officer and his sureties, from the date of a levy in pursuance of the warrant of distress issued against him or them. And for want of goods and chattels of such officer, and his surety or sureties, sufficient to satisfy any warrant of distress issued pursuant to the provisions of this act, the land, tenements, and hereditaments of such officer . . . may and shall be sold by the marshal of such district or his deputy and . . . shall give a valid title against all persons claiming under such delinquent officer, or his surety or sureties.<sup>104</sup>

Considering just this section of the statute (and another section will prove important in a moment), the law represents a legislative instruction to executive agents to seize and sell a person's property, and where necessary to imprison the person, without a prior judicial determination of liability. And, yes, people were actually imprisoned under this statute.<sup>105</sup> The

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<sup>104</sup> Act of May 15, 1820, ch. 57, § 2, 3 Stat. 592-93.

<sup>105</sup> See *In re Randolph*, 2 Brockenbrough 447 (1837). The case involved a naval purser whose account was found deficient. A marshal found insufficient property to satisfy the debt and had Randolph imprisoned. Randolph

relevant treasury agents under this law have the mandatory *duty* to issue and enforce the appropriate distress warrants. Issuance of a warrant not only makes possible the aforementioned deprivations of liberty and property but also, in the event of a deficiency, imposes liens on property and authorizes judicial sales that divest title of all other claimants. All of this is set in motion by executive action determining the existence and amount of a deficiency without recourse to the courts.

Section four of the statute brings the judiciary into the picture; anyone who thinks themselves aggrieved by a distress warrant can seek an injunction against the warrant in federal court.<sup>106</sup> The catches – and there are two of them -- to this judicial review provision are that the person seeking an injunction must initiate the action and then post a bond, indicating that the burden of proof is on the claimant, and that even the issuance of an injunction against enforcement action under a distress warrant does not “in any manner impair the lien produced by the issuing of such warrant.”<sup>107</sup>

Taken as a whole, this procedure looks like exactly the kind of executive action that both the principle of legality and Article III of the Constitution are designed to prevent. Under this scheme, executive agents can sell people’s property and put them in prison on their own say-so. Subsequent judicial determinations, even in favor of the party opposing the warrant, do not

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brought a habeas corpus action, raising broad-based challenges to the constitutionality of the Act of May 15, 1820 under, inter alia, Article III and the Seventh Amendment. Chief Justice Marshall, who heard the case on circuit along with district judge Philip Barbour, took the Article III argument very seriously: “The persons who are directed by the act of Congress to ascertain the debt due from a delinquent receiver of public money, and to issue process to compel the payment of that debt, do not compose a court ordained and established by Congress, nor do they hold offices during good behaviour . . . . They are, consequently, incapable of exercising any portion of the judicial power, and the act which attempts to confer it, is absolutely void.” *Id.* at 479-80. Both judges avoided the constitutional questions by construing the statute not to apply to Randolph, albeit for somewhat different reasons. *See id.* at 474-75( Judge Barbour construing the statute not to allow reopening of accounts); *id.* at 480-84 (Chief Justice Marshall construing the statute not to extend to pursers).

<sup>106</sup> Act of May 15, 1820, ch. 57, § 4, 3 Stat. at 595.

<sup>107</sup> *Id.*

cancel out all of the legal effects of the distress warrant because they leave in place the lien on the collector's property.<sup>108</sup> The plaintiffs in *Murray's Lessee*, who claimed under a common-law levy of execution that pre-dated the judicial sale under the distress warrant but post-dated the imposition of a lien under the statute, made these constitutional arguments against the statute with gusto.<sup>109</sup>

From the standpoint of the principle of legality, the obvious response to these arguments is that they are arguments against a *statute*, not against executive action taken of its own accord, and that the executive action was thus entirely in accord with the law of the land. Congress specified the executive procedures in this statute in gruesome detail. It made application of the statute mandatory on the treasury. The statute dictated, in painstaking fashion, exactly how warrants must be issued, enforced, and executed. The executive agents who issued distress warrants against the collector in this case followed the statute to the letter.<sup>110</sup> Factually, no one disputed that the collector – the infamous Samuel Swartout – had swindled the government out of more than one million dollars.<sup>111</sup> No one claimed that the executive agents had exceeded their statutory authority or gone after the wrong person. Isn't that exactly what the principle of legality demands, and isn't that exactly what this proceeding delivered?

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<sup>108</sup> Whether the requirements of initiation of judicial action by the target of the warrant and posting of a bond, by themselves, render the scheme potentially a violation of the principle of legality is a more difficult question. I am inclined to think that they do, since they give a presumptive legal effect to the executive action, but the law has been consistently contrary to my position. *See, e.g.,* *McMillen v. Anderson*, 95 U.S. (5 Otto) 37, 42 (1877) (“It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.”).

<sup>109</sup> *See* 59 U.S. (18 How.) at 272-73.

<sup>110</sup> *See id.* at 275 (“No objection has been taken to the warrant on account of any defect or irregularity in the proceedings which preceded its issue. It is not denied that they were in conformity with the requirements of the act of congress.”).

<sup>111</sup> One million dollars in 1839 would have been a big deal even for Dr. Evil.

