

EXPOSING THE CONTRADICTION: AN ORIGINALIST'S APPROACH TO UNDERSTANDING WHY SUBSTANTIVE DUE PROCESS IS A CONSTITUTIONAL MISINTERPRETATION

Jason A. Crook*

*“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”*¹

INTRODUCTION

Few phrases in American jurisprudence have created more of a stir or inspired greater controversy than the seventeen words that comprise the due process clause of the Fourteenth Amendment. Drafted by the Reconstruction Congress in the aftermath of the Civil War, these words have been used to strike down maximum-hours legislation,² permit the instruction of foreign languages in schools,³ and even establish the right of minors to purchase contraceptives.⁴ In light of its linguistic incongruity and the versatility of its judicial precedents, one could fairly state that the meaning of the Fourteenth Amendment's due process clause has been the subject of passionate debate and varying interpretation ever since its ratification in 1868.⁵

Recognizing the level of confusion that the due process clause produces, it may well be asked whether substantive due process is a contradiction of terms.⁶ The text of various documents spanning the history of Western Civilization and

* J.D., University of Mississippi School of Law; B.B.A., B.A., Middle Tennessee State University. Mr. Crook is a former staff aide to the Honorable Bart Gordon, Chairman of the House Committee on Science and Technology, and the author of numerous publications including *Corporate-Sovereign Symbiosis: Wilson v. ImageSat International*, *Shareholders' Actions*, and *the Dualistic Nature of State-Owned Corporations* and *From the Civil War to the War on Terror: The Evolution and Application of the State Secrets Privilege*. He currently resides in London and may be reached for comment at crook.jason@gmail.com.

¹ U.S. CONST. amend. XIV, § 1.

² *Lochner v. New York*, 198 U.S. 45, 52-53 (1905).

³ *Meyer v. Nebraska*, 262 U.S. 390, 397, 399-402 (1923).

⁴ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684, 694 (1977).

⁵ CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 114 (1912). “[A]fter five hundred and sixty-seven cases involving an interpretation of the ‘due process of law’ clause under the Amendment had been considered . . . Mr. Justice Holmes [could only say] ‘What is due process of law depends on the circumstances.’” *Id.*

⁶ “[T]he whole idea that the Due Process Clauses have anything to do with the substance of legislation, as opposed to the procedures that are used by the government, is subject to the standard objection that because ‘process’ means procedure, substantive due process is not

more than two-hundred state cases from the years immediately surrounding the Fourteenth Amendment's ratification suggests the following conclusion: substantive due process is a contradiction of terms or, at a minimum, an interpretation of the due process clause that goes well beyond what it was originally intended to mean. In support of this conclusion, this Article considers the language of the due process clause as it has existed at various points throughout history, as well as analyzing the meaning that judges, legislatures, scholars, and kings have given these words.

Admittedly, analyzing the due process clause is difficult even under the best of conditions; in this instance, it becomes all the more challenging given the trouble many courts have in articulating how substantive due process even works. As the Fifth Circuit aptly observed in *Schaper v. City of Huntsville*,⁷ substantive due process is "an area of the law famous for its controversy, and not known for its simplicity."⁸ Are the courts to define substantive due process as "a constitutional cause of action that leaves the door 'slightly ajar [sic] for federal relief in truly horrendous situations'"⁹ or as "a modest limitation that prohibits government action only when it is random and irrational"?¹⁰ Is the principle best seen as the "outer limit on the legitimacy of governmental action"¹¹ or as "an oxymoron if there ever was one"?¹²

It would be far too convenient to end such an analysis with the Eleventh Circuit's conclusion that "substantive due process is a puzzling concept."¹³ While such an observation is undoubtedly true, the controversy that the topic raises and the level of confusion it produces in the courts correctly demand a closer look at one of the Constitution's most intriguing clauses. What did the drafters of the Fourteenth Amendment really mean by a deprivation of life, liberty, or property without "due process of law"? How did an amendment designed to protect the rights of freed slaves acquire the power to invalidate state education statutes and abortion regulations? Before determining whether substantive due process is a contradiction of terms, it is first necessary to consider the concept's origin.

SENATUS POPULUSQUE ROMANUS

While a comprehensive analysis of the due process clause could begin at any number of points throughout history, it would be fundamentally unwise to bypass its formative period and rush into the linguistic debate about what the "substantive" part really means. After all, why did the principle of due process

just an error but a contradiction in terms." John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997).

⁷ *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987).

⁸ *Id.* at 716.

⁹ *Clark v. Boscher*, 514 F.3d 107, 112 (1st Cir. 2008) (quoting *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992)).

¹⁰ *Gen. Auto Serv. Station v. City of Chicago*, 526 F.3d 991, 1000 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1983 (2009).

¹¹ *Natale v. Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999).

¹² *United States v. Fitzgerald*, 724 F.2d 633, 639 (8th Cir. 1983) (en banc) (Arnold, J., concurring).

¹³ *McKinney v. Pate*, 20 F.3d 1550, 1567 (11th Cir. 1994) (Edmondson, J., concurring).

emerge when it did and what caused it to emerge in the first place? What type of society would need such a clause and how would this juridical measure protect it? Simply put, to fully understand the contradictory nature of substantive due process, it is best to begin such an analysis at the beginning and consider the events that led to the concept's formation and the unique conditions that shaped its early evolution.

In many ways, the story of due process begins with the overthrow of the Roman monarchy and the establishment of the Roman republic. Four-hundred and fifty years before the birth of Christ, an administrative commission known as the Decemvirate undertook a massive project to consolidate Roman law into a single unified code.¹⁴ After much work and diligent study, the result was a promulgation known as the Twelve Tables—a simplified collection of law meant to apprise the Roman citizenry of their basic civil rights.¹⁵ While the majority of this legal publication has been lost to history, a surviving fragment from Tabula Nona (Table Nine) is notable for its stance on public law: *De capite civis, nisi per maximum comitium ne ferunto*. Or, as translated into English by T. Lambert Mears, “Only the great comitium (‘comitia centuriata’) has the right of legislating so as to inflict a punishment on a citizen involving his life, his liberty, or his civic rights.”¹⁶

Although juridical commentary from this era is scarce, J.B. Moyle suggests that including such a provision in the heart of the Republic's governing structure indicates that the provision primarily operated to encourage a system of checks and balances between “the principles of democracy and oligarchy”¹⁷ that competed for authority during the Monarchical and early Republican periods:

The nomination of the king, or supreme executive magistrate, lay with the senate, but required confirmation by the comitia, which, by a *lex curiata*, invested him with an imperium of life-long duration, whereby he became, externally, the leader of the host in arms, internally, the depository of the highest administrative functions of government. On the other hand, it was to the *populus* alone, assembled in its comitia, that the legislative function belonged.¹⁸

With such broad authority placed in the hands of one man, granting the comitia centuriata the exclusive power to inflict punishments involving a deprivation of life, liberty, or civic rights ensured that multiple individuals would have oversight of such a significant matter and minimized capricious prosecutions by the royal authority.¹⁹ However, this safeguard operated in a purely procedural context, as the law did not concern itself with the substance of the

¹⁴ 1 J.B. MOYLE, *IMPERATORIS IUSTINIANI INSTITUTIONUM LIBRI QUATTUOR* 13 (1883).

¹⁵ *Id.* at 13-14. In this regard, the Twelve Tables also provided an early framework for what would now be known as rules of civil procedure: “[T]he law of procedure, as to which we have important fragments, was settled upon a basis which gave justice a fair chance of being administered by saving from magisterial caprice the decision of most points upon which the successful conduct of an action depended.” *Id.*

¹⁶ THE TWELVE TABLES, TABLE NINE (T. Lambert Mears trans.), reprinted in T. LAMBERT MEARS, *THE INSTITUTES OF GAIUS AND JUSTINIAN, THE TWELVE TABLES, AND THE CXVIIITH AND CXXVIITH NOVELS* 588 (1882).

¹⁷ MOYLE, *supra* note 14, at 4.

¹⁸ *Id.* (citation omitted).

¹⁹ See THE TWELVE TABLES, *supra* note 16, at 588.

underlying deprivation, but rather with the political institution that determined whether the deprivation would occur.²⁰ Even as the Republic transitioned into the Empire some five centuries later, this basic law remained in effect and was not superseded until some 984 years after its enactment by the promulgation of the Justinian Code.²¹ Although it might be a stretch to claim that contemporary due process was first forged in the Roman assembly, the parallels between *Tabula Nona* and the Fourteenth Amendment are clearly discernable.

