

ORIGINALISM AND PARKING TICKETS

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Originalism – the view that constitutional provisions should be interpreted as they were “understood at the time of the law’s enactment”¹ – is ascendant. Originalist methodology now proliferates throughout constitutional law. In one area of constitutional jurisprudence, however, originalism is nearly entirely absent. The Constitution twice forbids deprivation of life, liberty, or property without due process of law, but originalists cannot develop an account of what type of process was considered “due” at the time of the framing. That omission, I will argue, has important implications for originalism as a method of constitutional interpretation. Indeed, an inquiry into the original understanding of due process suggests that the original meaning of this constitutional provision – and perhaps many others – is nonoriginalist.

The discussion below unfolds in four parts. Part I surveys the rise of public-meaning originalism – the view that constitutional provisions should be construed in light of their generally understood meaning at the time of their enactment – and its effort to anchor constitutional interpretation in historical analysis by interpreting open-ended constitutional provisions in light of the legal rights that were commonly recognized at the time of the framing. Part II then applies public-meaning originalism to arguments about the

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¹ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1991). This definition will suffice for purposes of the present project, but I do not mean to overlook the many differences among originalists. For a particularly helpful discussion of the various flavors of originalism, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1811-15 (1996). Nonoriginalism also can have a variety of meanings, but for my purposes, that term will denote a method of constitutional interpretation that does not privilege legal arrangements and understandings at the time of the framing and ratification of a constitutional provision.

constitutionality of procedural innovation under the Fifth and Fourteenth Amendments’ Due Process Clauses. It begins by considering a specific type of procedural innovation – municipal systems for the administrative adjudication of parking tickets. Part II describes these systems of administrative adjudication, and then demonstrates their incompatibility with an originalist view of the Due Process Clause. Part II concludes by observing that an originalist view of procedural due process would necessarily condemn any innovation in civil or criminal procedure that would infringe upon procedural rights recognized at the framing. Next, Part III considers whether due process is properly understood, even on originalist terms, as a prohibition on procedural innovation. Part III observes that the original understanding of due process was remarkably diffuse; and concludes that the Due Process Clause was not framed in originalist terms – it is best understood as a mandate for the courts to evolve a common law governing the manner in which persons may be deprived of life, liberty, or property, rather than leaving that question to the mercies of majoritarian institutions. Finally, Part IV acknowledges that there are reasons for restraint when construing the Due Process Clause, but they are prudential in character, and not rooted in the original meaning of due process.

I. THE RISE OF PUBLIC-MEANING ORIGINALISM

Originalism has enjoyed a reversal of fortune. A generation ago, when the United States Supreme Court recognized a constitutional right to abortion under the Fourteenth Amendment’s Due Process Clause,² originalism’s only appearance came in then-Justice Rehnquist’s dissenting opinion, which argued that the Court’s construction of the Fourteenth Amendment was surely in error because its Framers did not intend to recognize

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

a right to abortion.³ That method of constitutional interpretation was evidently thought to be so implausible that it was not deemed worthy of comment by any other member of the Court.⁴ Today, in contrast, two members of the Court are avowed originalists,⁵ and at their confirmation hearings, the two most recent additions to the Court evinced considerable sympathy with originalist interpretation.⁶ Originalist methods of constitutional interpretation are also increasingly appearing in majority opinions.⁷ Originalism, for example, has revolutionized much of constitutional criminal procedure;⁸ originalist methodology has led the Court to overhaul its jurisprudence regarding the role of judges in sentencing,⁹ and the right of criminal defendants to confront the witnesses against them.¹⁰ In the due process arena, the Court's opinions increasingly stress that substantive rights are unlikely to be

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

⁴ See *Roe v. Wade*, 410 U.S. 113, 156-64 (1973); *id.* at 167-71 (Stewart, J., concurring); *Doe v. Bolton*, 410 U.S. 179, 207-08 (1973) (Burger, C.J., concurring); *id.* at 210-18 (Douglas, J., concurring); *id.* at 221-22 (White, J., dissenting). Moreover, Justice White, the other dissenting vote, had earlier embraced a decidedly nonoriginalist approach to the Due Process Clause in recognizing a constitutional right to contraception, at least in the context of marriage. See *Griswold v. Connecticut*, 381 U.S. 479, 502-07 (1965) (White, J., concurring).

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

⁶ See *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the Sen. Jud. Comm.*, 109th Cong., 1st Sess. 159, 570 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Jud. Comm.*, 109th Cong., 2d Sess. 357 (2006).

⁷ See, e.g., *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 997-1005 (2006); *McCreary County v. American Civil Liberties Union of Kentucky*, 125 S. Ct. 2722, 2742-45 (2005); *Eldred v. Ashcroft*, 537 U.S. 186, 200-04 (2003); *Utah v. Evans*, 536 U.S. 452, 474-77 (2002).

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

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

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

protected by due process unless they are rooted in historical understandings,¹¹ although the Court still occasionally embraces nonoriginalist approaches to substantive due process.¹² In the academy, the rise of originalism has been even more dramatic. As Professor Barnett has observed, until recently, “the received wisdom among law professors [wa]s that originalism was dead, having been defeated in intellectual combat sometime in the early eighties,”¹³ but by the dawn of the millennium, originalism had become “the prevailing approach to constitutional interpretation.”¹⁴

The explanation for this shift is not difficult to discern. In the 1970s and 1980s, the advocates of originalism advanced a form of intentionalism; they argued that the Constitution should be construed according to the intentions of those who framed its text.¹⁵ This original-intention method was met with two powerful objections. First, the difficulties of ascertaining the intentions of the multitudes involved in the framing and ratification of constitutional provisions – who often held disparate or even contradictory views about these provisions – were formidable.¹⁶ Second, there was considerable evidence that the

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

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

¹³ Randy Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611 (1999).

¹⁴ *Id.* at 613. Accord, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 68 (1996); Martin S. Flaherty, *The Better Angels of Self-Government*, 71 FORD. L. REV. 1773, 1774 (2003); Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELB. U.L. REV. 677, 695-97 (2000); Cass Sunstein, *Book Review: Justice Scalia’s Democratic Formalism*, 107 YALE L.J. 529, 558 (1997).

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

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

Constitution's framers believed that legal texts should be construed without regard to the underlying intentions of the drafters.¹⁷ Although there were a number of efforts to rebut these attacks,¹⁸ by the 1990s originalists had largely acknowledged the force of these objections and embraced the view that the Constitution should be construed in light of the generally understood meaning of its text at the time it was adopted rather than by reference to the likely intentions of the drafters or ratifiers.¹⁹ The case for this public-meaning originalism is perhaps best summarized by its most prominent advocate, Justice Scalia:

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

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

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

¹⁹ See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 92-117 (2004); GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 67-90 (1992); BORK, *supra* note 1, at 143-51; RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 19-31 (1985); WHITTINGTON, *supra* note 18, at 160-212; MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS 28-53 (1994); Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in A MATTER OF INTERPRETATION 38-41 (Amy Gutmann ed., 1997) [hereinafter cited as "A MATTER OF INTERPRETATION"]; Baade, *supra* note 17, at 1103-07; Charles Fried, *Sonnet LXV and the 'Black Ink' of the Framers' Intention*, 109 HARV. L. REV. 751, 756-60 (1987); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998); Kay, *supra* note 18, 229-36; Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1988); Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1268 (1997); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONSTIT. COMMENT. 529 (1998); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988).

determination that a statute is compatible with the Constitution should, as in England, prevail.²⁰

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

The appeal of originalism is hard to deny. As originalists point out, the point of a written constitution seems to inhere in creating fixed rules that are enforceable as positive law and supreme because they achieved supermajority support at the time of adoption, whereas Great Britain’s common law constitution posed little obstacle to its use of practices that the colonists regarded as both tyrannical and unconstitutional.²³ To use Justice Scalia’s words, treating the Constitution as an evolving statement of aspirations “is a preeminently common-law way of making law, and not the way of construing a democratically adopted text.”²⁴ He acknowledges that the Constitution contains much that is “abstract and general rather than specific and concrete,” but adds that “[t]he context suggests that the abstract and general terms, like the concrete and particular ones, are meant to nail down current rights, rather than aspire to future ones – that they are abstract and general references to *extant* rights and freedoms possessed under the then-current regime.”²⁵ This approach, accordingly, restrains judicial decisionmaking by linking constitutional protection to those

²⁰ Scalia, *supra* note 5, at 854 (brackets in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803)). He adds: “I take the need for theoretical legitimacy seriously, and even if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally meant to expound evolving rather than permanent values, . . . I see no basis for believing that supervision of the evolution would have been committed to the courts.” *Id.* at 862.

²¹ *Id.* at 856.

²² *Id.* at 863.

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

²⁴ Scalia, *supra* note 19, at 40.

²⁵ Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 19, at 135 (emphasis in original).

rights recognized at the time of the framing – as Akhil Amar has put it, Justice Scalia’s originalism is “frozen in 1791 or 1868 amber.”²⁶ Still, as James Ryan recently observed, “a compelling and popular alternative theory has yet to emerge from the academy or sitting judges as an alternative to originalism.”²⁷

To be sure, public-meaning originalism has its critics. Nonoriginalists deny that rebranded originalism can overcome the difficulties with ascertaining original meaning and they question the legitimacy and utility of shackling constitutional law to the wishes of the dead hands that drafted constitutional texts and embraced their original meaning long ago.²⁸ Still, nonoriginalists have yet to respond effectively to the central originalist argument – it is difficult to understand why one would adopt a constitutional text if not to memorialize its then-understood meaning as organic law.²⁹ It is on this point that I mean to open a new line of attack. To do so, I will focus on the inability of the originalist camp to develop an originalist account of procedural due process. That inability has important implications for the power of originalist methods of interpretation.

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

²⁷ James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1625 (2006).

²⁸ For a sampling of the literature responding to originalism’s turn toward original meaning, see, e.g., STEPHEN G. BREYER: ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 115- 32 (2005); RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION 290-305 (1996); CHRISTOPHER L. EISENGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 10-45 (2001); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 13-25 (2001); JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 99-124 (2005); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 53-78 (2005); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765 (1997); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998); Daniel S. Goldberg, *And the Walls Came Tumbling Down: How Classical Scientific Fallacies Undermine the Validity of Textualism and Originalism*, 39 HOUS. L. REV. 463 (2002); Philip C. Kissam, *Triangulating Constitutional Theory: Power, Time, and Everyman*, 53 BUFF. L. REV. 269 (2005); Larry Kramer, *Fidelity to History—And Through It*, 65 FORD. L. REV. 1627 (1997); William G. Michael, *When Originalism Fails*, 25 WHITTIER L. REV. 497 (2004); Peter J. Smith, *The Marshall Court and the Originalist’s Dilemma*, 90 MINN. L. REV. 612 (2006); Robert L. Tsai, *Democracy’s Handmaid*, 60 B.U. L. REV. 1 (2006); G. Edward White, *The Arrival of History in Constitutional Law*, 88 VA. L. REV. 485 (2002).

²⁹ For a particularly powerful statement of this view, see Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998).

The debate over originalism generally discusses the Constitution as an undifferentiated whole, but not all constitutional provisions are equally amenable to an originalist construction. The Seventh Amendment, for example, provides: “[I]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved”³⁰ This formulation virtually compels an inquiry into the nature of the common-law right to a jury trial at the time the Seventh Amendment was ratified. In fact, the Supreme Court has construed the Seventh Amendment in just this originalist fashion.³¹ Other constitutional provisions employ legal terms of art, such as the prohibition on Ex Post Facto Laws³² or Bills of Attainder.³³ It is difficult to construe these provisions with integrity except by reference to their meaning at the time they were added to the Constitution. Perhaps unsurprisingly, the Supreme Court has taken an originalist approach to these provisions as well.³⁴ The case for an originalist interpretation for more broadly phrased constitutional provisions – such as the Due Process Clause – is, however, far less clear.

It seems to have gone without notice that when it comes to the procedural rights secured by due process, originalist methods of interpretation are absent. The Supreme Court’s work in that area – even when written by the Court’s originalists – breathes not a word about originalism.³⁵ Consider the recent decision in *Jones v. Flowers*,³⁶ in which the Court held that when a notice of tax foreclosure sale of a residence sent to the taxpayer’s last

³⁰ U.S. CONST. amend. VII.

³¹ *See, e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-52 (1998); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 40-41 (1989); *Ross v. Bernhard*, 396 U.S. 531, 533-34 (1970).

³² U.S. CONST. art. I, § 10, cl. 1.

³³ U.S. CONST. art. I, §§ 9-10.

³⁴ *See, e.g.*, *Stogner v. California*, 539 U.S. 607, 611-15 (2003) (Ex Post Facto Clause); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473-75 (1977) (Bill of Attainder Clause).

³⁵ *See, e.g.*, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Dusenberry v. United States*, 534 U.S. 161 (2003);

³⁶ 126 U.S. 1708 (2006).

known address by certified mail is returned unclaimed, due process requires the taxing authority to provide some additional form of notice before proceeding with the foreclosure.³⁷ The dissenting opinion was written by Justice Thomas, one of the Court's avowed originalists, and was joined by Justice Scalia and Justice Kennedy, but its approach is nonoriginalist; the dissent merely contended that the measures undertaken to supply notice to the taxpayer were reasonable under the circumstances.³⁸ In particular, the dissenting opinion made no reference to the procedures for giving notice in place in 1868, when the Fourteenth Amendment was ratified.³⁹ Indeed, we will see that service by mail was considered ineffective in 1868,⁴⁰ but no member of the Court made anything of that fact. The failure to develop an originalist position on procedural due process is equally apparent among the academic expositors of originalism; I can identify no effort in the scholarly literature to develop an originalist account of procedural due process.⁴¹

This omission is perhaps unsurprising – procedural due process poses serious problems for originalism. The objections to the view that civil and criminal procedure are frozen in eighteenth or nineteenth century amber are more than consequentialist; they are originalist as well. Understanding due process to prohibit procedural innovation is inconsistent with longstanding legal tradition; civil and criminal procedure up to the time of the framing of the Fifth and Fourteenth Amendments' Due Process Clauses had been rife with innovation. For example, criminal procedure had undergone a virtual revolution in the centuries before the framing, as an essentially inquisitorial system in which defense counsel was virtually absent evolved into something much like the adversarial system we know

³⁷ See *id.* at 1715-21.