If the statute itself was constitutionally valid, then the answer has to be yes. Deprivations pursuant to constitutional statutes are lawful, provided that the statutes' substantive and procedural prescriptions are followed. The primary question in *Murray's Lessee* was thus not really whether the executive action was constitutional but whether the statute that authorized, and indeed mandated, the executive action was constitutional as a law "necessary and proper for carrying into Execution" federal powers. While the opinion by Justice Curtis in *Murray's Lessee* covered a lot of territory, some of it unsound as we will see, at one point it settled on exactly the right analysis:

Among the legislative powers of congress are the powers 'to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defence and welfare of the United States, to raise and support armies; to provide and maintain a navy, and to make all laws which may be necessary and proper for carrying into execution those powers.' What officers should be appointed to collect the revenue thus authorized to be raised, and to disburse it in payment of the debts of the United States; what duties should be required of them; when and how, and to whom they should account, and what security they should furnish, and to what remedies they should be subjected to enforce the proper discharge of their duties, congress was to determine. In the exercise of their powers, they have required collectors of customs to be appointed; made it incumbent on them to account, from time to time, with certain officers of the treasury department, and to furnish sureties, by bond, for the payment of all balances of the public money which may become due from them. And by the act of 1820, now in question, they have undertaken to provide summary means to

compel these officers -- and in case of their default, their sureties -- to pay such balances of the public money as may be in their hands.

The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money and use it in payment of the debts of the government; and, whoever may have possession of the public money, until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues.<sup>112</sup>

To be sure, while this is the right analytical approach, I am not at all certain that this is the right answer. That is, I am not at all certain that prescription of this particular executive procedure, including the power to imprison the debtor, is a valid exercise of Congress's power under the Necessary and Proper Clause -- unless one can say, and one might well be able to say, that accepting the position of collector amounts to a waiver of any constitutional claims that one might otherwise have.<sup>113</sup> Quite possibly, Article III requires judicial action in order for any person to be imprisoned pursuant to federal law, at least outside of executive action in war zones pursuant to the law of war.<sup>114</sup> I am saying only that this passage from *Murray's Lessee* hits upon

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<sup>112</sup> 59 U.S. (18 How.) at 281.

<sup>113</sup> The idea that one could waive claims sounding in due process of law was settled by 1857. See *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819).

<sup>114</sup> For the same reasons, I have long been dubious about any inherent congressional power to imprison for contempt. See *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1820) (unpersuasively allowing such a power).

the right analytical approach. It asks the right questions whether or not it reaches the right answers.

The Court was thus correct, but only in a backhanded sense, to say that “[i]t is manifest that it was not left to the legislative power to enact any process which might be devised. The . . . [Due Process of Law Clause] is 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>115</sup> The first sentence is correct, but the second is far off base. It is not really the Fifth Amendment’s Due Process of Law Clause that constrains the federal legislative power in this regard but rather the enumerations of legislative power in the Constitution. If those powers do not allow Congress to pass a statute empowering the executive in a particular fashion, then executive action under that statute is unauthorized. Invoking the Due Process of Law Clause rather than the doctrine of enumerated powers for this purpose is a conceptual mistake, unless the claim is that due process of law contains *more* limits than do the enumerated powers. That claim poses an empirical question about the scope of the enumerated powers. At the very least, in any instance in which Congress exceeds its enumerated powers, it is a mistake to turn to the Due Process of Law Clause rather than those enumerations as the source of the limitation. And, quite possibly, this particular conceptual mistake is what set the law down the wrong path of thinking of the Due Process of Law Clause as (1) a source of procedural rather than substantive constraints on the executive and (2) an independent source of substantive constraints on the legislature. Neither use is an obvious manifestation of the principle of legality.

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<sup>115</sup> 59 U.S. (18 How.) at 276.

#### IV. Substantive Due Legality?

Through the scheme of enumerated powers, the original Constitution limits the substance of what executive agents can do by requiring that executive agents act pursuant to valid law. It is easy to see how “due process of law” makes reference to this idea. The Constitution also limits the power of Congress through the enumeration of limited legislative powers that are “herein granted.” If Congress enacts a statute that exceeds its enumerated powers, the statute cannot serve as valid law to authorize executive or judicial deprivations of rights. Conceivably, one might try to describe enactment of the law itself as a violation of “due process *of law*,” even if Congress followed the procedures laid out in Article I, section 7. If that attempt is some kind of interpretative error, it appears to be harmless error. If the law really exceeds Congress’s enumerated powers and is therefore unconstitutional, nothing of substance is lost – or gained – by layering on a claimed violation of due process of law. Violating two constitutional provisions or principles is not worse than violating one; the action is unconstitutional in either case. If one wants to reflect the principle of enumerated powers in the Due Process of Law Clause and call it a kind of “substantive due process,” it is hard to see what difference that will make.<sup>116</sup>

But what “substantive due process” usually means these days is a limitation on legislative powers that goes beyond a straightforward enumerated powers violation and that does not implicate any express restriction on legislative power found in the Constitution. Is there room in

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<sup>116</sup> Nonetheless, I am doubtful, as a conceptual matter, whether that is an appropriate use of “due process of law.” Article I, section 7 declares to be “law” anything that clears its procedural hurdles. The language “shall be a law” suggests that those procedures are both necessary and sufficient to give the label “law” to entities that emerge from such a process. The reason that such “laws” do not satisfy the principle of legality by authorizing valid executive or judicial action is that they are superseded by a hierarchically superior form of law – the Constitution – that binds executive, judicial, and legislative actors alike. Norms that lose out to other norms in a conflict-of-laws duel can still be laws. If Congress passes an unconstitutional statute, and the Constitution is amended to validate the statute, Congress does not need to re-enact the statute. It was law from the beginning. Accordingly, I would not call enactment of an unconstitutional law a “due process of law” violation.

an originalist account of the Constitution for any such thing, from whatever source and however labeled?