With the conquest of southern Britannia by the Emperor Claudius in A.D. 43, *Tabula Nona* and the rest of Roman culture began to influence the barbarian tribes of modern Great Britain.²² British society had achieved a modicum of development by the time the first legions arrived, but it was also plagued with recurring warfare and tribal unrest.²³ As Rome's presence expanded across the island, however, the Empire's homogenizing influence began to permeate most areas of life until it redefined even the very nature of criminal procedure.²⁴ With respect to the charge of treason, Roman law established that:

the death penalty was not pronounced unless the accused confessed or all witnesses agreed; the testimony of one witness alone, no matter what his rank, was insufficient [to convict]; all evidence had to be given on oath; a person was not legally accused until the accusation had been presented in writing; and a quick trial was mandatory.²⁵

Three and a half centuries later, political decay and external assault had weakened Rome's authority to the point that British forces were recalled from their garrisons to defend the imperial heartland against attack.²⁶ In the midst of this military vacuum, Britannia was quickly left to its own defense, inevitably resulting in its subjugation by the invading Saxons—the Germanic tribe who quickly “became their tyrants, and formed seven Saxon kingdoms upon the ruins of the conquered country.”²⁷ Although the history of the Saxon heptarchy is notable in its own right, it was not until the reign of Alfred the Great in the late 800s that this feudal society developed one of the defining attributes of modern due process:

²⁰ The *Comitia Centuriata* “was exclusively taken to represent the State as embodied for military operations. [It], therefore, had all powers which may be supposed to be properly lodged with a General commanding an army, and, among them, it had authority to . . . inflict capital punishment. . . . So long as criminal jurisdiction was confined to the legislature . . . it was easy to prefer indictments for graver crimes” HENRY SUMNER MAINE, *ANCIENT LAW* 387-88 (2d ed. 1863).

²¹ MOYLE, *supra* note 14, at 15.

²² See LEONHARD SCHMITZ, *A MANUAL OF ANCIENT GEOGRAPHY* 251 (1857).

²³ EDWARD CONYBEARE, *ROMAN BRITAIN* 52 (1903) (“Tribes absorbed or destroyed by conquering tribes, tribes confederating with others under a fresh name, this or that chief becoming a new eponymous hero,—such is the ceaseless spectacle of unrest of which the history of ancient Britain gives us glimpses.”).

²⁴ See *id.* at 165-66 (“So profound was the quiet that for a whole generation Britain vanishes from history altogether. . . . But we may be sure that under such rulers . . . Roman civilization was getting an even firmer hold.”).

²⁵ Note, *Historical Concept of Treason: English, American*, 35 *IND. L.J.* 70, 71 (1959).

²⁶ CARADOC OF LHANCARVAN, *THE HISTORY OF WALES* 1 (Powell trans.) (1774) (“When the Roman empire . . . became sensibly unable to repress the perpetual incursions of the Goths, Huns, Vandals, and other barbarous invaders; it was found necessary to abandon the remotest Parts . . . and to recal [sic] the Roman forces that defended them, the better to secure the inward, and the provinces most exposed to the depredations of the Barbarians.”).

²⁷ SAMUEL JOHNSON, *A HISTORY AND DEFENCE OF MAGNA CARTA* ii (1769).

Convinced that oppression naturally follows power, to screen the humble from the tyranny of the great, [Alfred] instituted *trials by jury*; by which, in all criminal cases it was ordained, that twelve men should decide whether the accused person was guilty of the offence laid to his charge or not, and that the judge should pronounce sentence agreeably to their verdict. These twelve jurymen were chosen from amongst the peers of the delinquent. . . . The peers of the realm . . . [were to be] judged by those of their own rank; that is, by the rest of the lords; and the commoners by *their equals* also. The only difference between the lords and commons in this matter, [was], that *every* peer ha[d] a right to give his voice at the trial of any culprit, of the former denomination; and that twelve men only, [were] to acquit or condemn any person that [was] classed amongst the latter.²⁸

With the introduction of jury trials into Saxon law, Alfred the Great helped lay an important judicial foundation upon which future kings built. This cornerstone of liberty was so important that when William the Conqueror was crowned on Christmas Day in 1066, he “made a compact to insure the liberties of his subjects, by swearing the same coronation oath which had usually been taken by the Saxon monarchs.”²⁹ William’s ascension meant that Saxon rule was finally at an end, but, like the Romans who had gone before, Saxon culture had left its mark.

THE RISE OF MAGNA CHARTA

By itself, a discussion of Romano-Saxon British culture does not shed an abundance of light on the contemporary meaning of the due process clause. Nevertheless, it is important to have such a familiarity to appreciate the historical context and legal tradition that gave rise to the Magna Charta. Ratified by King John in 1215, this “Great Charter of Liberty” is conventionally regarded as embodying “the undoubted inheritance of England, being *their antient* [sic] *and approved laws*; so antient [sic], that they seem to be of the same standing with the nation . . . [having] passed through all the British, Roman, Danish, Saxon, and Norman times, with little or no alteration in the main.”³⁰

It is commonly overlooked that the Great Charter of Liberty was not the first of its kind.³¹ Rather, by the time William the Conqueror’s great-great-grandson King John was forced to place his seal upon the parchment at Runnymede, more than 113 years had passed since his great-grandfather, Henry I, had done nearly the same thing with a voluntary charter outlining the liberties of the British people.³² However, because of the era’s illiteracy rate and the sheer passage of time, the movement to restore the kingdom’s ancient laws and liberties did not truly begin until an archbishop showed a copy of Henry’s faded charter to the earls and barons at Bury St. Edmunds.³³ Armed with the knowledge Henry’s charter provided, a group of nobles assembled in a small country

²⁸ *Id.* at iii-iv. “Peers of the Realm” included Princes, Dukes, Marquesses, Earls, Viscounts, and Barons. JOHN BRYDALL, *JUS IMAGINIS APUD ANGLIOS; OR THE LAW OF ENGLAND RELATING TO THE NOBILITY & GENTRY* 5 (1675).

²⁹ JOHNSON, *supra* note 27, at vi.

³⁰ *Id.* at 3-4.

³¹ *Id.* at 5.

³² *Id.* at 7. See *infra* Appendix for the text of the Coronation Charter of Henry I.

³³ JOHNSON, *supra* note 27, at 7.

church on an autumn day to swear before the altar of God “[t]hat, if the King should refuse to confirm by his charter the said laws and liberties (being the rights of the kingdom) they would make war upon him till he did.”³⁴

After introducing their proposal to the King at Christmas, the following Easter:

[F]ive and forty Barons, with two thousand Knights, and all their retainers, met in arms at Stamford; they proceeded to Brakesley, in the direction of Oxford, where the King then was; and at Brakesley, on Easter Monday, the Primate and the Earl of Pembroke met them, and required on the King’s part to know their specific demands.³⁵

After reiterating the oath they had sworn the previous fall concerning the confirmation of their ancient liberties, the barons then delivered to the King’s messengers a list of the rights and privileges for which they sought restoration.³⁶ “When their demands were stated to John by [Archbishop] Langton, [however], he asked, why they did not demand his kingdom also, and swore that he would never grant them liberties, which should make himself a slave.”³⁷

Being thus repulsed, the barons quickly made good on their oath to make war against the King. Siege walls went up around Northampton, Bedford quickly fell into their hands, and soon thereafter, the barons “were invited to London, with assurance that the gates should be opened in the night, by some of the chief citizens.”³⁸ Finding himself outmaneuvered through strength and subterfuge, “John then felt the necessity of submission” and finally placed his seal upon the Magna Charta at Runnymede.³⁹ While many of the provisions in the document dealt with relatively mundane subjects,⁴⁰ the Charter also contained a clause of incalculable importance: “No freeman shall be taken, nor imprisoned, nor disseized, nor out-lawed, nor exiled, nor destroyed in any manner; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.”⁴¹

It had been more than 1600 years since the language of Tabula Nona had been etched in the Roman assembly and nearly 1200 years since the imperial legions had carried it across the English Channel.⁴² In that time, the manifestation of sovereign authority had shifted as the Comitia Centuriata eventually gave way to the Roman emperors and then to the British kings. Yet through it all, the idea remained that the people possessed certain fundamental liberties that could not be wantonly ignored. In 1354, Edward III further refined this principle with the adoption of the Liberty of Subject Act, which established that “no man, of what estate or condition soever, shall be put out of land or tene-

³⁴ *Id.* at 8.

³⁵ ROBERT SOUTHEY, *THE BOOK OF THE CHURCH* 165 (4th ed. 1837).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 166.

⁴⁰ Indicative of such measures is the provision that “[a]ll merchants may, with safety and security, go out of England, and come into England, and stay, and pass through England by land and water, to buy and sell without any evil tolls” JOHNSON, *supra* note 27, at 207.

⁴¹ *Id.*

⁴² *See supra* notes 14, 22 and accompanying text.

ment, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.”⁴³

Believed to be the first recorded use of the phrase “due process of law,” this statute, along with the Magna Charta before it, helped solidify centuries of ancient Romano-Saxon British liberties into a more comprehensible form.⁴⁴ Notable as this development was, however, it is even more remarkable considering how little the underlying principle had changed in the course of eighteen centuries:

[450 B.C.] Only the great comitium has the right of legislating so as to inflict a punishment on a citizen involving his life, his liberty, or his civic rights.⁴⁵

[A.D. 1215] No freeman shall be taken, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor destroyed in any manner; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land.⁴⁶

[A.D. 1354] No man, of what estate or condition soever, 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.⁴⁷

Even though the underlying notion that certain fundamental rights could not be taken away without adhering to some process remained relatively unchanged for nearly two-thousand years, one important structural change took place. When the Twelve Tables were first placed in the Roman forum, the *Tabula Nona* charged the *Comitia Centuriata*—a legislative assembly—with passing judgment on punishments involving a deprivation of life, liberty, or civic rights.⁴⁸ However, thirteenth-century England had no comparable legislative institution. In fact, Parliament would not become a fully functioning legislature for another two-hundred years; moreover, any *ad hoc* committee the king summoned often lacked the power to provide anything more than an advisory opinion.⁴⁹

In the absence of a legislative assembly like the ancient *Comitia*, the champions of the Magna Charta realized that some other form of popular protection was necessary to safeguard the people’s liberties against royal encroachment. The result, as seen through the language of the Magna Charta, was an

⁴³ 2 DAVID HUME, *THE HISTORY OF ENGLAND* 433 (1826); accord WILLIAM D. GUTHRIE, *MAGNA CARTA AND OTHER ADDRESSES* 22 (1916).