³⁸ See *id.* at 1721-27 (Thomas J., dissenting).

³⁹ See 16 Stat. 706, 707 (1868).

⁴⁰ See Part II.B.1, *infra*.

⁴¹ The only possible exception of which I am aware is Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339 (1987). Eberle's account, however, fails to qualify as originalist, for reasons explored below. See note 107, *infra*.

today.⁴² Civil procedure had also evolved from the intricacies of common law pleading toward a more streamlined approach emphasizing substance over form.⁴³ The constitutional text, moreover, does not suggest the kind of frozen-in-amber approach reflected in the Seventh Amendment.⁴⁴ But if history is not the guide for assessing whether a procedural innovation supplies “due process,” then constitutional interpretation is no longer anchored to historical understandings; it is no longer originalist. In this article, I explore the relationship between originalism and procedural due process in an effort to demonstrate that an originalist view of due process is untenable – I argue that the original meaning of the two Due Process Clauses – and perhaps much of the rest of the Constitution as well – is nonoriginalist.

II. THE FAILURE OF ORIGINALIST ACCOUNTS OF PROCEDURAL DUE PROCESS.

To demonstrate the difficulties of an originalist approach to procedural due process, I begin with a particularly prosaic example – the methods by which liability for vehicular parking offenses are adjudicated. The need to deal with millions of vehicles found illegally parked each year in the nation’s major cities has led to the emergence of an entirely new system of streamlined adjudication to deal with what would otherwise be a crushing volume of litigation. While the innovative systems of administrative adjudication and enforcement of parking ticket liability that have emerged fare well under prevailing due process jurisprudence, they are indefensible under an originalist approach – a perhaps unsurprising result given the likely inability of the constitutional framers to envision the millions of

⁴² See JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 284-343 (2003).

⁴³ For a summary of the dramatic evolution in civil procedure until and after the framing of the Fifth and Fourteenth Amendments, see ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 12-64 (1952).

⁴⁴ The relevant historical evidence of the original meaning of the Fifth and Fourteenth Amendments and the respective due process clauses is considered in Part III.A below.

vehicles that now clog our largest cities. Generalizing from this example, I then consider the implications of an originalist jurisprudence for procedural innovation.

A. Procedural Innovation in Parking Ticket Adjudication.

State law usually delegates to municipalities the power to regulate the parking of vehicles by municipal ordinance.⁴⁵ The rationale for delegation should be obvious; the need for regulation will vary with the size and density of the municipality. In a congested municipality, a lack of effective parking regulation can have an enormous impact on the quality of commercial and residential life.⁴⁶

1. *Characteristics of parking-enforcement reforms* – Enforcing parking regulations poses logistical difficulties not ordinarily present in ordinance-enforcement litigation. The first involves service. Personal service is rarely practicable; parking enforcement officials who observe an illegally parked car can hardly be expected to stake it out until the operator returns. Accordingly, state law generally authorizes a form of “tie-on” service – service of a

⁴⁵ See ALA. CODE § 32-5-1(e) (2005); ALASKA STAT. § 28.01.010 (2006); ARIZ. REV. STAT. § 28-627(A)(1) (2006); ARK. CODE ANN. §27-49-106(b)(1) (2006); CAL. VEH. CODE § 21100 (2006); COLO. REV. STAT. § 42-4-111(1)(a) (2005); CONN. GEN. STAT. § 14-307(a) (2006); DEL. CODE ANN. tit. 21, § 501 (2006); FLA. STAT. §316.008(1)(a) (2006); GA.CODE ANN. §40-6-371(a)(1) (2006); HAW. REV. STAT. ANN. § 291C-111(a) (2006); IDAHO CODE ANN. § 49-208(1)(a) (2006); 625 ILL. COMP. STAT. 5/11-208(a)(1) (2005); IND. CODE ANN. § 9-21-1-3(a)(1) (2006); IOWA CODE § 321-236(1) (2005); KAN. STAT. ANN. § 8-2002(a)(1) (2006); KY. REV. STAT. ANN. § 189.390(5)(c) (2005); LA. REV. STAT. ANN. § 32:41(A)(1) (2006); ME. REV. STAT. ANN. tit. 30A, § 3001 (2005); MD. CODE ANN., TRANSP. § 25-102(a)(1) (2006); MASS. GEN. LAWS CH. 90, § 20A (2006); MICH. COMP. LAWS SERV. § 257.606(1)(a) (2006); MINN. STAT. § 169.04(a)(1) (2005); MISS. CODE ANN. § 63-3-211(a)(1) (2006); MO. REV. STAT. § 49.266(1) (2006); MONT. CODE ANN. § 61-12-101(1) (2005); NEB. REV. STAT. ANN. § 60-680(1)(a) (2005); NEV. REV. STAT. ANN. § 484.777 (2006); N.H. REV. STAT. ANN. § 265:70 (2006); N.J. STAT. ANN. § 39:4-197.2 (2006); N.M. STAT. ANN. §66-7-9(A)(1) (2006); N.Y. VEH. & TRAF. LAW § 1640(a)(1) (2006); N.C. GEN. STAT. § 160A-174 (2006); N.D. CENT. CODE § 39-10-50 (2006); OHIO REV. CODE ANN. § 4511.07(A) (2006); OKLA. STAT. tit. 47, §15-102(a)(1) (2005); OR. REV. STAT. § 810.010 (2006); 75 PA. CONS. STAT. § 6109(a)(1) (2005); R.I. GEN. LAWS § 31-12-12(a)(1) (2006); S.C. CODE ANN. § 56-5-710(1) (2005); S.D. Codified Laws § 9-31-1 (2006); Tenn. Code Ann. § 55-8-61 (2005); TEX. TRANSP. CODE ANN. § 542.202(a)(2) (2005); UTAH CODE ANN. § 41-6a-208(1)(a) (2006); VT. STAT. ANN. tit. 23, § 2201 (2006); VA. CODE ANN. § 46.2-1220 (2006); WASH. REV. CODE ANN. § 46.61.575 (2006); W. VA. CODE ANN. § 17C-2-8(a)(1) (2006); WIS. STAT. § 346.50 (2006); WYO. STAT. ANN. § 31-5-109(a)(i) (2006).

⁴⁶ See, e.g., Jacquielynn Floyd, *Ticket Masters; Parking Officers Learn to Stay Cool as Drivers Fume*, DALLAS MORNING NEWS, Mar. 8, 1998, at 1A. The survey that follows is confined to state statutes even though parking is also subject to local regulation. Due to the difficulty of undertaking a comprehensive survey of municipal ordinances, no effort has been made along those lines, but the reader can assume that in many localities, regulations similar to those discussed below have been adopted by ordinance even when not specifically authorized by applicable state statute, either pursuant to some general delegation of regulatory authority or as an incident of home-rule authority.

parking ticket is accomplished by leaving a copy on the vehicle.⁴⁷ Another copy may be served by mail on the address of the registered owner identified in state records.⁴⁸ For similar reasons, the registered owner of the vehicle is usually deemed *prima facie* responsible when the vehicle is unlawfully parked.⁴⁹

Additional logistical problems face the adjudicative process. These difficulties are largely a function of staggering volume. For example, in 1988, shortly before Chicago turned to administrative adjudication, the police issued 4.2 million parking tickets.⁵⁰ Handling a caseload that large is a considerable challenge; enormous judicial resources are required to handle that many cases. But that is not the only logistical problem that large municipalities face, as Chicago's experience illustrates. In 1988, just prior to the introduction of administrative adjudication of parking tickets, among contested cases, guilty findings issued in 7,381 cases, while 127,849 cases were either not prosecuted or the violator was discharged.⁵¹ The primary reason for the dismal conviction rate was that judges would insist that the ticketing official testify and on the frequent occasions on which the ticketing official did not appear, the ticket would be dismissed.⁵² Yet testimony from the ticketing official is likely to be useless; given the volume of parking tickets, the only truthful testimony a

⁴⁷ See CAL. VEH. CODE § 40202 (2006); GA. CODE ANN. § 12-3-10 (s)(3) (2006); HAW. REV. STAT. § 291C-167 (2005); 625 ILL. COMP. STAT. 5/11-208.3(b)(3) (2005); KAN. STAT. ANN. § 8-2113 (2005); KY. REV. STAT. ANN. § 82.610 (2006); MD. CODE ANN., TRANSP. § 26-302 (2006); MASS. ANN. LAWS CH. 90, § 20A (2005); MISS. CODE ANN. § 21-23-19 (2006); MO. REV. STAT. § 300.585 (2005); N.J. STAT. ANN. § 39:4-139.4 (2006); N.Y. VEH. & TRAF. LAW § 238 (2006); N.C. GEN. STAT. § 15A-302 (2006); OHIO REV. CODE ANN. § 4521.03 (2006).

⁴⁸ See ALASKA STAT. § 28.05.121 (2006); ARIZ. REV. STAT. § 28-885 (2006); 625 ILL. COMP. STAT. 5/11-208.3(b)(5)(i) (2006); OR. REV. STAT. § 153.820 (2006).

⁴⁹ See, e.g., CAL. VEH. CODE § 40215 (2006); CONN. GEN. STAT. § 7-152B (2006); DEL. CODE ANN. tit. 21, § 4181 (D) (2006); FLA. STAT. ANN. § 316.1967 (2005); KAN. STAT. ANN. § 8-2114 (2005); LA. REV. STAT. ANN. § 13:2571 (2006); MD. CODE ANN., TRANSP. § 26-302 (2006); MASS. ANN. LAWS CH. 90, § 20A (2005); MICH. COMP. LAWS SERV. § 257.675A (2006); MISS. CODE ANN. § 21-23-19 (2006); N.H. REV. STAT. ANN. § 231:132-a (2006); N.J. STAT. ANN. § 39:4-139.8 (2006); N.Y. VEH. & TRAF. LAW § 239 (2006); OHIO REV. CODE ANN. § 4521.03 (2006).

⁵⁰ William Recktenwald, *City writes more tickets, but few pay*, CHI. TRIB., Feb. 19, 1989, at 1.

⁵¹ *Id.* See also, e.g., Raphael Lewis, *Traffic Tickets Beaten on Appeal*, BOSTON GLOBE, Sept. 24, 2000, at B1.

⁵² Rogers Worthington, *Scofflaw crackdown going flat fast in city*, CHI. TRIB., Mar. 25, 1986, at 1.

ticketing official is likely to be able to provide is that he has no recollection of issuing the ticket but presumes that the information recorded on the ticket is accurate.⁵³

To avoid the inefficiencies associated with the judicial process, Chicago sought and obtained a new state statute authorizing its use of administrative adjudication for parking violation.⁵⁴ This is reflective of a general trend toward nontraditional forms of adjudication for parking-ticket litigation.⁵⁵ Indeed, state statutes authorizing municipalities to run their own systems of administrative adjudication for parking violations are increasingly common.⁵⁶ Under these systems of administrative adjudication, the formal rules of evidence applicable to judicial proceedings usually do not apply,⁵⁷ and the parking ticket itself is often treated as prima facie evidence of liability.⁵⁸

⁵³ See, e.g., Ed Will, *That's the Ticket Excuses Start in the Referees' Court*, DENVER POST, Oct. 1, 1997, at G-01.

⁵⁴ See James M. Reilly, *The Department of Administrative Hearings for the City of Chicago: A New Method of Municipal Code Enforcement*, 18 J. NAT'L ASS'N ADMIN. L. JUDGES 89 (1998).

⁵⁵ See, e.g., John J. Lipinski, *Alternative dispute resolution for traffic cases*, CHI. DAILY L. BULL., April 27, 1992, at 6; Julie Mason, *Parking Citation Changes – Just the Ticket?*, Houston Chronicle, Jan. 24, 1995, at A-11; Rick McDonough, *Louisville Gets Tough on Parking Tickets; New Civil Court Tactics include Garnished Wages and Liens*, COURIER-JOURNAL (Louisville, KY), Feb. 15, 1999, at 01A; Brian McGrory, *Plan Emerges to Free Courts of Ticket Load; Shift to Municipalities Offers Solution, Some Say*, BOSTON GLOBE, July 23, 1989, at 17.

⁵⁶ See ALASKA STAT. § 28.05.141 (2006); CAL. VEH. CODE § 40215 (2006); CONN. GEN. STAT. § 7-152b (2006); DEL. CODE ANN. tit. 21, § 807 (2006); FLA. STAT. § 316.008 (2) (2005); GA. CODE ANN. § 40-13-50 (2006); 625 ILL. COMP. STAT. 5/11-208.3(a) (2005); IOWA CODE § 805.13 (2005); KY. REV. STAT. ANN. § 805.13 (2005); LA. REV. STAT. ANN. § 13:2571 (2006) (for municipalities with populations over 100,000); MASS. GEN. LAWS CH. 90, § 20A (2005); MO. REV. STAT. § 479.011(1) (2006); N.J. STAT. ANN. § 39 :5-2 (2006); N.Y. VEH. & TRAF. LAW § 235 (2006); N.C. GEN. STAT. § 160A-175 (2006); OR. REV. STAT. § 153.820 (2006) (for municipalities with populations over 500,000); 75 PA. CONS. STAT. § 6102 (2005); R.I. GEN. LAWS § 31-41.1-6 (2006); S.C. CODE ANN. § 1-23-380 (2005); TEX. TRANSP. CODE ANN. § 682.003 (2005); VT. STAT. ANN. tit. 23, § 1742 (2006) (for municipalities with populations over 1,000); VA. CODE ANN. § 10.1-104 (2006); WIS. STAT. § 345.28 (2006).