The answer, perhaps surprisingly to some, is yes. And the answer of “yes” goes beyond what Professors Chapman and McConnell have in mind when they say that Congress cannot act in a judicial or executive fashion directly to deprive people of rights.<sup>117</sup> It includes as well at least some instances in which Congress violates the Constitution by passing “prospective and general laws . . . [that are] enforced by means of impeccable procedures.”<sup>118</sup> The Constitution is, most fundamentally, a fiduciary instrument. By that I do not mean that, as a matter of either private obligation or political theory, it represents a valid transfer of authority from some persons to others. I simply mean that, as a descriptive matter, the Constitution falls most naturally into a family of documents known to eighteenth-century persons as fiduciary instruments. A book-length argument for this proposition can be found elsewhere.<sup>119</sup> The significance for due process of law is that fiduciary instruments carry in their wake a number of background interpretative rules, derived from the various rights and duties that accompany fiduciary relationships as a default. One of the most basic fiduciary duties is a duty of care on the part of the agent. The agent must exercise authority on behalf of the principal with some measure of attentiveness and skill. To the extent that Congress is seen as a fiduciary agent – and, as a matter of original meaning, the extent is close to absolute – a duty of care accompanies all of its grants of power. At a minimum, this duty grounds something like a “rational basis” review of congressional

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<sup>117</sup> See Chapman & McConnell, *supra* note 2, at 1677-79.

<sup>118</sup> *Id.* at 1679.

<sup>119</sup> See LAWSON & SEIDMAN, *supra* note 43.

action for arbitrariness. At a maximum, it imposes even more stringent requirements of reasonableness.<sup>120</sup>

Could one read this duty of care into the Due Process of Law Clause, so that action that falls below the standard of that fiduciary duty is an absence of “due process of law”? To the extent that the Due Process of Law Clause includes enumerated-powers limitations on Congress, there is no reason to exclude this limitation -- which, after all, is simply an implicit but nonetheless quite real limitation on the granted enumerated powers. Something that bears at least a family resemblance to “substantive due process” is thus really grounded in the Constitution. If one wants to call this fiduciary principle “substantive due process,” no great consequence ensues even if such a move is interpretatively unsound.

Whether that move from fiduciary duty to due process of law is interpretatively unsound depends on whether the idea of due process of law has application to legislative action. The Supreme Court said yes in *Murray’s Lessee* in 1856, at least with respect to legislation that changes traditional procedural forms. The next year, in the *Dred Scott* decision,<sup>121</sup> the Court went the full distance to use the Due Process of Law Clause to invalidate a substantive law regulating slavery in federal territory.<sup>122</sup> Before that time, as an historical matter, there was

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<sup>120</sup> See Gary Lawson & Guy Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government’s Fiduciary Duty of Care*, 69 FLA. L. REV. – (2017) (forthcoming).

<sup>121</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>122</sup> The Court said that “an 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.” *Id.* at 450. The big problem with this argument is the premise that Congress has no enumerated power to regulate slavery in federal territory. Congress has power under the Territories Clause to prescribe rules for the governance of federal territory, and that includes the power to declare certain forms of property contraband. Even without such a declaration, the mere absence of positive law providing affirmatively for slavery would be sufficient to end a slave relationship upon entry into such territory, since slavery was purely a creature of positive law and the Fugitive Slave Clause by its terms has no application to federal territory. See U.S. CONST. art. IV, § 2, cl. 3. More detailed thoughts on *Dred Scott* can be found elsewhere. See GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 197-201* (2004).

something of a back-and-forth about the extent to which ideas of due process of law applied to legislation.<sup>123</sup> Because there is no reason at all to suppose that anything contained in “due process of law” as it might apply to legislation would impose different or stricter requirements than do background fiduciary principles, nothing in the present analysis depends on the resolution of that controversy, and I accordingly pass it over. Whatever can plausibly, or even implausibly, be read into the Fifth Amendment’s Due Process of Law Clause with respect to congressional action is already contained in the Constitution of 1788.

This article, which is an attempt to uncover the original meaning of the Fifth Amendment’s Due Process of Law Clause, could end right here. Perhaps it should end right here. It might, however, be valuable to consider why and how the contemporary meaning of “due process of law” strayed so far from its original meaning, so that instead of talking about the principle of legality and enumerated powers, or even fiduciary duties, we today mostly talk about hearings, oral proceedings, cross-examination, and other procedures. For that part of the story, which I tell with some reluctance, we move to the second half of the nineteenth century.