⁴⁴ GUTHRIE, *supra* note 43, at 22.

⁴⁵ *THE TWELVE TABLES*, *supra* note 16, at 588 (excerpt from the *Tabula Nona*).

⁴⁶ *MAGNA CHARTA* cl. 39, reprinted in JOHNSON, *supra* note 27, at 207.

⁴⁷ HUME, *supra* note 43, at 433 (citing Liberty of Subject Act, 28 Edward III cap. 3 (1354)).

⁴⁸ See *THE TWELVE TABLES*, *supra* note 16, at 588.

⁴⁹ B.C. SKOTTOWE, *A SHORT HISTORY OF PARLIAMENT* 17 (1886). During the reign of Henry IV:

It was natural that a king whose sole title was that of election by Parliament . . . should be compelled to assume to a very large extent the position of constitutional monarch . . . The old rights, therefore, were asserted and exercised with the regularity of routine, and completed by a few fresh improvements. The entire control of taxation was finally assured to the Commons by their successful assertion, in 1407, of the axiom that all money-bills must originate in the Lower House. Their right to concur in legislation was placed on a firmer footing by the practice . . . of bringing in their petitions in the form of complete statutes, under the name of Bills, with the view of insuring that, for the future, the laws entered on the rolls of Parliament should correspond exactly to their desires.

Id.

appeal to the ancient customs and laws of the country: a recognition that no freeman would be deprived of his fundamental rights to life, liberty, or property except through “the lawful judgment of his peers, or by the law of the land.”⁵⁰ This reference to “the law of the land” is particularly significant since “[t]hese rights and liberties belonged to all the people of England, and they adhered in each person as a person. Their force did not depend on their written delineation; they existed in the customary or unwritten law of England that went back to time immemorial.”⁵¹

Nearly three centuries after the Liberty of Subject Act, Edward Coke’s famous Institutes on the Laws of England further illuminated the relationship between “the law of the land” and “due process of law.” As described in the Second Part of the Institutes:

For the *true sense* and exposition of these words [but by the law of the land], see the statute [Edward’s Liberty of Subject Act] where the words, by the law of the land, are rendred [sic] *without due process of law* . . . that is, *by indictment* or presentment of good and lawfull [sic] men, where such deeds be done *in due manner*, or *by writ originall* [sic] of the common law.

. . . .

No man [may] be put to answer without presentment before justices, or thing of record, or by due process, or by writ originall [sic], according to the old law of the land. Wherein it is to be observed, that this chapter is but declaratory of the old law of England.⁵²

Additionally, the following page of the Institutes evidences that “Coke’s mind [was] fixed upon the matter of procedure” when postulating on this connection between due process and law of the land:⁵³

[H]ere it is to be knowne [sic], in what cases a man by the law of the land, may be taken, arrested, attached, or imprisoned . . . [I]t is to be understood, that proces [sic] of law is two fold, viz. By the kings writ, or by due proceeding, and warrant, either in deed, or in law without writ.⁵⁴

Thus, Edward III’s “due process of law” was simply a synonym for John’s “law of the land” in the Magna Charta.⁵⁵

TWO REVOLUTIONS AND A CONSTITUTIONAL CONUNDRUM

Although the rights and liberties outlined in the Magna Charta were supposed to represent the inalienable heritage of the British people, due process of the law was not always diligently observed. For example, in 1627:

King Charles I attempted to raise money by forced loans [and] five English knights resisted, [causing] Charles [to have] the resisters arbitrarily imprisoned. This in turn led to the popular reinvocation of the Magna Carta and the reiteration of the rights of

⁵⁰ See MAGNA CHARTA cl. 39, reprinted in JOHNSON, *supra* note 27, at 207.

⁵¹ Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1423 (1999).

⁵² EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50 (1797) (emphasis added).

⁵³ 1 ANDREW C. McLAUGHLIN & ALBERT BUSHNELL HART, CYCLOPEDIA OF AMERICAN GOVERNMENT 614 (1914).

⁵⁴ COKE, *supra* note 52, at 51.

⁵⁵ McLAUGHLIN & HART, *supra* note 53, at 614.

a subject to his property and to no imprisonment without the legal judgment of his peers.⁵⁶

After Charles's execution for treason, Cromwell's personal rule as Lord Protector, and the restoration of a weakened monarchy in the Glorious Revolution of 1688, a victorious Parliament "set forth a Declaration of Rights that quickly became enshrined in English constitutionalism . . . [It] declared illegal certain actions of the crown . . . [and] asserted certain rights and freedoms possessed by Englishmen . . ."⁵⁷ As Wood writes:

So convinced were Englishmen in the decades following 1689 that tyranny could come only from a single ruler that they could hardly conceive of the people tyrannizing themselves. Once Parliament became sovereign . . . the English people lost much of their former interest in codifying and listing their personal rights. . . .

By the time of the American Revolution, therefore, most educated Englishmen had become convinced that their rights existed only against the crown. Against their representative and sovereign Parliament, which was the guardian of these rights, they existed not at all.⁵⁸

This attitude of unwavering faith in popular assemblies quickly took hold in post-Revolution America.⁵⁹ Within a few years, however, "the democratic despotism that had seemed so illogical and contradictory in the years 1775 and 1776 had become only too real for many of the gentry leaders. . . . [U]nlike England, the representative legislatures were the *source* of the problem, not the solution," and as a result, "some other bulwark for individual rights would have to be found."⁶⁰ As Corwin observed, these early legislatures were prone to pass:

all sorts of "special legislation" . . . that is, enactments setting aside judgments, suspending the general law for the benefit of individuals, interpreting the law for particular cases, and so on and so forth. So long, of course, as there were Tories to attain of treason this species of legislative activity had some excuse, but hardly was this necessity past than it came into great disrepute even with some of the best friends of democracy, by whom it was denounced not only as oppressive but as not properly within legislative power at all.⁶¹

With the ratification of the Fifth Amendment to the United States Constitution in 1791,⁶² the Founding Fathers sought to incorporate a bulwark into the

⁵⁶ Wood, *supra* note 51, at 1424-25.

⁵⁷ *Id.* at 1425.

⁵⁸ *Id.* at 1425-26.

⁵⁹ "Many thought that the new state legislatures, as the representatives of the people, could do for the public whatever the people entrusted them to do. Some argued that the needs of the public could even override the rights of individuals. Did not the collective power of the people . . . supercede [sic] the rights of the few?" *Id.* at 1433.

⁶⁰ *Id.* at 1434-35 (emphasis added). "[I]n the new republics, where there were no more prerogative rights, could the people's personal rights meaningfully exist apart from the people's sovereign power expressed in their assemblies? . . . What was the need of protecting the people's rights from themselves?" *Id.* at 1434.

⁶¹ Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 375 (1911).

⁶² "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

heart of the national order. In choosing the language that would comprise the federal due process clause, the drafters of the Fifth Amendment relied on a similar clause that existed in nearly all of the earlier pre-American state constitutions.⁶³ Pennsylvania's constitution, for instance, held that "in all criminal prosecutions, the accused . . . cannot be compelled to give evidence against himself; nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land."⁶⁴ Similarly, Maryland's constitution stated that its citizens were:

entitled to the common law of England, and the trial by jury, according to the course of that law

. . . .

That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land

. . . .

That no freeman ought to be taken, or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land.⁶⁵

Even in the Northwest Ordinance, an act passed by the Confederate Congress in 1787 and modified by the United States Congress in 1789, the fundamental language of the Magna Charta was recognizable: "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land"⁶⁶

Unlike the circumstances faced by the drafters of the Magna Charta, however, the circumstances before the drafters of the Fifth Amendment did not force them to be on guard against the usurpations of a tyrannical monarch, but rather against the potential—and equally-undesirable—usurpations of a tyrannical populace.⁶⁷ Absent a constitutional check on popular will, there was no way to stop one segment of the population from cheerfully voting away the fundamental rights of another. A deprivation of life or liberty would be no less unjust merely because a legislature dictated it rather than a king. Due process of law thus performed a critical function; it ensured that popular sovereignty did not degenerate into a form of mob rule cloaked with the auspices of political legitimacy.⁶⁸

Useful as the concept of due process was, however, the nation would quickly discover that its practical definition left much to be desired. In *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁶⁹ a case considering

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*" U.S. CONST. amend. V (emphasis added).