⁵⁷ See 625 ILL. COMP. STAT. § 11-208.3(b)(4) (2005); LA. REV. STAT. ANN. § 13:2571(D) (2006); N.Y. VEH. & TRAF. LAW § 240 (2)(c) (2006); OR. REV. STAT. § 153.820 (2006) (Multnomah County); 2 PA. CONS. STAT. § 554 (2005).

⁵⁸ See CAL. VEH. CODE § 40215 (c)(5) (2006); CONN. GEN. STAT. § 7-152b(e) (2006); DEL. CODE ANN. tit. 21, § 712 (2006); 625 ILL. COMP. STAT. 5/11-208.3(b)(3) (2005); IOWA CODE § 805.13 (2005); KY. REV. STAT. ANN. § 805.13 (2005); MD. CODE ANN., TRANSP. § 26-303 (2006); MASS. GEN. LAWS ch. 90, § 20A (2005); MICH. COMP. LAWS SERV. § 257.675a (2006); MO. REV. STAT. § 479.011 (2006); N.J. STAT. ANN. § 39:4-139.4 (2006); N.M. STAT. ANN. § 66-8-131 (2006); N.Y. VEH. & TRAF. LAW § 238 (2006); OHIO REV. CODE ANN. § 4521.03 (D) (2006); TEX. TRANSP. CODE ANN. § 682.006 (2005); VT. STAT. ANN. tit. 4 § 1106 (2006); VA. CODE ANN. § 10.1-104 (2006); WIS. STAT. § 345.28 (2006).

The final set of logistical problems relate to the enforcement of judgments. Because parking fines are generally small, it is frequently not cost-effective to undertake traditional collection efforts. But if the public comes to realize that parking fines are rarely collected, the entire regulatory system will eventually collapse.⁵⁹ Again, Chicago's experience is illustrative; in 1988, while 4.2 million parking tickets issued, 3.5 million summonses also issued because outstanding tickets had not been paid.⁶⁰ And, of course, the summonses ate up additional resources as they must be served, and the violator must then somehow be induced to cough up the outstanding fine. As a result, municipalities have turned to novel "self-help" enforcement measures. Statutory reforms have authorized municipalities to immobilize or "boot," and subsequently tow and impound vehicles that have accumulated a specified number of unpaid parking tickets.⁶¹ The owner's driver's license or vehicle registration may be suspended as well.⁶² Booting in particular has vastly improved the rate at which municipalities collect parking fines.⁶³

⁵⁹ See, e.g., Rick McDonough, *Louisville Gets Tough on Parking Tickets; New Civil Court Tactics include Garnished Wages and Liens*, COURIER-JOURNAL (Louisville, KY), Feb. 15, 1999, at 01A.

⁶⁰ William Recktenwald, *City writes more tickets, but few pay*, CHI. TRIB., Feb. 19, 1989, at 1.

⁶¹ See, e.g., CAL. VEH. CODE § 22651.7 (2006); 625 ILL. COMP. STAT. ANN. 5/11-208.3(c) (2005); Md. Code Ann., Transp. § 27-111 (2006); MASS. GEN. LAWS CH. 90, § 20A (2005) (for five or more unpaid parking violations); R.I. GEN. LAWS § 31-12-12 (2006) (for five or more notices of violations in a calendar year); VT. STAT. ANN. tit. 23, § 46.2-1216 (2006) (for three or more unpaid parking violations); WIS. STAT. § 349.137 (2006).

⁶² See, e.g., CAL. VEH. CODE § 4760 (2006); IDAHO CODE §49-326 (2006); 625 ILL. COMP. STAT. ANN. 5/6-306.5 (2005) (for ten or more unpaid parking violations); IOWA CODE § 321.40 (2005); LA. REV. STAT. ANN. § 32:393 (2006); MD. CODE ANN., TRANSP. § 26-305 (2006); MASS. GEN. LAWS ch. 90, § 20A (2005) (for two or more unpaid parking violations); N.H. REV. STAT. ANN. § 231:130-a (2006); N.J. STAT. ANN. § 39 :4-139.10 (2006); N.Y. VEH. & TRAF. LAW § 235 (2006); N.D. CENT. CODE, § 39-06.1-11 (2006); OHIO REV. CODE ANN. § 4521.10 (2006); 75 PA. CONS. STAT. § 1379 (2005) (for six or more unpaid parking violations); S.D. CODIFIED LAWS § 32-12-49 (2006); TEX. TRANSP. CODE ANN. § 682.010 (2005); VT. STAT. ANN. tit. 23, § 1752 (2006); VA. CODE ANN. § 46.2-1216 (2006) (for three or more unpaid parking violations).

⁶³ See, e.g., Hugo Martin, *Behind the Wheel; Parking Ticket Violators May Get 'the Boot'*, *Traffic enforcement teams clamp down on drivers with five or more overdue citations who get 72 hours to pay before a vehicle is towed*, L.A. TIMES, Oct. 22, 2002, California Metro at 2; Lekan Oguntoyinbo, *Fined With Their Boots On; Device Helped Collect \$8.5 Million in Tickets*, DET. FREE PRESS, July 3, 1996, at 3B; Sue Anne Pressley, *Metropolitan Life; 'The Boot': The Ultimate Weapon in the Parking War*, WASH. POST, Oct. 28, 1985, at D1; Fran Spielman, *Scofflaws face boot at Midway; O'Hare Crackdown nabbed thousands with 3 unpaid tickets*, CHI. SUN-TIMES, Aug. 17, 2005, at 6.

2. *Constitutionality of parking-enforcement reforms* – The new systems of parking enforcement fare reasonably well against a claim that they deprive vehicle owners of their property (vehicles, money, or driver’s licenses) without due process of law.⁶⁴ The Due Process Clause is construed to require that the government provide “notice and opportunity for hearing appropriate to the nature of the case.”⁶⁵ For notice to be constitutionally sufficient, it must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁶⁶ Accordingly, the actual receipt of notice is not constitutionally required as long as the means used was a reasonable one under the circumstances.⁶⁷ Moreover, “assessing the adequacy of a particular form of notice requires balancing the ‘interest of the State’ against ‘the individual interest sought to be protected by the Fourteenth Amendment.’”⁶⁸ Leaving a ticket on the vehicle that identifies the charge and the means by which it can be contested, and mailing an additional copy to the last known address of the registered owner, fares pretty well under these standards. While owners frequently deny that they received tickets served in this fashion, courts pragmatically reason that whoever is operating a vehicle will likely apprise the owner of the ticket.⁶⁹ The use of first-class mail is

⁶⁴ Even the temporary deprivation of the ability to use one’s vehicle is considered a deprivation of “property” within the meaning of the Due Process Clause. *See City of Los Angeles v. David*, 538 U.S. 715, 717-18 (2003) (per curiam). The suspension of a driver’s license is also considered a deprivation of “property” for constitutional purposes. *See Dixon v. Love*, 431 U.S. 105, 112 (1977); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

⁶⁵ *Jones v. Flowers*, 126 S. Ct. 1708, 1713 (2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

⁶⁶ *Id.* at 1713-14 (quoting *Mullane*, 339 U.S. at 314).

⁶⁷ *See Dusenberry v. United States*, 534 U.S. 161, 170 (2002). As the Court explained in *Jones*, “the failure of notice in a specific case does not establish the inadequacy of the attempted notice; in that sense, the constitutionality of a particular procedure for notice is assessed *ex ante*, rather than *post hoc*.” 126 S. Ct. at 1717.

⁶⁸ *Jones*, 126 S. Ct. at 1715 (quoting *Mullane*, 339 U.S. at 315).

⁶⁹ *See, e.g., Gross v. Carter*, 265 F. Supp. 2d 995, 1001-02 (W.D. Ark. 2003); *Bricker v. Craven*, 391 F. Supp. 601, 604-05 (D. Mass. 1975); *Patterson v. Cronin*, 650 P.2d 531, 535 (Colo. 1982).

also generally thought to be a reasonable means of providing actual notice.⁷⁰ The combination of tie-on service and mail to apprise the owner of a pending action should therefore satisfy prevailing constitutional standards.⁷¹

As for the constitutional adequacy of the procedures for adjudicating and enforcing liability, they are assessed under a three-part test articulated in *Mathews v. Eldridge*.⁷² Under this test, inquiry is made into the magnitude of the private interest at stake; the likelihood of error inhering in the adjudicative procedures and the value of additional procedural safeguards in reducing that error rate; and the government's interest, including the financial and administrative burdens that would be imposed by requiring additional procedural safeguards.⁷³ This test does not mandate formal evidentiary hearings or judicial proceedings prior to the issuance of enforceable judgments. In *Eldridge*, for example, the Court upheld administrative termination of disability benefits without a pre-deprivation evidentiary hearing on the ground that the written medical reports on which administrators relied provided a sufficiently reliable basis for determination.⁷⁴ The use of administrative hearings in which

⁷⁰ See, e.g., *Jones v. Flowers*, 126 S. Ct. at 1718-19 (notice to owner of real property of tax foreclosure sale); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490 (1988) (notice to creditors in probate proceedings); *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 799-800 (1983) (notice to mortgagee of tax foreclosure); *Greene v. Lindsey*, 456 U.S. 444, 455 (1982) (notice to public housing tenants of forcible entry and detainer actions); *Schroeder v. City of New York*, 371 U.S. 208, 213-14 (1962) (notice of condemnation proceedings); *Walker v. City of Hutchinson*, 352 U.S. 112, 116 (1956) (same); *Mullane*, 339 U.S. at 318 (notice of settlement of trust accounts). *Jones* illustrates the problems that inhere in the use of registered mail. When the recipient signs a receipt there is evidence that notice was actually received, but when registered mail is returned unclaimed the government will be on notice of non-delivery without knowing the reason. See 126 S. Ct. at 1718-19. In this fashion, a defendant can defeat service by the mere expedient of refusing to claim a letter.

⁷¹ As the court put it in *Sankstelis v. City of Chicago*, 932 F.2d 1171 (7th Cir. 1991), in which the plaintiffs challenged the constitutionality of the booting of vehicles that had accumulated more than 10 unpaid parking tickets, the court held "[t]his cascade of notices and opportunities for hearing is quite sufficient under the due process clause." *Id.* at 1173. Accord, e.g., *Gardner v. City of Columbus*, 841 F.2d 1272, 1279 (6th Cir. 1988); *Rackley v. City of New York*, 186 F. Supp. 2d 466, 480-83 (S.D.N.Y. 2002); *Jaouad v. City of New York*, 4 F. Supp. 2d 311, 313-14 (S.D.N.Y. 1998); *Morris v. City of New York Parking Violations Bureau*, 527 F. Supp. 724, 726-27 (S.D.N.Y. 1981).

⁷² 424 U.S. 319 (1976).

⁷³ See, e.g., *City of Los Angeles v. David*, 538 U.S. 715, 716-17 (2003) (per curiam); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993); *Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991).

⁷⁴ See 424 U.S. at 339-49.

the allegations in the parking ticket is given probative weight without a right to cross-examine the ticketing official should pass muster under this approach. The financial stakes in parking ticket litigation are relatively low; the increased risk of error in relying on tickets rather than live testimony subject to cross-examination is also likely to be low given the straightforward nature of illegal parking inquiry and the low probability that ticketing officials' live testimony will add anything useful; and the administrative and financial burden that would be imposed on the government by a rule requiring the presence of the ticketing officer would be great. Thus, the cost-benefit analysis demanded by *Mathews* favors the new systems for adjudicating and enforcing parking-ticket liability.⁷⁵ Indeed, courts usually

⁷⁵ Judge Posner has illustrated how the cost-benefit *Mathews* test is likely to play out in the parking ticket context:

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

The benefits of a procedural safeguard are even trickier to estimate than the costs. The benefits will depend on the harm that the safeguard will avert in cases in which it prevents an erroneous result and the likelihood that it *will* prevent and erroneous result. We know the harm here to the innocent car owner found "guilty" and forced to pay a fine: it is the fine, and it can be anywhere from \$10 to \$100, for an average of \$55. We must ask how likely it is that the error would be averted if the ticketing officer were present at the hearing and therefore subject to cross-examination. Suppose that in his absence the probability of an erroneous determination that the respondent really did commit a parking offense is 5 percent, and the officer's presence would cut that in half, to 2.5 percent. Then the average saving to the innocent respondent would be only \$1.38 ($\$55 \times .025$) – a trivial amount.

Van Harken v. City of Chicago, 103 F.3d 1346, 1351-52 (7th Cir.) (emphasis in original), *cert. denied*, 520 U.S. 1241 (1997). Also instructive is *City of Los Angeles v. David*, 538 U.S. 715 (2003) (per curiam), in which the Court held that a 27-day delay in an administrative hearing following the towing of an illegally parking vehicle did not deprive the owner of the use of his vehicle without due process of law, reasoning that the risk of error in

uphold these systems utilizing the *Mathews* approach to procedural due process.⁷⁶ But while the innovations in adjudicating and enforcing parking-ticket liability fare well under current due process doctrine, an originalist approach to due process would lead to quite different results.