There was not a lot of Supreme Court case law on due process of law before the Civil War. The two big cases were *Murray’s Lessee* and *Dred Scott*, and the latter actually has little relevance for this article. The real death knell for a sound understanding of due process of law in the Fifth Amendment was probably the Civil War and the ensuing rise of the administrative state in the Progressive Era. Doctrinally and historically, the Fifth Amendment was effectively deranged by the Fourteenth Amendment.

## V. Post-Bellum Due Process of Law

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<sup>123</sup> See MOTT, *supra* note 27 at 98-99, 101, 123, 141-42.

Up through 1868, for reasons that have already been given, it was possible to pay no serious attention to the language of the Fifth Amendment's Due Process of Law Clause. The clause added nothing of substance to constitutional discourse, and its use, as *Murray's Lessee* and *Dred Scott* graphically illustrated, was more likely to lead to confusion than to correct interpretation. It was in many respects a blessing that the Due Process of Law Clause was not often invoked. But, as with magic, everything has a price. In this instance, as a consequence of the irrelevance of the Fifth Amendment's Due Process of Law Clause, there was no body of established federal case law construing it prior to the Civil War. There was a great deal of *state* case law interpreting various due process of law or law of the land clauses in state constitutions,<sup>124</sup> but nothing of note at the federal level. As late as 1877, the Supreme Court could say "that the constitutional meaning or value of the phrase 'due process of law,' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States."<sup>125</sup>

When the Court made this observation in 1877, it made it in the context of a second due process of law clause that had been added to the Constitution less than a decade beforehand. Section 1 of the Fourteenth Amendment, ratified in 1868, provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

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<sup>124</sup> See Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENTARY 339, 346-59 (1987).

<sup>125</sup> *Davidson v City of New Orleans*, 96 U.S. 97, 101-02 (1877). See also *id.* at 103-04 ("It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion.").

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>126</sup> While there was little reason up to that point to invoke the Fifth Amendment’s Due Process of Law Clause against a limited federal government, whose scheme of enumerated and separated powers already included everything plausibly attributable to the Fifth Amendment’s Due Process of Law Clause, there was plenty of reason to invoke the Due Process of Law Clause of the Fourteenth Amendment against all manner of actions of state and local governments, especially after the central substantive provision of the Fourteenth Amendment was eviscerated in the *Slaughter-House Cases*<sup>127</sup> in 1873. And that is precisely what happened. Even by 1877, the Court could complain that “while it has been a part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law.”<sup>128</sup> The Court could not easily escape pronouncing on the meaning of the Fourteenth Amendment’s Due Process of Law Clause. Nor could it easily pronounce, as it is not at all clear, from the standpoint of original meaning, what those pronouncements are supposed to say.

It is very clear what due process of law means in the context of a limited government of constitutionally separated powers that is already subject to the principle of legality. It is much less clear what due process of law means in the context of governments that are not otherwise

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<sup>126</sup> U.S. CONST. amend. XIV § 1.

<sup>127</sup> 83 U.S. (16 Wall.) 36 (1873). The *Slaughter House Cases* are beyond the scope of this article. Suffice it to say that the weight of modern originalist scholarship suggests that the cases wrongly construed the Privileges or Immunities Clause. See, e.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 73 (2008).

<sup>128</sup> 96 U.S. (6 Otto), at 104.

subject to the Constitution’s enumeration-of-powers and separation-of-powers schemes. The Constitution of 1788 says almost nothing about how state governments must be structured. It does mandate that every state have a “Republican Form of Government,”<sup>129</sup> and in several places the Constitution assumes that states will have traditional governmental structures that include legislatures,<sup>130</sup> executives,<sup>131</sup> and courts,<sup>132</sup> but that is all; and there is little reason to think that this was understood in 1788 to impose specific structural rules on state governments short of prohibitions on monarchy or direct Athenian-style democracy.<sup>133</sup> There is nothing to suggest that Massachusetts must understand “executive” or “judicial” powers to be exactly what the federal Constitution envisions them to be. If, however, the Fourteenth Amendment’s Due Process of Law Clause means the same thing as the Fifth Amendment’s Due Process of Law Clause, and if the Fifth Amendment’s Due Process of Law Clause means the separation-of-powers-inspired principle of legality, does the Fourteenth Amendment thereby impose a specific separation-of-powers regime on the states by constitutional command?

The Court in 1877 in *Davidson v. City of New Orleans* might very well have suggested as much:

But when, in the year of grace 1866 [sic], there is placed in the Constitution of the United States a declaration that ‘no State shall deprive any person of life, liberty, or property without due process of law,’ can a State make any thing due process

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<sup>129</sup> U.S. CONST. art. IV, § 4.

<sup>130</sup> *See id.* art. I, § 2, cl. 1; art. I, § 4, cl. 1; art. II, § 1, cl. 2; art. IV, § 4; art. VI, § 2.

<sup>131</sup> *See id.* art. IV, § 4; art. VI, § 2.

<sup>132</sup> *See id.* art. VI, § 3.