⁶³ See THE CONSTITUTIONS OF THE UNITED STATES 121, 149-52 (John Conrad & Co. 1804) (1787).

⁶⁴ *Id.* at 121.

⁶⁵ *Id.* at 149-52.

⁶⁶ *Id.* at 320.

⁶⁷ See Corwin, *supra* note 61, at 375.

⁶⁸ See *id.* at 379 (recognizing that without protection, "what the legislature had given, the legislature could take away").

⁶⁹ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855).

whether the procedure for collecting a customs debt violated the Fifth Amendment's due process clause, the Supreme Court noted:

That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it "due process of law"? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether [something is] due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The [Fifth Amendment] 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.⁷⁰

While it was clear that the government could not enact just any provision in the name of "due process of law," the Court also recognized the challenge of articulating where the limit of this power should lie. After all, it was one thing to say that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in [the] *Magna Charta*,"⁷¹ and another matter entirely to determine whether a particular statute met this centuries-old standard:

To what principles, then, are we to resort to ascertain whether [a] process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself, to see whether [the] process be in conflict with any of its provisions. If not found to be so, we must [then] look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors⁷²

With the adoption of the English common law as the judicial foundation of the states, questions inevitably arose over time about the appropriate meaning of "due process of law."⁷³ Although Justice Curtis clearly signaled in *Murray* that due process was "undoubtedly intended to convey the same meaning as the words, 'by the law of the land,'" in the *Magna Charta*,⁷⁴ what did the phrase "the law of the land" mean? Certainly, there was etymological support for the

⁷⁰ *Id.* at 276.

⁷¹ *Id.*

⁷² *Id.* at 276-77. Reflecting on the interplay between "due process" and "the law of the land," the Court noted that:

Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." . . .

. . . To have followed, as in the state constitutions . . . the words of *Magna Charta*, and declared that no person shall be deprived of his life, liberty, or property but by the judgment of his peers or the law of the land, would have been in part superfluous and inappropriate. To have taken the clause, "law of the land," without its immediate context, might possibly have given rise to doubts, which would be effectually dispelled by using those words which the great commentator on *Magna Charta* had declared to be the true meaning of the phrase, "law of the land," in that instrument, and which were undoubtedly then received as their true meaning.

Id. at 276.

⁷³ Percy Werner, *National Common Law*, 8 S. L. REV. 414, 416 (1882) ("Every State in the Union has now adopted the common law of England . . . with the single exception of Louisiana, and she has adopted it by statute to supply the deficiency of her Criminal Code.").

⁷⁴ *Murray's Lessee*, 59 U.S. (18 How.) at 276.

conclusion that these terms were interchangeable,⁷⁵ but, absent something more, it appeared the Court had merely substituted one linguistic uncertainty for another.

The term “law of the land” had a long-established meaning by the time Justice Curtis rendered it synonymous with “due process of law,” whether or not he intended to adopt that meaning. As early as 1689, legal commentators routinely referred to “the *Common Law* of the Land” when speaking about the principle.⁷⁶ In the war-making context, they observed that “[n]one can levy War within this Realm, without Authority from the King, for to him only it belongeth to levy War, by the Common Law of the Land; to do otherwise, is High Treason, by the said Common Law.”⁷⁷ Likewise, courts in criminal cases recognized that one who makes an affirmative allegation “ought to make precise Proof of it, especially in the Case of a Penal Law made against the Common Law of the Land; for by the Common Law the Acceptance of a second Benefice was not any Avoidance of the first”⁷⁸ or, as stated in the 1737 *Universal Etymological English Dictionary*, simply the “common law.”⁷⁹

The historical view of the common law as a set of judge-made rules does not differ greatly from its contemporary meaning. A Parliamentary resolution passed in 1710 addressing the pleading standard for certain types of criminal complaints evidences the striking similarity between the historical and contemporary meanings of common law:

Because we conceive the Law of the Land, is as much the *Rule of Judicature*, as it is in Inferior Courts of Justice; and since by *the Opinion of all the Judges* in all Prosecutions by Information or Indictment, for writing or speaking, the particular words suppos'd to be Criminal, must be expressly specified in such Information or Indictment; and that this is the *Law of the Land confirm'd by constant Practice*, we conceive, that there is the same Reason, and Justice for specifying in Impeachments, the particular words suppos'd to be Criminal, for otherwise a Person who is Innocent, and Safe by the Law out of Parliament, may nevertheless be condemn'd in Parliament.⁸⁰

Given the abundance of historical support that “the law of the land” is synonymous with “the common law,” the Supreme Court’s decision in *Murray* to equate the term with “due process of law” rationally appears to establish a legal regime under which *due process of law* = *law of the land* = *common law* or, more simply, *due process of law* = *common law*. However, questions remain on how this algebraic simplification works. Does it refer to the judicial procedures of the common law or to some substantive limitation placed upon

⁷⁵ See *supra* notes 52-55 and accompanying text.

⁷⁶ J. FRASER, AGREEMENT BETWIXT THE PRESENT AND THE FORMER GOVERNMENT 61 (1689).

⁷⁷ David Jenkins, A Remonstrance to the Lords and Commons of the Two Houses of Parliament at Westminster, the 21st of February, 1647 in 4 A COLLECTION OF SCARCE AND VALUABLE TRACTS, ON THE MOST INTERESTING AND ENTERTAINING SUBJECTS 451, 453 (1748).

⁷⁸ Sharpe v. French, in 2 THE REPORTS OF THE RESOLUTIONS OF THE COURT ON DIVERS EXCEPTIONS TAKEN TO PLEADINGS, AND OTHER MATTERS IN LAW 544-45 (1718).

⁷⁹ N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (8th ed. 1737).

⁸⁰ ABEL BOYER, THE HISTORY OF THE REIGN OF QUEEN ANNE, DIGESTED INTO ANNALS YEAR THE EIGHTH 296 (1710) (emphasis added).

At first blush, it might appear as if Chief Justice Taney had been mistaken, or at the very least, analytically inconsistent. Specifically, it appeared incongruous to say that the Missouri Compromise deprived a slave owner of his or her “property” without due process of law when Congress passed plenty of laws each year that routinely deprived citizens of their property based upon territorial consideration. Moreover, it seemed nonsensical that Congress lacked the power to regulate the property status of slavery when it could pass a 100% ad valorem tax on any shipment of brandy a citizen brought into the United States.⁸⁸ In both instances, an act of Congress deprived a citizen of some amount of property merely because that property was brought into “a particular Territory of the United States,” and yet one act was perfectly constitutional while the other was not.

Arguably, much of the confusion surrounding the due process clause begins to emerge here in *Scott v. Sandford*. Although Justice Taney used the language of the Fifth Amendment to attack the legality of the Missouri Compromise, he used this language in a particularly unique way. Viewing the excerpt from his opinion once again, it actually contains two parts—first, a reference to the act itself and second, a challenge to its underlying effect: “[A]n act of Congress which deprives a citizen of the United States of his liberty or property [part one], *merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of due process of law* [part two].”⁸⁹ The problem with the Missouri Compromise, it would seem, was not so much that Congress had deprived a citizen of his property, but rather that Congress had deprived the citizen of this particular kind of property in a way that was inherently incompatible with due process.⁹⁰

In contrast with this viewpoint, Justice Curtis in his dissent argued that the history and application of the due process clause did not support such a substantively concerned result. Although the following excerpt from his opinion is lengthy, it nevertheless provides a strong constitutional argument for why the Missouri Compromise did not infringe upon the due process clause:

The only [prohibition] suggested is that clause in the fifth article of the amendments of the Constitution which declares that no person shall be deprived of his life, liberty, or property, without due process of law. . . .

. . . .

. . . [T]his restriction on the legislative power is not peculiar to the Constitution of the United States; it was borrowed from *Magna Charta*; was brought to America

which prohibited a citizen from holding and owning property of this kind in the [affected] territory . . . is not warranted by the Constitution, and is therefore void . . .” *Id.* at 452.

⁸⁸ E.D. OGDEN, TARIFF, OR RATES OF DUTIES PAYABLE ON GOODS, WARES, AND MERCHANDISE IMPORTED INTO THE UNITED STATES OF AMERICA 4 (1846).

⁸⁹ *Scott*, 60 U.S. (19 How.) at 450 (emphasis added).

⁹⁰ It is worth noting that, at least to some in Congress, the common law could also contain a legislative element. Quoting Senator Roberts from the 1816 debate on commerce with Great Britain, “The gentleman from New Hampshire (Mr. Mason) says the ‘law of the land’ is a common law term; but are we thence to go to common law legislation to learn how the Executive can make treaties the law of the land?” JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (FOURTEENTH CONGRESS—FIRST SESSION) 71 (1854).

by our ancestors . . . and has existed in all the States, usually in the very words of the great charter. It existed in every political community in America in 1787, when the ordinance prohibiting slavery north and west of the Ohio was passed.