B. An Originalist Look At The New Systems of Parking-Ticket Adjudication.

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

1. *Service* – Service of process by placing a ticket on a vehicle and mailing a copy to the registered owner’s address has little originalist support. Well into the twentieth century,

determinations about illegal parking is low and the administrative burden on the city in expediting the thousands of post-tow hearings it must conduct each year would be great. *See id.* at 718-19.

⁷⁶ *See, e.g.,* Van Harken v. City of Chicago, 103 F.3d 1346, 1350-54 (7th Cir.) (rejecting claims that use of a municipal administrative agency violates due process by eliminating procedural protections utilized by courts in criminal proceedings, eliminating a right of cross-examination, and utilizing an administrative agency under the control of a municipality with a financial interest in the proceedings), *cert. denied*, 520 U.S. 1241 (1997); Gardner v. City of Columbus, 841 F.2d 1272, 1277-79 (6th Cir. 1988) (rejecting due process challenge to use of municipal administration adjudication and treatment of ticket as prima facie evidence); Jaouad v. City of New York, 39 F. Supp. 2d 383, 388-89 (S.D.N.Y. 1999) (rejecting claim of bias because administrative hearing officers are employed by city); Pempek v. Edgar, 603 F. Supp. 495, 498-500 (N.D. Ill. 1984) (upholding summary suspension of driver’s license when warrant issues for 10 or more unpaid parking tickets); Van Harken v. City of Chicago, 713 N.E. 2d 754, 762-64 (Ill. App. Ct. 1999) (rejecting due process challenge to ordinance establishing administrative adjudication of parking or compliance violations on the ground that attendance of ticketing official is not required and hearing officers are contractual employees of the city); Baker v. City of Iowa City, 260 N.W.2d 427, 431-32 (Iowa 1977) (rejecting challenge to booting for ten unpaid tickets on the ground that other measures had not proven effective to enforce parking regulations); Bane v. City of Boston, 396 N.E.2d 155, 156-57 (Mass. Ct. App. 1979) (upholding Boston’s “tow and hold” law, under which owner of automobile must pay outstanding parking tickets or post a bond before seeking the release of his car, against challenge that issuance of tickets provided insufficient predeprivation notice and opportunity for hearing); O’Neill v. City of Philadelphia, 711 A.2d 544, 547-48 (Pa.Cmwth. Ct. 1998) (rejecting due process challenge to transfer of parking ticket cases from judicial to administrative adjudication). *But cf.* Wilson v. City of New Orleans, 479 So. 2d 891, 899-903 (La. 1985) (requiring the provision of notice and opportunity for hearing for impartial decisionmaker before vehicle is placed on boot list). Due process attacks on the imposition of liability on the registered owner of a vehicle without proof that the owner had actual knowledge of the violation have similarly been rejected on the ground that it is proper to presume that impose the owner of a vehicle monitors the use of the property. *See, e.g.,* Gardner, 841 F.2d at 1279-80; Bricker v. Craven, 391 F. Supp. 601, 605 (D. Mass. 1975); City of Chicago v. Hertz Commercial Leasing Corp., 374 N.E.2d 1285, 1290-91, *cert. denied*, 439 U.S. 929 (1978), Iowa City v. Nolan, 239 N.W.2d 102, 104-05 (Iowa 1976); Commonwealth v. Minicost Car Rental, Inc., 242 N.E.2d 411, 412-13 (Mass. 1968); City of Kansas City v. Hertz Corp., 499 S.W.2d 449, 452 (Mo. 1973); City of Missoula v. Shea, 661 P.2d 410, 414-15 (Mont. 1983); City of Portland v. Kirk, 518 P.2d 665, 668 (Or. Ct. App. 1974); Commonwealth v. Rudinski, 555 A.2d 931, 933-34 (Pa. Super. 1989).

it was thought that a defendant could be properly haled into court only when he was personally served with process or if process was left at the defendant's abode.⁷⁷ In fact, the first state statute authorizing service by mail was not enacted until 1917,⁷⁸ and the Federal Rules of Civil Procedure did not permit service by registered or certified mail until 1963 and did not permit service by ordinary mail until 1983.⁷⁹ As for the state of the law in 1868, New York's Field Code, which is generally considered to be the most advanced code of procedure extant at the time of the Fourteenth Amendment's ratification,⁸⁰ required personal service in order to initiate legal proceedings.⁸¹ To be sure, eighteenth century jurisdictional doctrine considered the possibility that it might be possible to locate a defendant's property but not the defendant himself; but in such cases in rem jurisdiction could be asserted over the property without acquiring personal jurisdiction over the defendant only if the property was seized and taken into the custody of the court.⁸² Seizure of the property was considered critical because "attachment combined with substituted service would provide greater

⁷⁷ See, e.g., 1 ROBERT C. CASAD & WILLIAM B. RICHMAN, JURISDICTION IN CIVIL ACTIONS §§ 3-1[1] & [3] (1998); MILLAR, *supra* note 43, at 85-91. This was the common law rule articulated by Blackstone. See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 279-80 (1765) (U. Chi. Press 1979).

⁷⁸ See MILLAR, *supra* note 43, at 88-89. Prior to that, however, it was common to permit service on a former resident of the forum state who had left the jurisdiction since the events giving rise to the suit by publication and by mail sent to his place of residence. See *id.* at 91-94.

⁷⁹ See Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1189-1212 (1987).

⁸⁰ See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 293-98 (2d ed. 2005); MILLAR, *supra* note 43, at 171-80.

⁸¹ See 1 COMMISSIONERS ON PRACTICE AND PLEADING, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK--NEW YORK FIELD CODES 1850-1865, at 254, 257-58 (1998) (§§ 621 & 628) [hereafter cited as "FIELD CODE"]. When the defendant could not be found and was a necessary party to litigation involving real property in New York, the court could authorize service by publication and by mailing a copy of the summons must to the defendant at his residence unless it is not know by the plaintiff and cannot be obtained with reasonable diligence. See *id.* at 258-60 (§§ 629-31).

⁸² See MILLAR, *supra* note 43, at 481-92. Thus,

Substituted service by publication, or in any authorized form, may be sufficient to inform the parties of the object of the proceedings taken *where the property is once brought under the control of the court by seizure or some equivalent act*. The law assumes that property is always in the possession of its owner, in person or by agent, and it proceeds on the theory that its seizure will inform him not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale

Pennoyer v. Neff, 95 U.S. 714, 727 (1878) (emphasis supplied).

assurance that the defendant would receive notice of the action than would substituted service alone.”⁸³ It follows that tie-on service coupled with mailing would fall well short of what the common law considered sufficient notice at the time of the Fourteenth Amendment’s ratification. Booting and subsequent impoundment could, in contrast, be a permissible means of asserting in rem jurisdiction; but we have seen that booting and impoundment are measures undertaken to enforce an administrative judgment that eighteenth and nineteenth century law would deem unenforceable for lack of proper service.

2. *Rules for adjudication* – An originalist inquiry would condemn treatment of tickets as evidence before an administrative tribunal without need of the ticketing officer’s testimony and availability for cross-examination. The nineteenth-century law of evidence recognized no exception to the rule against hearsay for the reports of law enforcement officials.⁸⁴ Nor were administrative tribunals utilized as a means of adjudicating an individual’s liability; in the mid-nineteenth century administrative law was still in its infancy and was confined to the use of administrative tribunals to regulate railroads and other utilities where special expertise was thought to be necessary to administer a complex regulatory scheme.⁸⁵ The use of administrative hearing officers employed by the same entity that was seeking to recover fines would have been thought particularly problematic. The development of an independent judiciary that enjoyed tenure protection was thought to be an important aspect of the common law’s protection of individual rights.⁸⁶

⁸³ *Shaffer v. Heitner*, 433 U.S. 186, 198 n.16 (1977). In *Jones*, the Court reiterated the importance of the seizure to the exercise of jurisdiction in the absence of personal service: “[L]ibel of a ship, attachment of a chattel[], or entry upon real estate in the name of the law,’ -- such seiz[ures] of property . . . may reasonably be expected to come promptly to the owner’s attention.” 126 S. Ct. at 1178 (quoting *Mullane*, 339 U.S. at 316)).

⁸⁴ See, e.g., FRIEDMAN, *supra* note 80, at 101-04, 300-01.

⁸⁵ See, e.g., *id.* at 329-40. By the late nineteenth century, administrative law had spread to occupational licensing, see *id.* at 340-46, still a far cry from the general use of administrative adjudication to impose liability for violating a generally applicable municipal laws.

⁸⁶ See 1 BLACKSTONE, *supra* note 77 at 257-60.

3. *Enforcement of judgments* – The use of self-help as a means of enforcing parking-ticket liabilities is wholly indefensible on originalist terms. In the nineteenth century, judgments were enforced only through judicial supervision of the enforcement process during which a defendant’s assets were identified and then seized pursuant to court order when necessary to satisfy an outstanding judgment.⁸⁷ There was simply no thought of permitting judgment creditors to engage in self-help by immobilizing or otherwise seizing a judgment debtor’s property.

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

C. *Originalism and Procedural Innovation.*

Parking-ticket litigation provides what is perhaps a particularly prosaic example of the problems that procedural innovation poses for an originalist interpretation of the Due Process Clause. The intersection of originalism and parking tickets, however, hardly exhausts the problems created by and originalist approach to procedural due process.

⁸⁷ See MILLAR, *supra* note 43 at 419-69. Under the Field Code, for example, an officer of the court, the Sheriff, was responsible for collecting an unpaid fine and was authorized to imprison a recalcitrant judgment debtor, and the sheriff was himself liable to county or city for the fine unless the judgment debtor could not be found or had been imprisoned. See FIELD CODE, *supra* note 81, at 687-88 (§§ 1667, 1648-50).

Applied to procedural due process, originalism would condemn virtually any effort at procedural innovation in order to meet the demands that contemporary litigation places on civil and criminal procedural. Consider, for example, the innovations in the law of personal jurisdiction that have enabled the litigation process to meet the demands of our complex and nationalized (even internationalized) economy.

The permissible methods of service have gradually liberalized as new technologies come to be seen as providing an efficient means of transmitting information and personal service comes to be seen as an inefficient method of initiating litigation.⁸⁸ As we have seen, however, at the time of the Fourteenth Amendment's framing, a defendant had a right not to be haled into court absent personal or at least abode service, and in rem jurisdiction could not be exercised except over property that had been seized and brought within the custody and control of the court.⁸⁹ Thus, under the legal rules in effect in 1868 that constitute the historical baseline for an originalist account of due process, there was simply no conception of long-arm jurisdiction or extraterritorial service effective outside of the forum state. That rule, at least as a matter of constitutional law, lasted until the decision in *International Shoe Co. v. Washington*,⁹⁰ which held that "due process requires only that in order to subject a defendant to a judgment *in personam*, he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁹¹ As a consequence of *International Shoe*, the Court "abandoned more formalistic tests that focused on a defendant's 'presence' in the State in favor of a more

⁸⁸ See generally, e.g., Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337 (2003); Kent Sinclair, *Service of Process: Amended Rule 4 and the Presumption of Jurisdiction*, 14 REV. LITIG. 159 (1994); John M. Murphy, Note, *From Snail Mail To E-Mail: The Steady Evolution of Service of Process*, 19 ST. JOHN'S J. LEGAL COMMENT. 73 (2004).

⁸⁹ See text at notes 77-83, *supra*.

⁹⁰ 326 U.S. 310 (1945).

⁹¹ *Id.* at 316. Accord, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 307-08 (1992); *Helicopteros Nacionales de Columbia, N.A. v. Hall*, 466 U.S. 408, 413-14 (1984); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780-81 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977).

flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend in that State."⁹² The view at the time of the Fourteenth Amendment's framing, however, was that a defendant who had not been served in the forum state had a right not be haled into that forum. Indeed, within a few years of the ratification of the Fourteenth Amendment, in *Pennoyer v. Neff*,⁹³ the Supreme Court held that due process forbids a state court from exercising jurisdiction over a nonresident defendant who had not been served in the forum state and whose property was not seized and thereby brought within the jurisdiction of the forum.⁹⁴ On an originalist view which measures the Fourteenth Amendment's protections by reference to those rights recognized at the time of framing, accordingly, there is no defense for the "minimum contacts" test that supports the now-pervasive use of "long-arm" jurisdiction over defendants who have never set foot in the forum state.⁹⁵ Such an approach was simply unknown in 1868.

The view that the Due Process Clause should be construed to forbid all procedural innovation that deprives a litigant of a procedural right recognized at the time of the Fourteenth Amendment's framing is so unattractive that no originalist of whom I am aware dares to embrace it. It surely is strange to think of the Due Process Clause as a guarantee that there would never be any procedural reforms in the manner by which questions of life, liberty, or property were adjudicated. Moreover, such a view is unsupported by this

⁹² *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992).

⁹³ 95 U.S. 714 (1878).

⁹⁴ *See id.* at 733-36. To be sure, the Court also imported into the Due Process Clause a notion that states were forbidden to exercise any form of extraterritorial jurisdiction over nonresidents, *see id.* at 722-24, 733-34, but we have seen that in 1868, even within a state's borders there were well-understood restrictions on the permissible methods for haling a defendant into court. Moreover, in Part III.A below we will see that whatever else is true, the guarantee of due process was always thought to regulate the manner in which a defendant was haled into court even when the defendant resided in the forum state.