<sup>133</sup> Do state referenda violate the Guarantee Clause? Quite possibly yes; I hope to explore the subject in future work.

of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.<sup>134</sup>

This passage makes perfect sense with respect to the national government. Congress has no enumerated power to shift land titles from A to B. Perhaps it could be done by authorizing an exercise of the power of eminent domain, but (1) just compensation would have to be provided to A and (2) it was quite doubtful at that time, and as a matter of original meaning, whether the federal government actually has a power of eminent domain to exercise.<sup>135</sup> A court could accomplish the task if there was substantive law prescribing the shift in titles but not otherwise. The executive similarly could not act without law. One would not need the Fifth Amendment's Due Process of Law Clause to conclude that Congress cannot declare the property of A to be the property of B. One need simply examine the enumerated powers of Congress and find none that do the trick and then apply the most basic form of the principle of legality that has any application to legislation. Even in federal territory, where Congress has the powers of a general government, its exercise of those powers is limited by fiduciary duties, which would make a straight-up transfer of land from A to B, without anything more, very difficult to defend.

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<sup>134</sup> 96 U.S. (6 Otto), at 102.

<sup>135</sup> See LAWSON & SEIDMAN, *supra* note 43, at --; William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013).

When one moves to state governments, however, matters are very different. Without the Fourteenth Amendment, there is no (obvious?) federal constitutional prohibition against a state law taking property from A and giving it to B. The federal Constitution does not empower state governments, so it does not function for them as a source of fiduciary duties.<sup>136</sup> The federal Constitution does not create or limit the institutions of state governments, so it does not impose upon them the principle of legality through a scheme of separated powers. It is quite possible that every state's own constitution prohibits taking property from A and giving it to B. It is quite possible (and I would say true) that natural law forbids it. It is remotely possible, I suppose, that a "Republican Form of Government" is incompatible with that kind of naked act of title transfer, though I would have to be convinced by evidence that I have never seen that the eighteenth-century concept of republicanism goes to that degree to substance as well as form. The original, pre-Civil War federal Constitution simply was not designed to police all manner of state mischief. It polices only very specific forms of state mischief, and transfers of title from A to B implicate those kinds of mischief only when they impair the obligation of contract.<sup>137</sup>

How might the ratification of the Fourteenth Amendment change things? The Court in *Davidson* in 1877 did not really explain how the Due Process of Law Clause would invalidate a legislative act of title transfer, though it assumed that it would do so. There are several possible grounds for such a conclusion. One is to say that the Due Process of Law Clause is a font of natural law and prohibits A-to-B transfers for that reason. That is not an impossible position to

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<sup>136</sup> There are modest exceptions, dealing with such matters as federal elections and federal constitutional amendments, and in those limited settings the federal Constitution imposes fiduciary duties on the states. That has nothing to do with the kind of legislation with which due process of law cases have been concerned.

<sup>137</sup> See U.S. CONST. art. I, § 10.

defend by any means,<sup>138</sup> and this article is officially agnostic on whether that is a good account of the Fourteenth Amendment's original meaning.<sup>139</sup> Alternatively, perhaps the Court was saying that determination of property titles is a judicial function and therefore cannot be performed by the legislature. That might well be true of the federal institutions of government, for reasons already explained, and this account of "due process of law" would make essentially the same distribution of powers applicable to all state governments as a matter of federal constitutional law. Maybe the Fourteenth Amendment's Due Process of Law Clause forbids state legislatures from engaging in activity that is "by its nature" judicial or executive. Again, this is not an impossible position to defend,<sup>140</sup> and it might even be correct in many states as a matter of state constitutional law.<sup>141</sup> To derive such a norm from the federal Constitution, however, is an extraordinary result that one would expect to have generated more interest than

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<sup>138</sup> See *Hurtado v. People of the State of California*, 110 U.S. 516, 536-37 (1884); Gedicks, *supra* note 17; Sandefur, *supra* note 26.

<sup>139</sup> To be sure, such a position is in some tension with the Constitution's uniformly positivist account of what makes something "law." See U.S. CONST. art. I, § 7, cl. 2; Harrison, *supra* note 11, at 530-32; Hyman, *supra* note 80, at 16. This positivist account, in which even unconstitutional statutes are "law" if they are enacted pursuant to the procedures in Article I, section 7, poses no problem for judicial (or executive) review. Constitutional review is premised on choice-of-law concerns; the Constitution is hierarchically superior to statute law if there is a conflict between the two. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007). That is entirely consistent with the hierarchically inferior source still being law in a meaningful sense.

<sup>140</sup> Cf. David A. Martland, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675 (1985) (arguing that the Fourteenth Amendment requires separation of executive and judicial powers).