And if a prohibition of slavery in a Territory in 1820 violated this principle of *Magna Charta*, the ordinance of 1787 also violated it . . . I think I may at least say, if the Congress did then violate *Magna Charta* by the ordinance, no one discovered that violation. Besides, if the prohibition upon all persons, citizens as well as others, to bring slaves into a Territory, and a declaration that if brought they shall be free, deprives citizens of their property without due process of law, what shall we say of the legislation of many of the slaveholding States which have enacted the same prohibition? As early as October, 1778, a law was passed in Virginia, that thereafter no slave should be imported into that Commonwealth by sea or by land, and that every slave who should be imported should become free. A citizen of Virginia purchased in Maryland a slave who belonged to another citizen of Virginia, and removed with the slave to Virginia. The slave sued for her freedom, and recovered it . . . and a similar law has been recognized as valid in Maryland. I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of *Magna Charta* incorporated into the State Constitutions. It was certainly understood by the Convention which framed the Constitution, and has been so understood ever since, that, under the power to regulate commerce, Congress could prohibit the importation of slaves . . . A citizen of the United States owns slaves in Cuba, and brings them to the United States, where they are set free by the legislation of Congress. Does this legislation deprive him of his property without due process of law? If so, what becomes of the laws prohibiting the slave trade? If not, how can similar regulation respecting a Territory violate the fifth amendment of the Constitution?

. . . .

For these reasons, I am of opinion that so much of the several acts of Congress as prohibited slavery and involuntary servitude within that part of the Territory of Wisconsin lying north of thirty-six degrees thirty minutes north latitude, and west of the river Mississippi, were constitutional and valid laws.⁹¹

DUE PROCESS OF LAW AND THE FOURTEENTH AMENDMENT

With the advent of the Supreme Court's decision in *Scott v. Sandford*, the political tensions over slavery that had been quietly simmering for decades finally began to boil over:

The Supreme Court's decision in *Scott v. Sandford* sent shockwaves through all parts of American life. When "the opinion of the court, as written by Chief Justice Taney of Maryland, adjudged the Missouri Compromise law unconstitutional, indignation became open rebellion. The Republican party, the abolitionists, and Northern States repudiated the decision, and declared that . . . Congress should and would treat the decision as a nullity." What had begun as one man's humble quest for freedom had morphed into "nothing short of the nullification of Federal power."⁹²

Five years later, the first shells of war were fired at Fort Sumter and eleven states seceded from the Union.⁹³ By the time the Civil War ended in 1865,

⁹¹ *Scott*, 60 U.S. (19 How.) at 624, 626-27, 633 (Curtis, J., dissenting) (citations omitted).

⁹² Jason A. Crook, *Toward a More "Perfect" Union: The Untimely Decline of Federalism and the Rise of the Homogenous Political Culture*, 34 U. DAYTON L. REV. 47, 55-56 (2008).

⁹³ 1 THE COMTE DE PARIS, HISTORY OF THE CIVIL WAR IN AMERICA 138 (1875).

more than 620,000 Americans would lie dead, and the disruption to civilian infrastructure and legal institutions was as severe as it was unprecedented.⁹⁴

Eight months after the Confederate surrender at Appomattox Courthouse, “Mr. Stevens, the Republican leader in the House, introduced a joint resolution proposing an Amendment to the Constitution of the United States.”⁹⁵ Many in Congress recognized that:

the defect of the Republic [was] that there was no express grant of power in the Constitution to enable Congress to enforce the requirements of the Constitution . . . and . . . that the provisions of the immortal Bill of Rights embodied in the Constitution rested for their execution and enforcement [solely] upon the fidelity of the States.⁹⁶

As the “fidelity” of the states had recently been tested by the fires of civil war, the Congressional leadership believed that the federal government should have “the power to enforce, *in every State of the Union*, the Bill of Rights, as found in the first eight Amendments” if the nation was to achieve the twin goals of political and social reconstruction.⁹⁷

The result, after much deliberation and no small amount of controversy, was the Fourteenth Amendment.⁹⁸ Addressing a number of post-war issues such as the status of the confederate debt and the loyalty requirements for southern representatives, the Amendment also contained a number of long-range constitutional enhancements, including the privileges and immunities clause, the due process clause, and the equal protection clause.⁹⁹

⁹⁴ William Thaddeus Coleman, Jr., *Truths That Unfortunately Were Not, and Still Are Not, Sufficiently Self-Evident*, 148 PROC. OF THE AM. PHIL. SOC’Y 434, 443 (2004).

⁹⁵ HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 56 (1908).

⁹⁶ *Id.* at 56-57.

⁹⁷ *Id.* at 57 (emphasis added).

By the Thirteenth Amendment . . . the freedom of the negro race was assured, but their rights were still at the mercy of State legislation. Some of the former slave states passed laws especially directed against the negro race . . . In some instances they were denied the right to appear in the towns, except in the capacity of menial servants. They were denied the right to purchase land. They were not permitted to testify in cases where a white man was a party. It was felt that national protection was necessary for the freedmen, and the Fourteenth Amendment was proposed to the States, and declared ratified in July, 1868.

LUCIUS POLK MCGEHEE, DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION 19-20 (1906).

⁹⁸ FLACK, *supra* note 95, at 57. As Ransom H. Gillet, a member of the Twenty-Third and Twenty-Fourth Congresses, wrote:

On the 16th of June, 1866, this amendment was transmitted to the several States by the Secretary of State. Tennessee, it is claimed, adopted it on the 12th of July, 1866, and thereupon Congress passed a joint resolution, approved by the President, admitting her into the Union, and her Senators and members to seats. Prior to March, 1867, Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia, ten in all, rejected it. Iowa, California, and Nebraska have not acted upon it. Twenty States have ratified it. This proposed amendment has not been sufficiently ratified to become a part of the Constitution, nor is it expected it ever will.

RANSOM H. GILLET, DEMOCRACY IN THE UNITED STATES 319-20 (1868).

⁹⁹ Section one of the Fourteenth Amendment states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

Although the drafters of the Fourteenth Amendment spoke very little about the meaning of due process when proposing the Amendment, what little they did say suggests a measure of continuity with the Supreme Court's decision in *Murray*. In response to a question from Representative Rogers about what was meant by "due process of law," Representative Bingham famously—if not opaquely—remarked that "the courts have settled that long ago, and the gentleman can go and read their decisions."¹⁰⁰ Frustratingly brief though it might have been, this response is nevertheless significant because it suggests that the Amendment's drafters did not have a fundamentally different understanding of due process beyond that which the Supreme Court had already articulated.

Even the Fourteenth Amendment's phrasing supports the premise that its due process clause was meant to conform in both spirit and effect to the Fifth Amendment's conceptual understanding. Viewed together below, one can see that beyond the introductory "no state/no person" language, the two clauses share the same core words "of life, liberty, or property, without due process of law" even down to the precise placement of the commas:

[The Fifth Amendment] "No person shall be . . . deprived of life, liberty, or property, without due process of law"¹⁰¹

[The Fourteenth Amendment] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"¹⁰²

Shortly after its ratification, the Supreme Court ruled that the Fourteenth Amendment's due process clause was synonymous in meaning to the Fifth Amendment.¹⁰³ Whereas the Fifth Amendment only applies to the federal government, the Fourteenth Amendment extended the due process requirement to the States:

Before the passage of the Fourteenth Amendment the security of the citizens of the several States for due process of law in proceedings by the State lay in its institutions alone. Even if due process was denied, the federal government had no right to

shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

¹⁰⁰ CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

¹⁰¹ U.S. CONST. amend. V.

¹⁰² U.S. CONST. amend XIV, § 1.

¹⁰³ As the Court held in *In re Kemmler*:

As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States . . . so, in the Fourteenth Amendment, the same words refer to that law of the land in each State . . . exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

In re Kemmler, 136 U.S. 436, 448 (1890). Shortly thereafter:

In 1901, the [C]ourt, having occasion to consider the meaning of due process in the Fifth and Fourteenth Amendments [once again], said [in *French v. Barber Asphalt Paving Co.*, 181 U.S. 324]: "While the language of those amendments is the same, yet as they were engrafted 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 provision may be proper." But in the decision of the case before it, the court proceeded "on the assumption that the legal import of the phrase, 'due process of law,' is the same in both amendments."

McGEHEE, *supra* note 97, at 35.

interfere. The Fourteenth Amendment changed this condition of affairs. It made it a matter of national concern that the State should not deny due process to its citizens and to others. It gave to the United States the right to supervise the performance of this duty, and transferred from the State to the Federal Supreme Court the ultimate decision on the question of the presence of due process in all proceedings affecting life, liberty, and property.¹⁰⁴

This transfer of supervisory authority away from the states granted the federal government the power to review the subject matter of state regulations, which were previously beyond its constitutional reach.¹⁰⁵ Four years later, the Supreme Court considered the propriety of one such regulation when a consortium of butchers brought suit against a state-established slaughterhouse monopoly.¹⁰⁶

On March 8, 1869, the Louisiana legislature passed a law “to protect the health of the city of New Orleans, to locate the stock-landings and slaughterhouses, and to incorporate the Crescent City Live-Stock Landing and Slaughter-House Company.”¹⁰⁷ This act declared that:

the company . . . shall have the sole and exclusive privilege of conducting and carrying on the live-stock landing and slaughter-house business within the limits and privilege granted by the act, and that all such animals shall be landed at the stock-landings and slaughtered at the slaughter-houses of the company, and nowhere else.¹⁰⁸

Aggrieved at this monopolistic grant, the plaintiffs—a group of independent butchers—argued that it “deprive[d] them of their property [the right to exercise their trade] without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment” while also “abridg[ing] the[ir] privileges and immunities [as] citizens of the United States.”¹⁰⁹

Aware of the case’s political significance, the Supreme Court took care in giving constructive meaning to the Amendment’s provisions.¹¹⁰ While focusing the majority of its opinion on a discussion of the Amendment’s privileges and immunities clause, the Court also observed that in interpreting the due process clause it was necessary “to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.”¹¹¹ Additionally, with respect to the due process clause, the court observed:

¹⁰⁴ MCGEHEE, *supra* note 97, at 35-36.