⁹⁵ For a description of the growth of long-arm statutes, see FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, *CIVIL PROCEDURE* 74-87 (5th ed. 2001).

constitutional text. Had the framers wished to freeze procedural law in amber, they would have used a formulation akin to that of the Seventh Amendment. But once one agrees that the Due Process Clause permits procedural innovation, there are immense difficulties in articulating an originalist account of procedural due process.⁹⁶

These difficulties are reflected in the decision in *Burnham v. Superior Court*.⁹⁷ In that case, the question presented was whether due process permits a court to exercise jurisdiction over a nonresident defendant served during a transient stay in the forum state.⁹⁸ Writing for a three-justice plurality, Justice Scalia concluded that *International Shoe's* minimum contacts test was inapplicable to personal service within the forum state because this method of service was well-accepted at the time of the Fourteenth Amendment's framing.⁹⁹ As he put it: "[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'¹⁰⁰ Justice Scalia nevertheless defended *International Shoe* as a necessary response to "changes in the technology of transportation and communication, and to the tremendous growth of interstate business activity"¹⁰¹ In his view,

⁹⁶ To be sure, when the Constitution mandates a particular procedure, then there is an originalist test available for assessing procedural innovation. For example, on an originalist view, the Confrontation Clause mandates a particular method by which evidence must be adduced in criminal cases, and procedural innovations must therefore be assessed with respect to their conformity with a constitutionally mandated procedure. *See Crawford v. Washington*, 541 U.S. 36, 50-56 (2004); *White v. Illinois*, 502 U.S. 346, 360-65 (1992) (Thomas, J., concurring in part and concurring in the judgment); *Maryland v. Craig*, 497 U.S. 836, 864-67 (1990); *Coy v. Iowa*, 487 U.S. 1012, 1015-20 (1988). The Due Process Clause, however, does not mandate any particular procedure; persons must only receive that process which is "due." Since the Due Process Clauses do not identify any particular procedure as constitutionally mandated, the seemingly originalist approach to due process, as Justice Scalia has argued, is to recognize as "due process" those procedural entitlements that existed at the time of framing and ratification. *See* text at note 25-26, *supra*.

⁹⁷ 495 U.S. 604 (1990).

⁹⁸ *See id.* at 608 (plurality opinion).

⁹⁹ *See id.* at 610-19 (plurality opinion).

¹⁰⁰ *Id.* at 619 (plurality opinion).

¹⁰¹ *Id.* at 617.

For new procedures, hitherto unknown, the Due Process Clause requires analysis to determine whether “traditional notions of fair play and substantial justice” have been offended. But a doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets that standard.¹⁰²

Thus, for Justice Scalia, due process originalism is a one-way ratchet; it permits innovation but shields from constitutional procedures accepted at the framing.¹⁰³

Whatever the virtues of this interpretation of the Due Process Clause; it is not originalist. There is no evidence that the original understanding of due process included an acknowledgment that something less than the physical presence of the defendant in the forum state or the seizure of its property could support the exercise of jurisdiction. To the contrary, as we have seen, the evidence is overwhelming that *Pennoyer v. Neff* correctly identified the prevailing understanding of the right of the nonresident defendant not to be haled into a jurisdiction where he was not physically present.¹⁰⁴ Nor is there any reason to believe that the original understanding relaxed the requirement of physical presence when considerations of transportation technology and the needs of interstate commerce were at issue; at the time of the Fourteenth Amendment’s adoption, the mobility and importance of maritime commerce was presumably understood, and yet the settled rule in admiralty was

¹⁰² *Id.* at 622 (plurality opinion) (citation omitted).

¹⁰³ For example, Justice Scalia wrote:

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

Id. at 619 (plurality opinion) (quoting *Hurtado v. California*, 110 U.S. 516, 528-29 (1884) (brackets and ellipses in original). *Accord* *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29-31 (1991) (Scalia, J., concurring in the judgment). For a similar articulation of procedural due process by an avowed originalist, see Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1286 (1997).

¹⁰⁴ See text at notes 77-83, *supra*.

that in the absence of personal service on a ship's owner, a court could not exercise jurisdiction in an admiralty action unless the ship was seized and taken into the custody of the court.¹⁰⁵ And there is no evidence that the one-way ratchet itself reflects the original understanding; the only authority Justice Scalia cites for his view is the Supreme Court's decision in *Hurtado v. California*,¹⁰⁶ which itself cited no historical evidence to support its own view of procedural innovation.¹⁰⁷

Even aside from all that, the one-way ratchet reflects a view that as a result of changes in society, the meaning of due process can change – a right not to be haled into a distant forum thought to be due process at the time of the framing can be eliminated if it comes to be viewed as sufficiently inexpedient in light of contemporary economic demands. That is not originalism; Justice Scalia has himself contended that if one believes that the Constitution's meaning can change in light of changes in society, “there is no real difference between the faint-hearted originalist and the moderate nonoriginalist, except that the former finds it comforting to make up (out of whole cloth) an original evolutionary intent, and the latter thinks that superfluous.”¹⁰⁸ Justice Scalia's approach in *Burnham*, however, does not

¹⁰⁵ See, e.g., GRANT GILMORE AND CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 4-85 (1957). On the Framers' understanding of the importance of maritime commerce and transportation, see William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEG. HIST. 117 (1993). As we have seen, in the nineteenth century a judicial seizure of property was thought to be essential to jurisdiction since a seizure was thought highly likely to be brought to the attention of the property's owner, who would also understand that he needed to appear before the court that had custody of the property if he was to obtain its return. See text at notes 82-83, *supra*.

¹⁰⁶ See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29-31 (1991) (Scalia, J., concurring in the judgment); *Burnham*, 495 U.S. at 619 (plurality opinion).

¹⁰⁷ See *Hurtado v. California*, 110 U.S. 516, 528-29 (1884).

¹⁰⁸ Scalia, *supra* note 5, at 862. For a somewhat more detailed explanation as to why such an approach does not qualify as originalist, see Laurence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1252-61 (1993). For the same reasons, the one effort to date to provide an originalist account of procedural due process is not really originalist. In his article, Edward Eberle concluded that pre-ratification case law had established that “[d]ue process guaranteed notice, and opportunity to be heard, and a determination by a neutral decisionmaker according to some fair and settled course of judicial proceeding.” Eberle, *supra* note 41, at 339. This formulation, however, articulates a standard so general that it articulates no meaningful difference from an ahistorical evolutionary jurisprudence tied to nothing more than an abstract notion of procedural fairness, since it leaves a judge free to decide what constitutes fair notice, opportunity to be heard, and fair adjudicative procedures without regard to those procedural rights extant at the time of the framing. For a

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

But perhaps it is unfair to accuse originalism of lacking a persuasive account of procedural due process based on the work of Justice Scalia. Justice Scalia admits that consequentialism infects his jurisprudence; he acknowledges that “in a crunch I may prove a faint-hearted originalist.”¹⁰⁹ Or, Justice Scalia’s acceptance of *International Shoe* may reflect no more than his deference to the precedential force of nonoriginalist decisions.¹¹⁰ But the question remains – is there a persuasive originalist account of procedural due process, and, if so, must it forbid procedural innovation? Or does due-process originalism demand that we

useful elaboration on the difficulties originalism faces in defining original meaning at an appropriate level of generality, see LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 31-64 (1991). Christopher Eisengruber has demonstrated originalism merges with nonoriginalist decisionmaking if the original understanding is defined at such a high level of generality:

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

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

¹⁰⁹ Scalia, *supra* note 5, at 864.

¹¹⁰ See Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION, *supra* note 19, at 138-40. For a leading discussion of originalism’s view on adherence to nonoriginalist precedent, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

return to *Pennoyer v. Neff* and the balance of nineteenth-century procedural thinking? It is to these matters that I now turn.

III. THE NONORIGINAL ORIGINAL MEANING OF THE DUE PROCESS CLAUSE

It remains to develop an account of the original meaning of the Due Process Clause. That account suggests that the due process was intended to be an evolving concept rather than one with a fixed and historically-determined meaning. But before I offer that account, I consider another that attempts to solve the dilemmas that procedural innovation poses for originalism.

A. *The Original Understanding of Due Process.*

Raoul Berger has advanced an originalist account of due process that would permit procedural innovation. While not addressing procedural due process in terms, Berger argues that the original meaning of due process was simply that deprivations of life, liberty or property, must be authorized by the common law or statute.¹¹¹ On this view, procedural innovation is permissible as long as it is authorized by statute. In fact, history thoroughly

¹¹¹ See BERGER, *supra* note 15, at 193-214. For a more recent restatement of this view, see Andrew T. Hyman, *The Little Word "Due"*, 38 AKRON L. REV. 1, 10-23 (2005). Justice Thomas has come close to endorsing this position. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (dissenting opinion). This was Justice Black's view, although he believed that the Due Process Clause also incorporated the Bill of Rights. See *In re Winship*, 397 U.S. 358, 378-84 (1971) (dissenting opinion). Among contemporary scholars, there is considerable support for the view that incorporation was intended under the Fourteenth Amendment's Privileges and Immunities Clause, *see, e.g.*, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181-230 (1998); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 57-130 (1986); Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICH. L. REV. 289 (1999); but due-process incorporation has never found support among legal scholars and the meaning of the Privileges and Immunities Clause remains contested. *See, e.g.*, Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 987-1026 (1998). The fundamental problem with Justice Black's view of incorporation is textual. The Fourteenth Amendment's Due Process Clause tracks that of the Fifth Amendment, but on Justice Black's view, the former clause takes on a totally different meaning than the latter with no apparent textual support. See *Adamson v. California*, 332 U.S. 46, 63-66 (1947) (Frankfurter, J., concurring). The Court has ultimately taken the view that the Fourteenth Amendment's Due Process Clause incorporates those provisions of the Bill of Rights that are thought to be fundamental, but it has made no attempt to justify that view in terms of the original meaning of due process. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968); *Pointer v. Texas*, 380 U.S. 400, 403-06 (1965); *Malloy v. Hogan*, 378 U.S. 1, 4-11 (1964); *Gideon v. Wainwright*, 372 U.S. 335, 340-44 (1963); *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233-41 (1897).

undermines Berger's position. The historical evidence against Berger, moreover, suggests a quite different originalist account of due process.

1. *The Fifth Amendment* – Evidence of the understanding of those who crafted the Fifth Amendment's Due Process Clause is surprisingly slim.¹¹² The Due Process Clause was ratified in the form proposed by James Madison but neither Madison nor anyone else involved in the process made any substantive comments about its meaning.¹¹³ Given the paucity of evidence of the original understanding, Berger was forced to rely on remarks of Alexander Hamilton to the New York legislature some three years before the Due Process Clause was presented to Congress.¹¹⁴ Citing Lord Coke, Hamilton argued that “[t]he words ‘*due process*’ have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.”¹¹⁵ When placed in context, however, Hamilton's remarks are far from supportive of Berger's position. This statement appears in the course of an argument that proposed legislation barring former privateers from holding public office violated the due process clause in New York's bill of rights on the ground that due process requires the legislature to proceed by judicial process when imposing this type of disability.¹¹⁶ In context, accordingly, Hamilton

¹¹² The Fifth Amendment's Due Process Clause provides: “No person shall be . . . deprived of life, liberty, or property, without due process of law . . .” U.S. CONST. amend. V.

¹¹³ See NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS* 337-48 (1997).

¹¹⁴ See BERGER, *supra* note 15, at 194. Berger is not the only one to seize on Hamilton's remarks. Many eminent scholars have invoked Hamilton on this score, perhaps demonstrating the remarkable paucity of contemporaneous evidence. See, e.g., 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1103-04 (1953); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1437 (1999).

¹¹⁵ Alexander Hamilton, *New York Assembly: Remarks on an Act Regulating Elections* (Feb. 6, 1787), in 4 PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

¹¹⁶ The context is as follows:

Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted this very session removes it. It is there declared that, no man shall be disenfranchised or deprived of any

was claiming that due process is a constraint on legislative power.¹¹⁷ To be sure, Hamilton's argument is confusing. If Hamilton meant that legislatures have no power to define the rights or privileges of individuals, he was asserting a position that Coke never took; and if he meant only that due process includes a prohibition on legislatively imposed punishments akin to Bills of Attainder, then Hamilton's conception of due process was different than subsequently expressed in the federal constitution, which treated with due process and bills of attainder separately.¹¹⁸ Thus, Hamilton's remarks are an unsteady reed on which to premise an original understanding of the Fifth Amendment's Due Process Clause.¹¹⁹

What is more, it is far from clear that Hamilton correctly described Coke's views. Coke apparently equated due process with Magna Carta's prohibition on the deprivation of liberty or property except by a jury's verdict or the "law of the land"¹²⁰ His well-known treatise explained:

right, but by *due process of law*, or the judgment of his peers. The words "*due process*" have a precise and technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.

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

Id. at 35-36 (emphasis in original and footnote omitted).

¹¹⁷ See Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 989-90.

¹¹⁸ Compare U.S. CONST. art. I, §§ 9-10 with U.S. CONST. amend. V.

¹¹⁹ Reliance on Hamilton's comments is additionally perilous because he was speaking of the due process clause in New York's recently enacted bill of rights, and the differences in the subsequently enacted federal Bill of Rights are, for present purposes, of some consequence. For example, Hamilton relied on Coke to claim that due process was equivalent to the provision in Magna Carta prohibiting any deprivation of rights except "by the law of the land," which "mean[s] presentment and indictment, and process of outlawry, as contradistinguished from trial by jury." Hamilton, *supra* note 115, at 35. Accord Alexander Hamilton, *A Letter from Phocion to the Considerate Citizens of New York* (Jan. 1-27, 1784), reprinted in 3 *id.* at 485. The federal Bill of Rights, however, contained separate Due Process and Grand Jury Clauses, suggesting that the Fifth Amendment's conception of due process was different from Coke's. The Supreme Court made this point in the course of holding that the Fourteenth Amendment's Due Process Clause does not require that criminal charges be brought by a grand jury. See *Hurtado v. California*, 110 U.S. 516, 534-35 (1884).