<sup>141</sup> Could the Fourteenth Amendment's due process of law clause mean nothing more than that states must obey their own internal norms of separated powers, essentially making state constitutional violations matters of federal law? There is nothing in the nature of things to rule out such a notion. But due process of law duplicates compliance with the rest of the Constitution for federal actors because of the contents of the federal Constitution. The Constitution's scheme for federal actors just happens to contain all of the norms plausibly embodied by due process of law. If that was not so, a due process of law clause would not be redundant. Maybe the Fourteenth Amendment's Due Process of Law Clause absorbs this fact and just accepts anything that a state chooses to do in its own constitution, but that is not a reading that leaps forth from the page.

has yet emerged.<sup>142</sup> Nonetheless, it appears to be the most plausible interpretation of the *Davidson* decision – and even a plausible interpretation of the Fourteenth Amendment’s Due Process of Law Clause once one treats the Fourteenth Amendment clause as equivalent to the Fifth Amendment version. The Fifth Amendment’s Due Process of Law Clause embodies the principle of legality, which includes, in the context of the Fifth Amendment, a substantive account of legislative, executive, and judicial powers. If the Fifth and Fourteenth Amendment’s Due Process of Law Clauses really mean exactly the same thing, then it follows fairly readily that all state governments must conform to the basic separation-of-powers scheme imposed on the federal government by the Constitution’s three vesting clauses. On this account, states can only deprive people of life, liberty, and property through governmental institutions that conform in substance to the federal model of separated powers.

If that seems to be an unlikely account of what “due process of law” means in the context of state governments under the Fourteenth Amendment, then what else might due process of law mean in that context? One perfectly sensible option is to give up trying to relate the Fifth and Fourteenth Amendment clauses and simply take the Fourteenth Amendment’s Due Process of Law Clause as an independent interpretative entity. There is much to be said for this approach. While there was little federal case law interpreting the Fifth Amendment’s Due Process of Law Clause in 1868, there was, as we have already noted, a fair amount of state law interpreting related provisions in state constitutions. Perhaps the meaning of the Fourteenth Amendment’s

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<sup>142</sup> Any such claims are non-starters as a matter of doctrine. *See Dreyer v. People of the State of Illinois*, 181 U.S. 71, 83-84 (1902) (“A local statute investing a collection of persons not of the judicial department, with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.”).

Due Process of Law Clause lies in those state cases, which would presumably have no relevance to the original meaning of the Fifth Amendment clause that has its own history and context.<sup>143</sup> If that is the right answer, this article has concluded.

But suppose that one is, for reasons either of interpretation or of doctrine, committed to the idea that the Fifth and Fourteenth Amendment's Due Process of Law Clauses must be harmonized at least in principle measure, if not treated as lock-step identical in meaning. Then one has to come up with some way to give content to the Fourteenth Amendment provision in light of the meaning of the Fifth Amendment provision. What kind of account of original meaning would make sense on those assumptions?

In the context of the original Constitution, due process of law essentially refers to the principle of legality and thus requires executive and judicial actors to ground their deprivations of life, liberty, or property in law.<sup>144</sup> The text of the Constitution then limits the manner in which those deprivations can take place by actors who are granted enumerated "executive" or "judicial" powers, respectively. It is not easy to apply this notion to state governments that are not formally constrained by the Constitution's separation-of-powers norms. What if a state wants its courts or executive agencies to function essentially as legislatures? What if it wants the highest court in the state to be the most numerous branch of the state legislature? If due process of law does not forbid these structural arrangements (if it does, we ended the discussion three paragraphs ago), what might it do?

A possible answer is to say that as long as the state legislature is the relevant actor, federal notions of due process of law mostly drop out of the picture (subject, perhaps, to a

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<sup>143</sup> I take this to be one of Professor Eberle's key points. See Eberle, *supra* note 124.

<sup>144</sup> Because the focus here is on the development of procedural due process doctrine, I am setting aside the possibility that due process of law functions as a constraint on the substance of legislation.

*Murray's Lessee* qualification for laws that change traditional legal forms too much and perhaps to a “rational basis” or “arbitrariness” check on substance). When the relevant state actor is judicial, the traditional forms of judicial process, which were as well known in 1868 as they were in 1788 and 1791, must be followed. And when the relevant state actor is executive . . . . That is where the rise of the administrative state makes its entrance.

State legislatures sometimes choose to act by vesting a measure of discretion in other actors that effectively lets those other actors make law. Rather than set railroad rates themselves, which they could do without violating the principle of legality (though any particular act might violate a host of constitutional provisions, both state and federal), they sometimes choose to create executive commissions that will find facts and set rates for them. Rather than prescribe and apportion taxes, which they could do without violating the principle of legality (though any particular tax might violate a host of constitutional provisions, both state and federal), they sometimes choose to create boards that find facts and fix and apportion the taxes for them. As state governments took on increasingly complex regulatory tasks in the nineteenth century, especially concerning such matters as railroad transport and irrigation, this strategy of delegation of legislative authority to executive commissions acquired considerable appeal.

A pure separation-of-powers understanding of the Fourteenth Amendment's Due Process of Law Clause might forbid the delegation outright, on the ground that executive actors can perform only executive functions. But once that version of due process of law has been dismissed as implausible in the context of state governments, the permissibility of the delegation is purely a matter of state law. Some states might choose to forbid their legislatures from passing off their powers, but others might permit it.