¹⁰⁵ *Id.*

¹⁰⁶ Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

¹⁰⁷ *Id.* at 59.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 66. The plaintiffs argued that “[t]he right to labor . . . is past doubt property, and property of a sacred kind. Yet *this* property is destroyed by the act; destroyed not by due process of law, but by charter” *Id.* at 56.

¹¹⁰ *Id.* at 67.

not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members.

Id.

¹¹¹ *Id.* at 72.

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law [This clause, however,] has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal Government.¹¹²

Even though the act was upheld and the Court found that no construction of the due process clause allowed the Court to hold that the Louisiana law was a deprivation of property within the meaning of the Fourteenth Amendment,¹¹³ this decision was notable because the federal Supreme Court passed judgment on a purely state regulation.¹¹⁴

DUE PROCESS OF LAW AND THE STATES

In the 2300 years between the Decemvirate's consolidation of the Roman law¹¹⁵ and the ratification of the Fourteenth Amendment, the principle underlying the due process clause had undergone a number of important evolutionary changes. What had first appeared as a quasi-judicial oversight by a Roman assembly had morphed into an Anglo-Saxon safeguard against royal encroachment before finally transitioning into an American protection against unchecked legislative power.¹¹⁶ Although the historical development of this clause suggests a principal concern with ensuring that certain procedural safeguards were in place,¹¹⁷ it is important to consider the interpretation the various states gave to it before a more complete picture can emerge.

Based on an in-depth review of more than two hundred cases decided between 1845 and 1875, this author concludes that due process of law was understood as a strictly procedural concept and, at the time of the Fourteenth Amendment's ratification, the country's leading jurists did not contemplate a substantive dimension. For the sake of brevity, this Article highlights excerpts from the opinions of ten cases randomly selected from this body of law to provide textual support for this premise.¹¹⁸

Beginning in 1857, the Massachusetts decision in *Merriam v. Sewall*,¹¹⁹ a case in which creditors sought to attach claims to an estate, clearly supports this procedural view of due process. There, the Massachusetts Supreme Court found that the language of the due process clause "implies and includes regular

¹¹² *Id.* at 80.

¹¹³ "[I]t [was] sufficient to say that under no construction of [the due process clause] that we have ever seen, or any that we deem admissible, [could] the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." *Id.* at 80-81.

¹¹⁴ *Id.*

¹¹⁵ See *supra* notes 15-29 and accompanying text.

¹¹⁶ See Corwin, *supra* note 61, at 375.

¹¹⁷ See *id.*

¹¹⁸ These cases were chosen at random by a non-legal trained colleague.

¹¹⁹ *Merriam v. Sewall*, 74 Mass. (8 Gray) 316 (1857).

allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings.”¹²⁰

Subsequently, in *Jones v. Robbins*,¹²¹ a habeas petition decided immediately after *Merriam*, the Massachusetts Supreme Court further expounded upon this principle:

It having been stated by Lord Coke that, by the “law of the land” was intended a *due course of proceeding, according to the established rules and practice of the courts of common law*, it may perhaps be suggested, that this might include other modes of proceeding, sanctioned by the common law, the most familiar of which are, by informations of various kinds, by the officers of the crown in the name of the king. But in reply to this it may be said, that Lord Coke himself explains his own meaning by saying, “the law of the land,” as expressed in *Magna Charta*, was intended due process of law, that is, by indictment or presentment of good and lawful men.¹²²

Likewise, the Michigan Supreme Court approved the position that “law of the land” referred to an established rule or practice of a court in the cases of *Sears v. Cottrell*¹²³ [appearing first] and *Parsons v. Russell*¹²⁴ [appearing second]:

The words “due process of law,” mean the law of the land, and are to be so understood in the constitution. . . . Lord Coke construed the words “law of the land,” to mean *due process of law*. Hence, we sometimes find one phraseology used, and sometimes the other. They were held, and we think correctly, to mean the same thing in *The Matter of John and Cherry streets* By “the law of the land” we understand laws that are general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws.¹²⁵

This constitutional provision is borrowed from Magna Charta—not the language, but the idea, or principle. The phraseology is a little different, but the one great idea expressed is, that no one shall be deprived of life, liberty or property, except in pursuance of law. The language of the great charter is, *by the law of the land*; which Lord Coke, in commenting on the charter, paraphrased *due process of law*. The two phrases, therefore, mean the same thing. And, history shows us, with the clearness of a sunbeam, the meaning of the former, and that it was not intended to protect the subjects of the king against the legislation of Parliament, but against the illegal and arbitrary acts of the king and his government.

. . . .

. . . [Thus] the phrases, due process of law in our Constitution, and law of the land in Magna Charta, mean the same thing.¹²⁶

¹²⁰ *Id.* at 326.

¹²¹ *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

¹²² *Id.* at 346 (emphasis added).

¹²³ *Sears v. Cottrell*, 5 Mich. 251, 253 (1858).

¹²⁴ *Parsons v. Russell*, 11 Mich. 113, 129 (1863).

¹²⁵ *Sears*, 5 Mich. at 253 (citations omitted). In this case, the principal question involved the application of a distress-sale tax law that could be used to seize one’s property in the event of nonpayment. *Id.* at 251. On review by the Michigan Supreme Court, it was found to be constitutional. *Id.* at 253.

¹²⁶ *Parsons*, 11 Mich. at 128-29, 132. In this case, a statute authorizing a vessel to be seized and sold on the mere assertion of a debt or a demand for payment was held to be a violation of due process of law. *Id.* at 113.

In the middle of the Civil War, Judge Williams of the Kentucky Court of Appeals also supported this proposition in his opinion in *Norris v. Doniphan*.¹²⁷ There, the Court reviewed the propriety of a statute authorizing the appropriation of the “property of rebels” then waging war against the Union government.¹²⁸ Although affirming that Congress could “declare [w]ar, grant [l]etters of [m]arquee and [r]eprisal, and make [r]ules concerning [c]aptures on [l]and and [w]ater,”¹²⁹ the seizure and confiscation of property on land in this instance was not an act of war but rather a deprivation of property without due process of law¹³⁰:

Let us pause a moment to consider what is meant in the constitution, “by due process of law,” without which *no person* is to be deprived of *life, liberty, or property*. Lord Coke gives, as the settled construction and true meaning of the words “or by the law of the land,” in *Magna Charta*, “without due process of law, so that no man be taken, imprisoned, or put out of his freehold, without due process of law; that is, by indictment of good and lawful men.” Judge Kent, in his twenty-fourth lecture says: “It may be received, as a proposition universally understood and acknowledged throughout this country, that . . . [t]he words, by the law of the land, as used originally in *Magna Charta*, in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men. The better and larger definition of *due process of law* is, that it means *law in its regular course of administration through courts of justice*[”]. . . . Judge Story . . . says . . . [“]Lord Coke says these latter words, by the law of the land, mean by due process of law; that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause, in effect, affirms *the right of trial according to the process and proceedings of the common law*.”¹³¹

Similarly, in 1869, the Supreme Court of Alabama decided *Weaver v. Lapsley*.¹³² There, it held that:

[t]he terms “the law of the land,” “due process of law,” and “due course of law,” whether found in the English charters and statutes, or in our American constitutions, have the same meaning. Lord Coke says that “by the law of the land,” means “by due course and process of law, by indictment or presentment of good and lawful men, where such deeds be done, in due manner, or by writ original of the common law.” In *Dorman v. The State*, 34 Ala., at page 236, the court says “*due process of law*” means a *judicial proceeding, regularly conducted in a court of justice*, as contradistinguished from a statutory enactment.¹³³

Juxtaposing these decisions demonstrates that America’s early legal commentators considered “due process of law” to be synonymous with “the law of the land,” regardless of how grammatically incongruent the substitution may initially appear. Furthermore, the cases show that each phrase was used in reference to a regularly conducted judicial proceeding.

In another case decided in 1869, the Supreme Court of Tennessee also signaled its interpretation that due process of law referred to the “rules and

¹²⁷ *Norris v. Doniphan*, 61 Ky. (4 Met.) 385, 424-25 (1863).

¹²⁸ *Id.* at 387.

¹²⁹ U.S. CONST. art. I, § 8, cl. 11.

¹³⁰ *Norris*, 61 Ky. (4 Met.) at 400.