¹²⁰ Article 39 of Magna Carta provided: "No free man shall be arrested or imprisoned, or disseised or outlawed or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or the law of the land." RALPH V. TURNER, *MAGNA CARTA*, App. 231 (Harry Rothwell trans., 2003).

For the truest sense and exposition of these words, see the Statute of 37 E. 3. cap 8. where the words, by the words, by the law of the land, are rendred, without due proces of law, for there it is said, though it be contained in the great Charter, that no man be taken, imprisoned, or put out of his free-hold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the Common Law. Without being brought in to answere but by due process of the common law. No man being put to answer without presentment before Justices, or thing of record, or by due process, or by writ original, according to the law of the land.¹²¹

This passage, however, is ambiguous about whether a statute inconsistent with what were thought to be common-law procedural rights was valid. If anything, Coke's view was likely that such a statute was invalid. Sitting as a judge in *Bonham's Case*,¹²² Coke wrote of a statute that authorized the Royal College of Physicians to fine and imprison persons practicing medicine without a license while granting it a share of all fines it imposed, "when an Act of Parliament is against common right and reason, the common law will . . . adjudge such at to be void."¹²³ Based on this and similar evidence, a number of scholars have argued that Coke was understood in colonial America to endorse judicial review of statutes that infringed upon rights recognized at common law.¹²⁴ In contrast, Blackstone's famous treatise was clearer in expressing the view that a deprivation of life, liberty or property was permissible when authorized by either the common law or statute, but Blackstone never equated "due

¹²¹ EDWARD COKE, THE SECOND PART OF THE INSTITUTES ON THE LAWS OF ENGLAND 45 (1671). This passage makes it plain that whatever else it meant, due process regulated the manner in which a defendant was haled into court. For an account of the historical evidence on just this point, see Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEG. HISTORY 265 (1975). Thus, *Pennoyer* was quite correct to read the Due Process Clause as regulating the permissible methods of service.

¹²² 77 Eng. Rep. 647 (C.P. 1610).

¹²³ *Id.* at 652.

¹²⁴ See, e.g., EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 40-57, 72-89 (1928); Riggs, *supra* note 117, at 958-73. Even opponents of a reading of Coke's conception of due process as embracing substantive rights acknowledge that the framers may have understood Coke differently. See, e.g., Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 96. On the influence of Coke on American legal thinking at the time of the framing of the Fifth Amendment, see, e.g., A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CHARTA AND CONSTITUTIONALISM IN AMERICA 117-25 (1968); RODNEY L. MOTT, DUE PROCESS OF LAW 87-90 (1926) (1973).

process” with Magna Carta’s “law of the land.”¹²⁵ Hence, the probative value of Blackstone’s account for understanding the meaning of due process is uncertain.

The most influential treatises of the 1820s and 1830s described due process as “the right to trial according to the process and proceedings of the common law.”¹²⁶ This formulation preserves the ambiguity of Coke’s explication and accordingly tells us little about the force of Berger’s account. In what remains the most comprehensive survey of the evidence of the original meaning of due process, Rodney Mott argued that the American colonists understood Coke and Blackstone to have offered competing accounts, and as they came to believe that Parliament had infringed upon what they thought to be their rights as Englishmen, Coke’s account of the substantive limitations on legislation became ascendant in the years leading to the Revolution.¹²⁷ Mott himself punted on the original meaning of the Fifth Amendment’s Due Process Clause: “It is evident that the colonists looked on due process of law as a guarantee which had a wide, varied, and indefinite content.”¹²⁸

It is hard not to sympathize with Mott. Drawing reliable conclusions about the original meaning of the Fifth Amendment is particularly difficult because Madison employed a textual formulation – due process of law – that was relatively novel and had heretofore received no well-settled judicial construction. As one leading historian observed: “No state . . . had a due process of law clause in its own constitution, and only New York had

¹²⁵ See 1 BLACKSTONE, note 76, at 30-34. On the influence of Blackstone in America in the late eighteenth century, see, e.g., STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM 49-57 (2000); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

¹²⁶ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789 at 567 (1833) (Melville M. Bigelow ed., 1994) (footnote omitted). Accord II JAMES W. KENT, COMMENTARIES ON AMERICAN LAW 13-14 (1826) (O.W. Holmes ed., 1873).

¹²⁷ See MOTT, *supra* note 121, at 46-70, 125-39. For a more recent statement of this view, see Riggs, *supra* note 116, at 963-76.

¹²⁸ MOTT, *supra* note 121, at 123.

recommended such a clause in favor of the more familiar ‘law of the land’ clause.”¹²⁹ It may well be that Berger, on balance, has the better argument. *Bonham’s Case* had produced no progeny and English courts since then had treated Parliament as the supreme authority on the constitutionality of legislation.¹³⁰ But for that reason, English common law offered no reliable guideposts for assessing the meaning of the Fifth Amendment’s Due Process Clause in a system with a written constitution which was to be treated as “the supreme law of the land.”¹³¹ As for New York’s bill of rights, the most direct antecedent of the Fifth

¹²⁹ LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 248 (1999). Although it cited no historical support for its position, in *Murray’s Lessee v. Hoboken Land & Development Co.*, 59 U.S. (18 How.) 272 (1855), the Supreme Court attempted to explain Madison’s choice:

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

Id. at 276. There is a good deal of question-begging going on here. Nothing compelled the Framers to separate the Fifth, Sixth and Seventh Amendments. Had they wished to track Magna Carta, they could have simply combined all three protections into the familiar “judgment of his peers or the law of the land” formulation used in Magna Carta. A bit more plausibly, Charles Miller has suggested that Madison employed the due-process formulation because a law-of-the-land clause was already in the Constitution’s Supremacy Clause, and its repetition might have caused confusion. See Charles A. Miller, *The Forest of Due Process Law: The American Constitutional Tradition*, in *NOMOS XVIII: DUE PROCESS* 11-12 (J. Roland Pennock and John Chapman eds., 1977). This explanation, however, overlooks the fact that the due-process formulation was borrowed from New York’s bill of rights, which was drafted prior to the federal constitution, and New York’s rationale for adopting this formulation is entirely mysterious. See Easterbrook, *supra* note 124, at 96-97.

¹³⁰ See CHARLES G. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* 32-48, 106-07 (1930); David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 *VAND. J. TRANSNAT’L LAW* 863, 888-90 (2003). Berger stressed this point. See Raoul Berger, “‘Law of the Land’ Reconsidered,” 74 *NW. U.L. REV.* 1, 5-6, 29-30 (1979). In fact, it is not even clear that Coke held the statute at issue in *Bonham’s Case* invalid; the best reading of his opinion may be merely that the statute should be narrowly construed. See Jenkins, *supra*, at 884-88. Nor did the 1354 statute that Coke invoked in his treatise as equating the law of the land guarantee with due process produce and reliable guideposts for assessing the meaning of due process; as Keith Jurow has demonstrated, its language and construction makes plain that it was limited to assessing the manner in which a defendant could be haled into court. See Jurow, *supra* note 121, at 266-71.

¹³¹ U.S. CONST. art. VI, cl. 2.

Amendment, it was far from clearly understood, at least if Alexander Hamilton's views are any guide.

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

As with the Fifth Amendment's Due Process Clause, the debates in Congress and the ratifying states over the Fourteenth Amendment offer no meaningful discussion of the meaning of due process.¹³² The debates, however, make clear the reason for this omission – it was generally understood that the courts had already articulated the parameters of due process. Representative John Bingham, presenting what would become the Fourteenth Amendment to the House of Representatives, parried inquiry into the meaning of due process thusly: “[T]he courts have settled that long ago, and the gentleman can go read their decisions.”¹³³ Indeed, the advocates of the Fourteenth Amendment consistently argued that their proposal did no more than make existing constitutional protections enforceable against the states.¹³⁴ Even aside from this legislative history, an inquiry into the contours of Fifth Amendment due process jurisprudence at the time of the Fourteenth Amendment's ratification seems inescapable. The Fourteenth Amendment's Due Process Clause was framed in terms already found in the Fifth Amendment; accordingly it should have been plain that judicial interpretations of the Fifth Amendment's parallel provision would inform

¹³² See, e.g., HORACE EDGAR FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 95-97, 140-209 (1908) (2003); MOTT, *supra* note 121, at 154-59. For a representative example of the type of unhelpful truisms to be found in the congressional debates on those relatively rare occasions on which due process was discussed, see CONG. GLOBE, 39th Cong., 1st Sess. App. 256 (1866) (remarks of Rep. Baker) (emphasis in original) (“The Constitution already declares generally that no person shall ‘be deprived of life, liberty, or property without due process of law.’ This declares particularly that no *State* shall do it.”).

¹³³ CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866). On the pivotal role of Bingham in the drafting and adoption of the Fourteenth Amendment, see, e.g., Richard L. Aynes, *On the Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589 (2003).

¹³⁴ See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (remarks of Rep. Stevens); *id.* at 2542 (remarks of Rep. Bingham); *id.* at App. 256 (remarks of Rep. Baker); *id.* at 2765-66 (remarks of Sen. Howard).

the construction of the new provision. But the state of the decisional law at the time of the Fourteenth Amendment's framing provides little support for Berger's account.

Prior to 1868, the Supreme Court had addressed the meaning of due process on four occasions. The first was *Bank of Columbia v. Okely*,¹³⁵ in which the Court upheld a Maryland statute granting the bank a summary remedy on its notes against a due process attack based on the Maryland Constitution on the ground that the debtors had waived whatever rights they had by agreeing to the terms of the notes.¹³⁶ Notably, the Court did not suggest that the summary remedy was valid because it was authorized by statute; to the contrary, the Court characterized due process as “intended to secure the individual from the arbitrary powers of government, unrestrained by the established principles of private rights and distributive justice.”¹³⁷

The Court did not treat with the federal due process clause until *Bloomer v. McQuewan*,¹³⁸ when the Court construed an Act of Congress extending the term of a patent as entitling a licensee to continue to use the patented item during the extension without need of an additional license.¹³⁹ In dicta, the Court added, without elaboration: “The right to construct and use these planing machines, had been purchased and paid for without any limitation . . . [a]nd a special Act of Congress, passed afterwards, depriving appellees of their right to use them, certainly could not be regarded as due process of law.”¹⁴⁰

Next, in *Murray's Lessee v. Hoboken Land & Development Co.*,¹⁴¹ the Court upheld a federal statute authorizing issuance a lien on the property of federal tax collectors based on the results of an administrative audit against due process attack on the ground although the

¹³⁵ 17 U.S. (4 Wheat.) 235 (1819).

¹³⁶ *See id.* at 244-45.

¹³⁷ *Id.* at 244.

¹³⁸ 55 U.S. (14 How.) 539 (1852).

¹³⁹ *See id.* at 550-53.

¹⁴⁰ *Id.* at 553.

¹⁴¹ 59 U.S. (18 How.) 272, 276 (1855).

statute departed from the traditional common law requirement of a trial and a jury determination, it was consistent with longstanding statutory remedies granted against tax collectors.¹⁴² Thus, the Court implicitly held that the common law incidents of due process could be altered through statutory innovation, but it nevertheless characterized the Due Process Clause as “a restraint upon the legislative as well as 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.”¹⁴³

Finally, and most famously, in *Dred Scott v. Sandford*,¹⁴⁴ as it rejected the power of Congress to prohibit slavery in federal territories, the Court wrote, again without much in the way of elaboration: “[A]n Act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular territory of the United States and who committed no offense against the laws could hardly be dignified with the name of due process of law.”¹⁴⁵

In sum, by the time the Fourteenth Amendment was drafted, the Supreme Court had twice expressly rejected the view that due process was inapplicable to statutes, and it had

¹⁴² See *id.* at 277-85.

¹⁴³ *Id.* at 276. As for the methodology to be used when assessing a procedural innovation under due process attack, the Court wrote:

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

Id. at 276-77. This, of course, comes close to a view of due process as prohibiting procedural innovation. But this discussion in *Okely* never ripened into a general understanding that due process prohibits procedural innovation after the framing, as the discussion below demonstrates.

¹⁴⁴ 60 U.S. (19 How.) 393 (1857).

¹⁴⁵ *Id.* at 450.

implicitly but fairly clearly rejected that view on two other occasions as well.¹⁴⁶ Thus, the Berger view did not represent the understanding of due process by 1868, at least if the pronouncements of the Supreme Court are to be taken seriously.¹⁴⁷ At the same time, it is hard to divine very much about the nature of due process from the four available cases; the Court had discussed the concept in only skeletal terms.

The rather muddled understanding of due process is reflected in Thomas Cooley's treatise, which appeared about the time of the Fourteenth Amendment's ratification.¹⁴⁸

Cooley echoed *Murray's Lessee*: "[A] legislative enactment is not necessarily the law of the land That construction would render the restriction absolutely nugatory, and turn this

¹⁴⁶ It is perhaps curious that the framers of the Fourteenth Amendment would incorporate into that amendment the very clause that had been at the root of *Dred Scott*, but the anomaly disappears when one considers that due process was a popular concept among abolitionists. Prior to the Civil War, abolitionists had argued that slavery was itself a deprivation of the liberty of slaves and without due process of law, and therefore inconsistent with the Fifth Amendment. See, e.g., CURTIS, *supra* note 111, at 42-56; HOWARD J. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY," AND AMERICAN CONSTITUTIONALISM 252-58 (1968); JACOBIOUS TENBROEK, EQUAL UNDER LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 43-56 (1951) (1965). See generally ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 73-102 (1970).