If a state legislature delegates tax-setting or rate-setting authority to an agency or commission, it is effectively allowing the agency or commission to deprive people of property. The legislature could, we are assuming, effect the particular deprivation in question directly without violating the Due Process of Law Clause. (On the other side of the coin: If a particular deprivation is for some reason substantively invalid, it is hard to see how it could become valid by virtue of legislative delegation.) If the legislature sets a general norm, the default assumption would be that the norm must be applied in the courts, through ordinary judicial processes that conform to the model of due process of law. In those circumstances, any deprivations occur only through and after due process of law in the strongest sense of that term. The interposition of an agency or commission, however, changes the field. The deprivation no longer occurs through court processes, nor does it happen through the direct action of the legislature. The executive actor, in this scenario, is making rather than enforcing law by hypothesis. Couldn't one see the minimum content of the Fourteenth Amendment's Due Process of Law Clause as a constraint on this kind of executive action, given that the principle of legality is first and foremost concerned with executive action that makes its own law to enforce?

That is precisely the move that was made, sometimes directly and sometimes indirectly, by many of the post-Civil War due process of law cases. The Court suggested this result in *Spencer v. Merchant*,<sup>145</sup> which held that the legislature could fix and apportion the tax itself,<sup>146</sup> but noted in dictum that “[w]hen the determination of the lands to be benefited is intrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their

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<sup>145</sup> 125 U.S. 345 (1888).

<sup>146</sup> See *id.* at 356. Well, maybe not quite. Relying on the prior decision in *Davidson*, the Court added the qualification: “If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.” *Id.* at 355-56. The legislature did not have an entirely free hand.

lands are benefited, and how much.”<sup>147</sup> Delegation, like magic, has its price, and the price charged by the Court in this analysis is the imposition of procedural requirements when legislative power is exercised by executive agents.

This delegate-your-legislative-power-and-lose-your-procedural-free-ride doctrine gained steam (no pun intended) in 1890 in *Chicago, M. & St. P. Ry. Co. v. State of Minnesota ex rel Railroad and Warehouse Commission*.<sup>148</sup> The Minnesota legislature delegated to a railroad commission the power to determine whether railroad rates are unfair or unequal, to set fair and equal rates, and to force those rates on the railroads through mandamus actions. As construed by the Minnesota courts, determinations of (un)fair or (un)equal rates by the commission were not judicially reviewable.<sup>149</sup> Explained the Court:

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, conflicts with the constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice . . . . No hearing is provided for; no summons or

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<sup>147</sup> *Id.* at 356.

<sup>148</sup> 134 U.S. 418 (1890).

<sup>149</sup> *See id.* at 456.

notice to the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission, -- in fact, nothing which has the semblance of due process of law . . . . The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.<sup>150</sup>

Here we have a full-blown theory of “procedural due process” recognizable in its broad outlines to modern eyes. When legislatures delegate their power to make law, the Court seems to say, they must delegate that power to courts or, at the very least, to executive agencies that employ judicial-like procedures. The principle of legality thus morphed into a junior-varsity non-delegation doctrine that does not actually forbid state legislative delegations but which requires judicial, or judicial-like, proceedings to substitute for legislative judgment.<sup>151</sup>

There is, of course, a big difference between judicial proceedings and judicial-like proceedings. The latter can take place within executive agencies, and while they may have many of the trappings of judicial proceedings, such as notice and hearing, they will not necessarily have all of the bells and whistles, such as an impartial adjudicator and, most conspicuously, a jury. If the legislature delegates authority to an executive agency or commission (or perhaps

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<sup>150</sup> *Id.* at 456-58.

<sup>151</sup> I am not the first person to focus on the importance of legislative delegation in these cases. See Matthew J. Steilen, *Due Process as Choice of Law: A Study in the History of a Judicial Doctrine*, 24 WM. & MARY BILL RTS. J. 1047, 1086 (2016); Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223. Professor Woolhandler emphasizes a distinction between cases involving rate-setting and tax assessments, finding that the latter were really the origins of what we now call procedural due process. See *id.* at 234-38. She may very well be right about that as an historical matter. By the end of the nineteenth century, however, any such distinction had effectively disappeared.

corporation), does it satisfy late nineteenth-century notions of due process of law if the agency provides notice and a right to some kind of hearing, short of full-blown judicial determinations?

The Court's unsurprising answer was yes. As was explained in *Fallbrook Irrigation Dist. v. Bradley*,<sup>152</sup> an important late nineteenth-century case that was understood to be a test case for the many irrigation districts springing up throughout the western states: "The legislature, not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and therefore it would be necessary to give a hearing at some time, to those interested, upon the question of fact, whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient."<sup>153</sup> Here the assumption was that irrigation districts, which paid off their bonds by levying assessments against property within the districts, were valid only if the assessments on land bore some relationship to the benefits to that land. If facts regarding those assessments were going to be determined by executive agents rather than legislatures or courts, there had to be hearings of some kind at the agency level.<sup>154</sup> It is incidental to this story that the assumption of a requirement of rough proportionality, which had teeth for a while,<sup>155</sup> soon gave way to a more deferential view of the state's assessment power.<sup>156</sup>

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<sup>152</sup> 164 U.S. 112 (1896).

<sup>153</sup> *Id.* at 167.

<sup>154</sup> On the important connection between the integrity of fact-finding and judicial requirements of procedure, see Woolhandler, *supra* note 151, at 235-41.

<sup>155</sup> See *Village of Norwood v. Baker*, 172 U.S. 269, 278-79 (1898).