¹³¹ *Id.* at 424-25 (emphasis added).

¹³² *Weaver v. Lapsley*, 43 Ala. 224 (1869).

¹³³ *Id.* at 232 (emphasis added).

forms” used in adjudication.¹³⁴ Moreover, the court held that the courts could not declare an act void merely because, in its opinion, the act was opposed to the spirit that was supposed to pervade the constitution:

The phrase, “the law of the land” is another expression for the “due process of law;” and is of equivalent import, in respect to the question involved in the present litigation.

The “due process of law,” or the “law of the land,” by which a person may be deprived or divested of his properties . . . is not an act of the Legislature, or any act of executive power, or a proceeding in a court other than a proceeding wherein the party whose right [sic] is involved, can have, or is authorized to have, a hearing and to make defense. A definition given by Mr. Daniel Webster of “due process of law,” has been much commended. *The law of the land or due process of law, he says: “Is the general law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under general rules which govern society.”* 4 Wheaton, 519. Mr. Justice Edwards, (12 New York Reports, 209,) defines the rule thus: “Due process of law, undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.”¹³⁵

Similarly, in a case involving a municipal dog regulation, the New Hampshire Supreme Court also concluded that the legislature intended the language of its constitution to require that “proceedings” be construed according to the “law for the time being”¹³⁶:

In this State it would seem to have been understood that the provision of the Bill of Rights which prohibits all acts affecting life, liberty or property, except “by the law of the land,” was not intended to limit the legislative power, but only to require that the proceedings should be according to the law for the time being. But the same limitation on the legislature has been by our courts placed on the ground that the general grant of authority to make reasonable and wholesome laws confers no power to enact a law in violation of the fundamental maxims of justice and equity; and the interpretation given to the term “law of the land” in the constitutions of other States, when applied as a limitation upon legislative authority, amounts in substance to the same thing; for as interpreted there, the term “law of the land” is understood to embody in legal meaning *the fundamental rules and maxims of justice* which prevailed in the law of the time when the constitutions were adopted.¹³⁷

In the 1860 decision of *Griffin v. Mixon*,¹³⁸ the Mississippi High Court of Errors and Appeals ruled on a statute providing for the forfeiture of land to the State upon the owner’s failure to pay the appropriate amount of property taxes.¹³⁹ In its opinion, the court discussed whether “due process of law,” “due

¹³⁴ *State v. Staten*, 46 Tenn. (6 Cold.) 233, 245 (1869).

¹³⁵ *Id.* at 244-45 (emphasis added).

¹³⁶ *E. Kingston v. Towle*, 48 N.H. 57, 58, 61 (1868).

¹³⁷ *Id.* at 61 (emphasis added) (citation omitted). In one of the more unusual due process decisions rendered by a court, this case involved the propriety of “an act in relation to damages occasioned by dogs” which was found to be unconstitutional because the ability to unilaterally charge the dog’s owner for the amount of damage caused by the dog without an opportunity to be heard violated the right to a jury trial which normally occurred in situations involving a deprivation of property. *Id.* at 57.

¹³⁸ *Griffin v. Mixon*, 38 Miss. 424 (1860).

¹³⁹ *Id.* at 424.

course of law,” and “the law of the land” were meant to share a particular meaning and, if so, what that meaning was understood to be:

When the Constitution declares that the citizen shall not be deprived “of his life, liberty, or property, but by *due course of law*,” it means what Magna Charta meant by “the law of the land,” [and] what the Constitution of the United States means by “due process of law.” . . . Lord Coke says, “that to judge a man in a civil or criminal case, without affording him *an opportunity of being heard*, would be against this provision in Magna Charta.”

Mr. Webster says: “By the law of the land is most clearly intended, the *general law*, a law which *hears before it condemns*, which proceeds *upon inquiry*, and renders judgment *only after trial*. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of *general rules* which govern society. . . .

. . . “The meaning of this section, then, seems to be, that no member of the State shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be *adjudged against him, upon trial*, had according to the course of the common law. . . . *It cannot be done by mere legislation.*”

. . . .

Judge Story says: “This clause in effect affirms the right of trial according to the process and proceedings of the common law.” . . .

. . . .

“By ‘the law of the land’ is meant the law of an individual case, as established in a fair open trial, *or an opportunity* given for such trial in open court, and by due process of law. Not a bill of attainder, in the shape of an act of Assembly, whereby a man’s property is swept away from him without a hearing, trial, or judgment, or the opportunity of making known his rights or producing his evidence.”

. . . [T]he words *per legem terre* mean, by due process of law, and being brought into court to answer according to law. . . .

. . . .

. . . “Law of the land means due course and process of law,” . . . “by indictment or presentment,” . . . “or by original writ of the common law.”¹⁴⁰

Finally, in 1870 the State of Pennsylvania opined on the validity of an owner’s title to logs floated in the Susquehanna River in *Craig & Blanchard v. Kline*.¹⁴¹ Under the terms of this decision, the Court viewed due process of law as a requirement that all claims for justice be tried in court:

The law of the land means by due process of law It does not mean merely an act of the legislature, for that would abrogate all restriction on legislative power: 2 Kent 13* in note. The design of the Convention (says Gibson, C. J.) was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it, if such rescripts or decrees were allowed to take effect in the form of a statute: *Norman v. Heist*, 5 W. & S. 173. This provision and those as to the administration of justice in the bill of rights, require that all claims for justice between man and man, shall be tried, decided and enforced by the judicial authority of the state and by due course of law¹⁴²

¹⁴⁰ *Id.* at 442-45 (citations omitted).

¹⁴¹ *Craig & Blanchard v. Kline*, 65 Pa. 399, 400 (1870).

¹⁴² *Id.* at 413.

EXPOSING THE CONTRADICTION

As John Hart Ely once famously remarked, “[T]here is simply no avoiding the fact that the word that follows ‘due’ is ‘process.’ . . . Familiarity breeds inattention, and we apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”¹⁴³ After reviewing the case law and historical documents in which the due process clause or its primitive versions appear, one may very well conclude that Ely’s statement is correct and that substantive due process is indeed a contradiction of terms.

Reviewing the support for this premise in sequential order, there is first the language of *Tabula Nona*. Appearing 450 years before the founding of the Roman Empire, this early safeguard—crude though it might be—clearly reflects a heightened concern with the procedure through which a particular deprivation would occur instead of the substantive merit of its occurrence.¹⁴⁴ The phrase “[o]nly the great comitium has the right of legislating so as to inflict a punishment on a citizen involving his life, his liberty, or his civic rights” excludes any reference to the substantive propriety of these punishments.¹⁴⁵ Instead, the phrase merely identifies which institution determines whether the deprivation would occur and, through the legislative element, the procedure used to affect it.¹⁴⁶

Thirteen-hundred years later, Alfred the Great’s introduction of the jury system into Saxon criminal law further refined the procedure for depriving someone of fundamental rights such as life or liberty.¹⁴⁷ Instead of allowing an assembly like the Roman *Comitia* to determine whether the deprivation should occur, Alfred “instituted trials by jury; by which, in all criminal cases it was ordained, that twelve men should decide whether the accused person was guilty of the offence laid to his charge or not.”¹⁴⁸ As with the *Comitia Centuriata*, this legal development does not appear to be concerned with the substantive dimension of the punishment (i.e. whether it was morally right or wrong) but simply with who determined whether it should be inflicted.¹⁴⁹

Going forward another three-hundred years, neither the language of the *Magna Charta* nor its surrounding historical context indicates the presence of any substantive emphasis or concern.¹⁵⁰ Although the passage states that “[n]o freeman shall be taken, nor imprisoned, nor disseized, nor out-lawed, nor exiled, nor destroyed in any manner; nor will we pass upon him, nor condemn him, but by the lawful judgment of his peers, or by the law of the land,”¹⁵¹ it does not discuss any of the substantive value of these particular types of depri-

¹⁴³ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

¹⁴⁴ See *supra* text accompanying note 20.

¹⁴⁵ *THE TWELVE TABLES*, *supra* note 16, at 588.

¹⁴⁶ *Id.*

¹⁴⁷ See JOHNSON, *supra* note 27, at iii-iv.

¹⁴⁸ *Id.* at iii (emphasis removed).

¹⁴⁹ *Id.* at iv.

¹⁵⁰ See *supra* notes 30-61 and accompanying text.

¹⁵¹ *MAGNA CHARTA* cl. 39, reprinted in SOUTHEY, *supra* note 35, at 207 & JOHNSON, *supra* note 27, at 207.

vation. Rather, it refers only to the procedural mechanism through which the deprivation was to occur: “by the lawful judgment of his peers or by the law of the land.”¹⁵² With the enactment of the Liberty of Subject Act a century later, Edward III further modified the phrasing of this clause by substituting “due process of law” for “the law of the land;” yet, as context suggests and future cases would conclude, the underlying principle was meant to be interpreted synonymously.¹⁵³

Even if this historical analysis is completely erroneous, the Supreme Court’s ruling in *Murray v. Hoboken Land & Improvement Co.* ultimately reached the same understanding. By establishing that “[t]he words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in [the] *Magna Charta*,”¹⁵⁴ Justice Curtis implicitly recognized that “due process of law” was meant to be viewed as a unified concept; if one group of four words was “undoubtedly intended” to have the same meaning as a different group of six words, it logically follows that the emphasis is not on the individual words in the two groups but rather on the collective meaning these words achieve acting together.¹⁵⁵ In this sense, the whole is indeed greater than the sum of its individual parts.