¹⁴⁷ Professor Harrison, in the course of the debate over substantive due process, disparages the significance of the antebellum Supreme Court decisions on due process:

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

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

¹⁴⁸ On the importance of the Cooley treatise, see, e.g., EDWIN CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING, AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 116-18 (1948); FRIEDMAN, *supra* note 80, at 628; CLYDE JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON ON AMERICAN CONSTITUTIONAL LAW 27-32 (1954); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LASSEZ FAIRE CAME TO THE SUPREME COURT 18-41 (1942).

part of the Constitution into mere nonsense.”¹⁴⁹ Instead, due process “exclude[s] arbitrary power from every branch of the government; and there would be no exclusion if such receipts or decrees were to take effect in the form of a statute.”¹⁵⁰ As to procedural innovation, Cooley explained that the legislature could deprive an individual of what was thought to be a “vested right,” adding that “a vested right of action is property in the same sense in which tangible items are property, and is equally protected against arbitrary interference.”¹⁵¹ Nevertheless, Cooley cautioned that there was no vested right to any particular remedy,¹⁵² to the existing rules of evidence,¹⁵³ or, more generally, “to an anticipated continuance of the present general laws”¹⁵⁴ He added that a vested right

rests upon equities, it has reasonable limits and restrictions; it must have some regard to the general welfare and public policy; it cannot be a right which is to be examined, settled, and defended on a distinct and separate consideration of the individual case, but rather on broad and general grounds, which embrace the welfare of the whole community, and which seek the equal and impartial protection of the interests of all.¹⁵⁵

While some scholars claim that Cooley unambiguously endorsed a broad view of substantive due process,¹⁵⁶ one is hard-pressed to find such clarity in his treatise. Cooley is actually quite elusive on what constitutes a vested right; about the only clear point he makes is that retroactive legislation will frequently impair vested rights, although even in that context Cooley’s discussion is rife with qualifications.¹⁵⁷ Still, Cooley’s account makes plain that at the time of the Fourteenth Amendment’s framing, due process was considered fully

¹⁴⁹ THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 433 (1868) (1998) (quoting *Taylor v. Porter*, 4 Hill 140, 145 (N.Y. Sup. Ct. 1843)).

¹⁵⁰ *Id.* at 484 (footnote omitted) (quoting *Norman v. Heist*, 5 Watts & Serg. 171, 173 (Pa. 1843)).

¹⁵¹ *Id.* at 445 (footnote omitted).

¹⁵² *See id.* at 443-45.

¹⁵³ *See id.* at 452-55.

¹⁵⁴ *Id.* at 440.

¹⁵⁵ *Id.* at 438 (footnote omitted).

¹⁵⁶ *See, e.g.,* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 342-45 (1999).

¹⁵⁷ *See id.* at 455-73.

applicable to the legislature. It makes equally clear that due process imposed no general prohibition against procedural innovation, but it did not quite give legislatures an entirely free hand either. Moreover, we have seen that the concept of due process, from Magna Carta onward, had posed no obstacle to procedural innovation, which had continued apace through the framing of the Fifth and Fourteenth Amendments.¹⁵⁸

C. *A Nonoriginalism For Originalists.*¹⁵⁹

By now, it should be plain that ascertaining the original meaning of the Fifth Amendment's Due Process Clause is a tricky business. Scholars have not come close to any type of consensus about whether the original understanding of due process limited legislative authority.¹⁶⁰ Berger's account seems an unlikely candidate for the original understanding; even if accurate in 1791, the antebellum precedents make plain that it was decidedly out of favor by 1868. But the antebellum precedents substituted nothing very clear for the English view of due process as inapplicable to legislation. A "frozen in amber" view is even more implausible. It is unsupported by the constitutional text, and at odds with both the tradition of procedural reform that predated the framing of both provisions and with Cooley's account, which permits, at least to some extent, procedural innovation.¹⁶¹ To be sure, the antebellum Supreme Court decisions had seen to show special solicitude for property interests, but the Court had not yet been called upon to define the scope of constitutionally protected "liberty," and the constitutional text suggests that "life" and "liberty" are no less

¹⁵⁸ See text at notes 42-43, *supra*.

¹⁵⁹ Cf. Barnett, *supra* note 13, at 611 (title).

¹⁶⁰ Compare, e.g., DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 272 (1985) (no limitation on legislature); JOHN HART ELY, DEMOCRACY AND DISTRUST 14-21 (1980) (same); Easterbrook, *supra* note 124, at 95-100 (same), Harrison, *supra* note 147, at 542-54 (same) with 2 CROSSKEY, *supra* note 114, at 1102-10 (due process limited legislative power); Douglas Laycock, *Due Process and Separation of Powers: The Effort To Make the Due Process Clause Nonjusticiable*, 60 TEX. L. REV. 875, 890-96 (1982) (same); Riggs, *supra* note 117, at 991-1004 (same); Miller, *supra* note 129, at 4-17 (same); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 220-28 (Eugene W. Hickok, Jr. ed., 1991) (same) [hereafter cited as "THE BILL OF RIGHTS"].

¹⁶¹ See text at notes 147-57, *supra*.

entitled to constitutional solicitude than is “property.” Moreover, the antebellum Supreme Court cases were themselves inconsistent. *Murray’s Lessee* had suggested that there would be special constitutional solicitude for legislatively endorsed innovation, at least when it reflected the law of England,¹⁶² but the dicta in *Bloomer v. McQueenan* suggested that legislative innovation could run afoul of due process,¹⁶³ and in *Dred Scott* the Court held that legislation prohibiting slavery in federal territories violated due process, despite a long history of such legislation in both Britain and this country.¹⁶⁴ Thus, no clear approach emerges from the antebellum cases. The unfortunate truth is that there just was not a lot of original meaning to be found in the two Due Process Clauses. The concept of due process was amorphous and undeveloped until well after both clauses had been adopted. Even if Berger was right that there was a clear original understanding in 1791, by 1868 the Supreme Court had discarded it, while putting nothing readily definable in its place.

One point, however, surely comes clear from the antebellum Supreme Court cases and Cooley’s account – the Due Process Clause made it the responsibility of the courts to assess the propriety of the manner in which persons are deprived of life, liberty, or property, whether by statutory or common law procedures. Despite the vagueness of the standards to be derived from the extant precedents, it is quite clear that Bingham and the other Framers made no attempt to create their own definition of due process. Instead, the framers relied on the then-extant constitutional common law, unsatisfactory though it was.¹⁶⁵ Moreover, in

¹⁶² See text and note at note 143, *supra*.

¹⁶³ See text at note 140, *supra*.

¹⁶⁴ See 60 U.S. (19 How.) at 534-40 (McLean, J., dissenting). See also *id.* at 605-28 (Curtis, J., dissenting).

¹⁶⁵ As one leading historian of the Fourteenth Amendment put it:

[I]t seems reasonable under the circumstances that the Thirty-ninth Congress, even as the First Congress before it, realized that they did not know just what due process meant; it being a technical matter of legal interpretation, they preferred to leave it to the decisions of the courts. In this way the members of Congress, knowing that there was a body of technical rules built up around the idea of

light of the primitive state of due process jurisprudence in 1868, surely the Framers could not have doubted that due process jurisprudence would continue to evolve by common law methods.¹⁶⁶ What is more, the Framers knew that this process of common law constitutional adjudication would continue since the federal courts would inevitably elaborate upon the newly crafted Due Process Clause under their power to hear “all cases, in law or equity, arising under this Constitution”¹⁶⁷ Indeed, we know from *Federalist 78* that it was the general expectation that the judiciary would operate as a countermajoritarian guarantor of the individual rights identified in the Constitution.¹⁶⁸

On this view, the purpose of the due process guarantee was to ensure that legislative majorities did not have unfettered power to determine the manner in which persons could be deprived of life, liberty, or property. When such deprivations were at stake, due process ensured that a countermajoritarian institution would exercise review. To apply the concept

“due process of law” and considering it to be a most valuable protection of the general rights of the people, decided to incorporate it into the fundamental law as a limitation on the power of the states and leave its ultimate definition and application to the future adjudication of the courts.

MOTT, *supra* note 121, at 165.

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

¹⁶⁷ U.S. CONST. art. III, § 2. For a survey of the evidence that the framers of the original constitution envisioned its elaboration through a process of common law adjudication, see Powell, *supra* note 17, at 903-13.

¹⁶⁸ In particular, I refer to *Federalist 78*'s defense of judicial tenure:

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

THE FEDERALIST, No. 28, at 494 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

of due process courts would be required to develop a substantive account of the permissible methods by which majoritarian institutions may authorize the deprivation of life, liberty, or property, but their review would ensure that life, liberty, or property have some normative protection over and above that available by the grace of legislative majorities. This account is explicitly countermajoritarian; but surely countermajoritarianism is the essential nature of any Bill of Rights. That point is itself originalist; as James Madison explained as he put before the House of Representatives what became the Bill of Rights:

[T]he presumption in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative [*sic*] of power. But this is not found in either the executive or legislative departments of the government, but in the body of the people, operating by the majority against the minority.¹⁶⁹

Madison added that were a Bill of Rights

incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will naturally be led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.¹⁷⁰

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

Thus, the account I offer identifies the original meaning of due process as nonoriginalist and countermajoritarian. On this view the function of the Due Process Clause was not to enshrine a fixed original understanding as organic law – the meaning of due process at the time of the framing was too amorphous to support that view – but

¹⁶⁹ 1 ANNALS OF CONGRESS 437 (Joseph Gales ed., June 8, 1789), reprinted in COGAN, *supra* note 113, at 54.

¹⁷⁰ 1 ANNALS OF CONGRESS 457 (Joseph Gales ed., June 8, 1789), reprinted in COGAN, *supra* note 113, at 56.

instead to delegate to the judiciary responsibility for countermajoritarian oversight. For this reason, the nonoriginalist conception of due process revels in countermajoritarianism.¹⁷¹

To be sure, the case for an original understanding of procedural due process as evolutionary and countermajoritarian is inferential and speculative. Neither Bingham nor any of the other proponents of the Fourteenth Amendment ever explicitly argued for an evolutionary common-law conception of due process. Of course, it might have been political dynamite to explicitly acknowledge that the Due Process Clause would grant the judiciary potentially broad authority in an ill-defined area of constitutional law.¹⁷² But an evolutionary common-law conception of due process is consistent with the evolutionary nature of procedure up until the adoption of the Due Process Clause, as well as the tradition of common law constitutional adjudication that had taken firm root by 1868.¹⁷³

In contrast, I know of no evidence that the Due Process Clause was intended to freeze procedure in amber – that view is unsupported by the text and can be found nowhere in the congressional or ratification debates on the Fourteenth Amendment, pre-ratification precedents, or by Cooley or other eighteenth-century commentators. Similarly, the historical evidence does not identify any type of original standard by which procedural

¹⁷¹ It follows that I share Barry Friedman’s misgivings about the “academic obsession” with what is thought to be the “countermajoritarian dilemma” posed by constitutional adjudication. See Barry Friedman, *The Birth of an Academic Obsession: The Countermajoritarian Dilemma, Part Five*, 112 YALE L.J. 153 (2002). One can debate the merits of countermajoritarianism as a normative matter, but as a formalist matter, it seems to me indisputable that countermajoritarianism is embedded in the Constitution. The concerns about countermajoritarian review, in my judgment, are best addressed through a series of prudential considerations governing judicial review discussed in Part III below.

¹⁷² Bingham’s earlier proposal for a fourteenth amendment that would grant Congress the power to enact all laws “necessary and proper” to secure the privileges and immunities of citizenship and equal protection in the rights of life, liberty, and property had been defeated because it was thought to grant Congress too much authority to interfere with existing state law, and that defeat had induced considerable caution on the part of Bingham and the other advocates of the Fourteenth Amendment. See, e.g., EARL M. MALTZ, *THE FOURTEENTH AMENDMENT AND THE LAW OF THE CONSTITUTION* 63-69 (2003).

¹⁷³ The account of procedural due process advanced here accordingly complements the account of common law evolution of constitutional law provided by David Strauss, although I approached the matter from the standpoint of original meaning. See David A. Strauss, *Common Law Constitutional Adjudication*, 63 U. CHI. L. REV. 877 (1996).

innovation could be judged – that matter was left for future adjudication. Though the case presented here may not be unassailable, there is no other originalist account of procedural due process that can boast of even this much originalist support.

This account has implications for substantive due process as well.¹⁷⁴ If the original understanding of the Due Process Clause permitted the courts to take an evolutionary common-law approach when reviewing procedural legislation, then it is hard to understand why the same approach should not be used for purposes of defining those substantive rights granted by due process. After all, the substantive rights secured by due process were no better developed than its procedural component at the time of the framing; they had been outlined in only the barest way in *Bloomer* and *Dred Scott*. And we have seen that Cooley’s treatise, while perceiving no vested right in the continuation of present law, acknowledged rather ill-defined substantive rights protected by due process. Moreover, if the concept of due process was intended to evolve through common law adjudication, surely that was equally true for its procedural and substantive components.¹⁷⁵

¹⁷⁴ Indeed, the antebellum Supreme Court cases offer no distinction between procedural and substantive due process. This dichotomy appears to have been invented long after 1868. For the first mention of “procedural due process” in United States Supreme Reports, see *Snyder v. Massachusetts*, 291 U.S. 97, 137 (1934) (Roberts, J., dissenting). For the first mention of “substantive due process,” see *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).