<sup>156</sup> See *French v. Barber Asphalt Paving Co.*, 181 U.S. 324 (1901) (limiting, by a 6-3 vote, the holding in *Norwood*).

The idea that *some* executive procedures of notice and hearing, even if they do not approach the full magnificence of a common-law judicial trial, are both necessary and sufficient to validate executive exercises of delegated legislative authority found perhaps its definitive statement in one of the most famous of the post-Civil War due process of law cases. In *Londoner v. City and County of Denver*,<sup>157</sup> the Court faced the then-latest in a long line of cases challenging state tax assessment mechanisms under the Fourteenth Amendment Due Process of Law Clause.<sup>158</sup> Colorado gave its local governments unusual autonomy, though that did not seem to make a difference in the decision. The Denver City Council sent out tax bills to local property owners to pay for street paving. There were numerous irregularities in the process leading up to those tax bills; as Professor Steilen aptly remarks, “[o]ne catches a distinct whiff of corruption.”<sup>159</sup> None of that, however, raised a federal constitutional claim. The landowners opposing the tax bills got their case into federal court by claiming, as was factually true, that they had never had the opportunity for an in-person meeting with the City Council, presumably to they see if the city council members were willing to lie to their faces (as they seemed quite willing to lie in written documents). “From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them.”<sup>160</sup> They were allowed to file pieces of paper with the city council but nothing more, and the city council wildly misrepresented those filed papers in its

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<sup>157</sup> 210 U.S. 373 (1908).

<sup>158</sup> For an epic-length summary of the nineteenth-century cases, see *Barber Asphalt Paving Co.*, 181 U.S. at 328-45. For a briefer overview of the highlights, see Steilen, *supra* note 151, at 1079-85.

<sup>159</sup> *Id.* at 1087.

<sup>160</sup> 210 U.S. at 385

written issuances.<sup>161</sup> In now-famous language, the Court both reiterated its delegation-based theory of due process of law and held that some kind of oral proceeding was necessary under the facts of this case:

In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states . . . . But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing . . . .

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief: and, if need be, by proof, however informal.<sup>162</sup>

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<sup>161</sup> The city council averred, in approving the tax assessments, that “no complaint or objection has been filed or made against the apportionment of said assessment . . . but the complaints and objections filed deny wholly the right of the city to assess . . . .” *Id.* at 384-85. This was transparently false. *See id.* at 382.

<sup>162</sup> *Id.* at 385-86.

Here we have the familiar foundations of modern due process law. The key element is now the kinds of procedures that executive agents employ, not whether the executive agent complies with the principle of legality. The move from substance to procedure is complete.

To carry the story to the present day, one would have to stop at many stations. There is the station, seven years later, at which Justice Holmes, who had dissented in *Londoner*, wrote for a majority in *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*<sup>163</sup> that generalized, rather than site- or block-specific, taxation does not require any kind of notice or hearing – an idea that has translated into the doctrine that agency rulemakings of sufficient generality are not subject to due process analysis. One would have to trace how the delegation element in this analysis dropped out of sight, leaving the post-Civil War due process framework applicable to *all* state and local executive deprivations of life, liberty, or property.<sup>164</sup> One would need to track through the process by which the content of life, liberty, or property came to include government benefits, again vastly expanding the universe of actions subject to due process scrutiny. One would need to explore how the procedural requirements of this expanded universe morphed from a vague but emphatic requirement that agencies provide whatever procedures are fair under all of the facts and circumstances of the particular case into a three-factored utilitarian calculus.<sup>165</sup> Most pertinently to this project, one would need to see how this framework that developed under the Fourteenth Amendment became applicable, through a kind of reverse-incorporation, to federal agency action under the Fifth Amendment. After all, if the Fifth and Fourteenth Amendment’s Due Process of Law Clauses must mean the same thing, then

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<sup>163</sup> 239 U.S. 441 (1915).

<sup>164</sup> For a good start to the telling of this story, see Woolhandler, *supra* note 151, at 258-60.

<sup>165</sup> Two co-authors and I have traced that particular development in prior work. See Lawson, Ferguson & Montero, *supra* note 9.

doctrine developed to deal with the peculiarities of state executive action will also become applicable to federal administrative action. This, of course, entails a gross misinterpretation of the Fifth Amendment's Due Process of Law Clause, shearing it entirely free of its roots in the principle of legality.

It is beyond this project to say whether it would be a good or bad thing to have a due process doctrine in which the Fifth Amendment provision means simply the principle of legality (and is entirely redundant for that reason) while the Fourteenth Amendment provision has a very different application – whether that be modern law, the delegation-based doctrine of the late nineteenth century, a hard requirement of state compliance with separation of powers, or something completely different grounded in antebellum state case law it is unnecessary to say here. My goal has been only to explore the original meaning – or, rather, non-meaning – of the Fifth Amendment's Due Process of Law Clause and to suggest how the ratification of the Fourteenth Amendment generated problems whose answers, as a matter of original meaning, are very far from obvious, but whose effect on the Fifth Amendment have been profound. Even if modern doctrine will not de-couple the Fifth and Fourteenth Amendments, that de-coupling is essential to recovery of the former's original meaning.