Establishing due process of law as a unified phrase is a critical step toward resolving the question of whether substantive due process is a contradiction of terms. If the phrase is seen as having a common meaning with “the law of the land,” it is much more conceivable that due process of law had “a generally accepted meaning that differed from what someone ignorant of that meaning would deduce from the words themselves.”¹⁵⁶ Admittedly, it is difficult for the twenty-first century scholar to discern with exact precision what the Framers understood the phrase to mean. However, by examining the historical context and legal environment in which they were educated, it is possible to ascertain what the eighteenth century legal mind commonly understood “the law of the land” (and by association “due process of law”) to mean. If educated members of society generally understood the terms to have a particular meaning, then the Founders might simply have not seen a need to spell it out in the Constitution, believing, however erroneously, that because they understood what it meant, others would intuitively grasp the principle as well.

Historical sources and legal publications from the seventeenth and eighteenth centuries show that “the law of the land” is itself a stand-in for another phrase, namely, the common law.¹⁵⁷ In the reign of Queen Anne, the law of the land (and by association the common law) was regarded as a “Rule of Judicature.”¹⁵⁸ However, American state courts provide the clearest indication that this phrase referred to the common law of judicial rules and procedures.

¹⁵² *Id.*

¹⁵³ *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); *Parsons v. Russell*, 11 Mich. 113, 129, 132 (1863); *Merriam v. Sewall*, 74 Mass. (8 Gray) 316, 326 (1857).

¹⁵⁴ *Murray’s Lessee*, 59 U.S. (18 How.) at 276.

¹⁵⁵ See *supra* text accompanying notes 74-79.

¹⁵⁶ Harrison, *supra* note 6, at 553.

¹⁵⁷ See *supra* text accompanying notes 74-79.

¹⁵⁸ See BOYER, *supra* note 80, at 296.

As noted in *Jones v. Robbins*, “by the ‘law of the land’ was intended a *due course of proceeding, according to the established rules and practice of the courts of common law*.”¹⁵⁹ Similarly, in *Weaver v. Lapsley*, the Alabama Supreme Court held that “‘due process of law’ means a judicial proceeding, regularly conducted in a court of justice, as contra-distinguished from a statutory enactment.”¹⁶⁰

Without repeating the full panoply of decisions discussed previously, it is sufficient to say the evidence shows that state courts interpreted the due process clause as a procedural, rather than substantive, device. Furthermore, the historical evolution of the clause—as seen through Tabula Nona, the Magna Charta, the Liberty of Subject Act, and the American Fifth and Fourteenth Amendments—strongly supports the conclusion that “substantive” due process was simply not on the constitutional radar.¹⁶¹ Indisputably, twenty-first century America is different from thirteenth-century England or post-monarchial Rome, but in each of these environments, the purpose of the due process clause appears fundamentally procedural without regard for the deprivation’s substantive effect.¹⁶²

¹⁵⁹ *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 346 (1857) (emphasis added).

¹⁶⁰ *Weaver v. Lapsley*, 43 Ala. 224, 232 (1869).

¹⁶¹ See *supra* text accompanying notes 119-33.

¹⁶² Although exceeding the scope and focus of this Article, it is arguable that much of the “substantive” analysis currently conducted under the due process clause could be safely reallocated to the Fourteenth Amendment’s Privileges and Immunities clause instead. While the logistical challenges and practical feasibility of resurrecting this line of constitutional analysis in the wake of *Slaughterhouse* would provide innumerable sources of scholarly debate and academic conversation, such a discussion goes beyond this paper’s narrow focus of whether substantive due process, in view of the textual evolution of the due process clause, is a contradiction of terms.

APPENDIX

CORONATION CHARTER OF HENRY I, A.D. 1101¹⁶³

In the year of the incarnation of the Lord, 1101, Henry, son of King William, after the death of his brother William, by the grace of God, king of the English, to all faithful, greeting:

1. Know that by the mercy of God, and by the common counsel of the barons of the whole kingdom of England, I have been crowned king of the same kingdom; and because the kingdom has been oppressed by unjust exactions, I, from regard to God, and from the love which I have toward you, in the first place make the holy church of God free, so that I will neither sell nor place at rent, nor, when archbishop, or bishop, or abbot is dead, will I take anything from the domain of the church, or from its men, until a successor is installed into it. And all the evil customs by which the realm of England was unjustly oppressed will I take away, which evil customs I partly set down here.

2. If any one of my barons, or earls, or others who hold from me shall have died, his heir shall not redeem his land, as he did in the time of my brother, but shall relieve it by a just and legitimate relief. Similarly also the men of my barons shall relieve their lands from their lords by a just and legitimate relief.

3. And if any one of the barons or other men of mine wishes to give his daughter in marriage, or his sister or niece in relation, he must speak with me about it, but I will neither take anything from him for this permission, nor forbid him to give her in marriage, unless he should wish to join her to my enemy. And if when a baron or other man of mine is dead a daughter remains as his heir, I will give her in marriage according to the judgment of my barons, along with her land. And if when a man is dead his wife remains and is without children, she shall have her dowry and right of marriage, and I will not give her to a husband except according to her will.

4. And if a wife has survived with children, she shall have her dowry and right of marriage, so long as she shall have kept her body legitimately, and I will not give her in marriage, except according to her will. And the guardian of the land and children shall be either the wife or another one of the relatives as shall seem to be most just. And I require that my barons should deal similarly with the sons and daughters or wives of their men.

5. The common tax on money which used to be taken through the cities and counties, which was not taken in the time of King Edward, I now forbid altogether henceforth be taken. If any one shall have been seized, whether a moneyer or any other, with false money, strict justice shall be done for it.

6. All fines and all debts which were owed to my brother, I remit, except my rightful rents, and except those payments which had been agreed upon for the inheritances of others or for those things which more justly affected others. And if any one for his own inheritance has stipulated anything, this I remit, and all reliefs which had been agreed upon for rightful inheritances.

¹⁶³ Coronation Charter of Henry I, A.D. 1101, *reprinted in English Constitutional Documents of the Middle Ages*, in 1 TRANSLATIONS AND REPRINTS FROM THE ORIGINAL SOURCES OF EUROPEAN HISTORY 6-3 to -5 (Edward P. Cheyney ed., 1902).

7. And if any one of my barons or men shall become feeble, however he himself shall give or arrange to give his money, I grant that it shall be so given. Moreover, if he himself, prevented by arms, or by weakness, shall not have bestowed his money, or arranged to bestow it, his wife or his children or his parents, and his legitimate men shall divide it for his soul, as to them shall seem best.

8. If any of my barons or men shall have committed an offence he shall not give security to the extent of forfeiture of his money, as he did in the time of my father, or of my brother, but according to the measure of the offence so shall he pay, as he would have paid from the time of my father backward, in the time of my other predecessors; so that if he shall have been convicted of treachery or of crime, he shall pay as is just.

9. All murders, moreover, before that day in which I was crowned king, I pardon; and those which shall be done henceforth shall be punished justly according to the law of King Edward.

10. The forests, by the common agreement of my barons, I have retained in my own hand, as my father held them.

11. To those knights to hold their land by the cuirass, I yield of my own gift the lands of their demesne ploughs free from all payments and from all labor, so that as they have thus been favored by such a great alleviation, so they may readily provide themselves with horses and arms for my service and for the defence of the kingdom.

12. A firm peace in my whole kingdom I establish and require to be kept from henceforth.

13. The law of King Edward I give to you again with those changes with which my father changed it by the counsel of his barons.¹⁶⁴

14. If any one has taken anything from my possessions since the death of King William, my brother, or from the possessions of any one, let the whole be immediately returned without alteration, and if any one shall have retained anything thence, he upon whom it is found will pay it heavily to me. Witnesses Maurice, bishop of London, and Gundulf, bishop, and William, bishop-elect, and Henry, earl, and Simon, earl, and Walter Giffard, and Robert de Montfort, and Roger Bigod, and Henry de Port, at London, when I was crowned.

¹⁶⁴ With respect to the “law of King Edward” referenced in paragraph 13, as noted by Charles Warren Hollister:

This was doubtless the fundamental principle underlying the coronation charter, just as the idea of continuity with the Anglo-Saxon royal line and the Anglo-Saxon past was a major theme of Henry’s reign. There was of course, literally speaking, no “law of King Edward.” Unlike a number of his Old English predecessors, Edward the Confessor issued no dooms. But as is made clear in legal treatises written during Henry I’s reign—the *Quadripartitus* and the *Leges Henrici Primi*—the “law of King Edward” was taken to summarize the entire Anglo-Saxon past; it constituted the totality of earlier Anglo-Saxon law that remained in effect during Edward’s reign. C. WARREN HOLLISTER, *HENRY I* 112 (Amanda Clark Frost ed., 2001).