¹⁷⁵ The advocates of a robust doctrine of substantive due process have relied on the evidence by 1868, due process was understood to limit legislative power and offer substantive protections to support their own claim that the Fourteenth Amendment’s original understanding included robust protection against a wide array of government regulation. See, e.g., Ely, *supra* note 156, at 344-45; Jeffrey M. Shaman, *On the 100th Anniversary of Lochner v. New York*, 72 TENN. L. REV. 455, 477-88 (2005); Stephen A. Siegel, *Lochner Era Jurisprudence and American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991). To my eye, these scholars are doing quite a bit of cherry-picking of the evidence to claim that there was a settled understanding of a broad substantive due process protection against government regulation by 1868. In the lower courts, there had been a smattering of cases construing state constitutional due process clauses to protect substantive rights, but far more state courts had rejected that view. See, e.g., CORWIN, *supra* note 124, at 89-115; HAINES, *supra* note 130, at 104-16. Compare, e.g., *Wynehamer v. People*, 13 N.Y. 378 (1856) (recognizing substantive limitations on legislative power under the state’s due process clause) with *State v. Keeran*, 5 R.I. 497 (1858) (rejecting substantive due process). The Supreme Court had yet to address this dispute; the closest it came to embracing substantive due process was in *Dred Scott*, and it is difficult to disentangle the due process holding in that case from the Court’s holdings that African-Americans had not rights that could be protected by the federal courts, see 60 U.S. at 403-06, and that Congress had no authority to regulate slavery in the territories, see *id.* at 446 – conclusions that were repudiated with the ratification of the Thirteenth and Fourteenth Amendments.

Indeed, the original meaning of much of the Constitution may be nonoriginalist. To take two examples from the Bill of Rights, there is extremely limited contemporaneous evidence about the Framers' understandings of the First and Fourth Amendments. As to the former, Congress rejected a version of the First Amendment that would have incorporated the common law, and framed a novel text while doing little to explicate its meaning.¹⁷⁶ As to the latter, the law of torts had traditionally regulated search and seizure, but the Framers adopted a new formulation – a requirement of probable cause for warrants and a prohibition on unreasonable search and seizure – that had no common-law antecedents and that was, again, ratified with little in the way of explication.¹⁷⁷ The original understanding of these provisions therefore likely would have included an expectation that these relatively abstract and novel formulations would be developed through common law adjudication by a countermajoritarian institution. When a heretofore largely unknown legal concept winds up in a written constitution accompanied by limited explication of its public meaning, against a background of common-law construction by a countermajoritarian institution, the original understanding, I submit, is largely nonoriginalist, with the text supplying only the most general parameters for decisionmaking.

IV. NONORIGINALISM AND THE PRUDENTIAL VIRTUES

Certainly nothing in *Dred Scott* spoke in any straightforward way to the scope of congressional power to regulate interstate commerce, much less state and local regulatory and police powers, which were not at issue in that case. Moreover, there was a long tradition of pervasive regulation in antebellum America, and there is precious little evidence that the framers of the Fourteenth Amendment intended to alter that tradition. See, e.g., WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 51-233 (1996).

¹⁷⁶ See, e.g., Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, in *THE BILL OF RIGHTS*, *supra* note 160, at 82-93. As it happens, although Robert Bork originally articulated his conception of originalism in the context of the First Amendment, even he acknowledged that the Framers “seem to have had no coherent theory of free speech,” and thus “[w]e are . . . forced to construct our own theory of the constitutional protection of speech.” Bork, *supra* note 15, at 22. Even Judge Bork's admirers are unable to identify historical evidence to support his account of the original understanding of the First Amendment. See, e.g., Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *STAN. L. REV.* 299, 307-08 (1978).

¹⁷⁷ See, e.g., David A. Sklansky, *The Fourth Amendment and Common Law*, 100 *COLUM. L. REV.* 1739 (2000).

The preceding discussion has answered much but not all of the case for public-meaning originalism. Perhaps the most powerful argument remains – the claim that nonoriginalism is an invitation to judges to read their policy preferences into the law.¹⁷⁸ After all, the understanding of due process advanced here, although consistent with the minimal standards for due process that had been articulated as of 1868, leaves a wide swath for judicial discretion. A nonoriginalist and countermajoritarian conception of due process requires the courts to develop a substantive theory to identify those questions that should not be left to majoritarian determination, and therefore grants the judiciary potentially vast authority. Still, as Professor Sager has taught us, the institutional limitations on the judiciary frequently cause it to “fail[] to enforce a provision of the Constitution to its full conceptual boundaries.”¹⁷⁹ That concept has particular utility for present purposes.

One need not be an originalist to see reason to circumscribe the scope of judicial review. Courts necessarily make decisions based on the limited information placed before them by the parties consistent with the constraints imposed by the rules of evidence; their conclusions on empirical questions are necessarily tentative and fraught with uncertainty; their ability to recognize and correct errors is limited by the doctrine of stare decisis; and all of this suggests that on any number of issues, judicial decisionmaking is likely to be inferior to that of majoritarian institutions.¹⁸⁰ Consider, for example, the asserted due process right

¹⁷⁸ See text at notes 20-22, *supra*.

¹⁷⁹ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978). See also LAWRENCE GENE SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 86-128 (2004). This thesis enjoys considerable support among legal scholars. See, e.g., FALLON, *supra* note 28, at 31-34; Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1524, 1594-96 (2000); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 866-69 (1999); Gerald L. Neuman, *The Nationalization of Civil Liberties by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 467-73 (2000); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 321-24 (1987).

¹⁸⁰ As the Court has put it: “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we think a political branch has acted.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)). For an

of terminally ill patients to physician-assisted suicide at issue in *Washington v. Glucksberg*.¹⁸¹ A nonoriginalist will not find the common law's failure to recognize a right of terminally ill patients to assisted suicide dispositive, but even a judge whose theory of countermajoritarianism inclines her toward libertarianism respectful of an autonomous doctor-patient relationship is not ready to decide the matter. The judge still must consider whether a prophylactic prohibition is justified by the risks that patients suffering from terminal illness lack the ability to make fully informed choices, or will yield to pressure from friends of family eager to be spared the emotional and financial toll of a long and likely terminal illness, as well as the difficulty in designing a regulatory system that can reliably prevent such abuses at reasonable cost.¹⁸² These are difficult and largely empirical questions on which courts, at best, can reach only provisional judgments. The prudent nonoriginalist will surely hesitate before removing this issue from the legislative arena.

There are any number of nonoriginalist theories of constitutional interpretation that acknowledge the institutional strengths of majoritarian decisionmaking and the perils of countermajoritarianism. This point, for example, is central to the view of constitutional adjudication as reinforcing democratic deliberation advanced by Justice Breyer,¹⁸³ the utilitarian pragmatism of Judge Posner,¹⁸⁴ and the representation-reinforcing theory of John Hart Ely.¹⁸⁵ It may well be that as theories of constitutional interpretation these approaches are wanting; there is little in the constitution's text or history to suggest that it was intended to do any one thing above all others – be it promoting democratic deliberation, social

excellent summary of the advantages of majoritarian institutions and the significant risks of error in judicial decisionmaking, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 24-60 (1999). For a more detailed inquiry, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 153-288 (2006).

¹⁸¹ 521 U.S. 702 (1997).

¹⁸² See *id.* at 782-89 (Souter, J., concurring in the judgment).

¹⁸³ See BREYER, *supra* note 28, at 118-32.

¹⁸⁴ See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 26-37 (1990).

¹⁸⁵ See ELY, *supra* note 160, at 73-104.

welfare, or evenhanded opportunities for political participation.¹⁸⁶ But on Professor Sager's view that constitutional adjudication not only concerns the interpretation of text, but also the extent to which the judiciary can prudently pursue the norms it derives from text, then these approaches have much to commend them. A judge attentive to these prudential virtues, moreover, will see in the occasion of judicial review no license to write his own policy preferences into constitutional law. Indeed, there is plenty of evidence that nonoriginalist due process jurisprudence has been attentive to just this concern.

To take an example related to the parking-ticket context, we have seen that the cost-benefit approach of *Mathews v. Eldridge* is thoroughly nonoriginalist – a historically-based understanding of due process would not tolerate the gaping exception to the historically accepted rule against hearsay that was blessed in that case¹⁸⁷ – but it is also the approach least likely to inject the judge's own values into an assessment of constitutional judgments about procedure. An approach that attached some sort of intrinsic value to specified procedural safeguards would effectively require the taxpayers to shoulder the cost of those procedural safeguards that pricked the Court's conscience.¹⁸⁸ Instead of externalizing the costs of its conscience onto the taxpayers, the Court has chosen to require only cost-justified investments in procedural regularity – an approach akin to the time-tested Hand formula for

¹⁸⁶ For a leading elaboration on this criticism, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

¹⁸⁷ See Part II.B, *supra*.

¹⁸⁸ Jerry Mashaw, for example, has criticized *Eldridge* on the ground that when the government fails to hear out a claimant, the resulting “lack of personal participation causes alienation and a loss of that dignity and self-respect that society properly deems independently valuable.” Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Decisionmaking in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976). See also Charles H. Koch, Jr., *A Community of Interest in the Due Process Calculus*, 37 Hous. L. Rev. 635, 657-70 (2000). But imposing a requirement of hearings also diverts scarce resources from the provision of government services and renders governmental welfare programs a less efficient means of aiding the needy, a result which is also likely to sap political support for such programs. Mashaw balances these competing claims in favor of the provision of evidentiary hearings, but surely he can fairly be accused of reading his own policy preferences into the Constitution.

negligence transposed to the realm of procedural due process.¹⁸⁹ Whatever the criticisms of *Mathews v. Eldridge*, it is difficult to argue that the Court has merely imposed its policy preferences on the Due Process Clause.¹⁹⁰

Thus, at least in the due process context, the nonoriginalist answers the charge of judicial activism by observing that an overt concern with the virtues of prudence is far more likely to discipline judicial decisionmaking than a search for an illusory precision through historical inquiry into the original meaning of due process. When history is as imprecise as in the historical meaning of due process, it can little serve to constrain the discretion of judges or enforce a principled boundary between the realms of politics and constitutional law.¹⁹¹ To be sure, prudence will frequently argue in favor of long-established legal regimes because the risks always associated with nonmajoritarian change, but there will be occasions on which a court can satisfy itself that those risks are acceptable. For example, the Supreme Court used the Due Process Clause to revolutionize criminal procedure by imposing an

¹⁸⁹ I refer, of course, to Learned Hand's explication of the tort of negligence as turning on whether the cost of the injury multiplied by the likelihood that it would occur exceeds the cost that the defendant would have had to incur to avoid the loss. See *United States v. Carroll Towing Co.* 159 F.2d 169, 172 (2d Cir. 1947). See *l. See United States v. Carroll Towing Co.* 159 F.2d 169, 172 (2d Cir. 1947). The Hand formula reflects nearly a consensus view of the outcome of centuries of evolution in the common law of torts. See, e.g., GUIDO CALEBRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 135-73 (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.1 (4th ed. 1992).

¹⁹⁰ For a defense of the much-criticized *Eldridge*, see Gary Lawson, Katharine Ferguson & Guillermo A. Montero, "Oh Lord, Please Don't Let Me Be Misunderstood! Rediscovering the *Mathews v. Eldridge* and Penn Central Frameworks," 81 NOTRE DAME L. REV. 1, 21-24 (2005). In contrast, in the area of criminal procedure, the Court has rejected *Eldridge* and adopted a test that pays heavy deference to tradition. See *Medina v. California*, 505 U.S. 437, 442-46 (1992). If anything, that approach reflects a good deal more judicial ideology because of its conservative bias. The Court, however, is far from consistent on this point; it used the Due Process Clause to impose a duty on prosecutors to disclose exculpatory evidence to the accused in *Brady v. Maryland*, 373 U.S. 83 (1963), and subsequently broadened that duty to require prosecutors to identify and disclose exculpatory information in the hands of the police and other investigators, see *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), even though historically prosecutors had never been placed under any type of duty of disclosure, see LANGBEIN, *supra* note 42, at 283-343; Michael Moore, *Criminal Discovery*, 19 HASTINGS L.J. 865, 865-67, 893-99 (1968). For additional discussion of due process doctrine in the criminal context, see Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretative Guidelines*, 45 St. Louis U. L.J. 303 (2001).

¹⁹¹ Cf. Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 U.C.L.A. L. REV. 217 (2004) (using citation patterns in federalism cases to demonstrate that originalism fails to constrain judicial discretion).

obligation on prosecutors to identify and disclose exculpatory evidence,¹⁹² but no one argues that this reform has produced mischief, perhaps because, like *Mathews v. Eldridge*, it is largely directed at producing a more reliable adjudicative process. More generally, we have seen that hostility to procedural innovation is not characteristic of the common law, nor is there any evidence that such hostility was at the root of seventeenth or eighteenth-century understandings of due process. And it may well be that in the context of procedural due process, relevant judicial expertise is relatively great, in light of the judiciary’s familiarity with procedural devices that facilitate adjudicative factfinding, and therefore the counsel of prudence argues with somewhat lesser force for judicial restraint than in any number of substantive due process contexts that demand what amounts to legislative factfinding, such as the asserted right to assisted suicide.¹⁹³ A jurisprudence that is attentive to the limits of judicial expertise, rather than one based on an illusory original meaning, is likely to better serve the advocates of judicial restraint.

* * * * *

I conclude with an admission of failure – I do not claim to have discovered the original meaning of due process. In my view, the historical evidence shows that the original understanding of due process was murky and incomplete. In this, however, I am in good company. Learned Hand wrote that the Due Process Clauses are drawn “in such sweeping terms that history does not elucidate their contents.”¹⁹⁴ Arthur Sutherland wrote that “no one knows precisely what the words ‘due process of law’ meant to the draftsmen of the Fifth

¹⁹² See note 190, *supra*.

¹⁹³ For the seminal work articulating the distinction between legislative and adjudicative factfinding, see Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07, 423-25 (1942). The distinction is widely accepted, although its precise formulation and application is debated. See, e.g., John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in the Law*, 134 U. PA. L. REV. 477, 482-91 (1986); Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 113-16 (1988).

¹⁹⁴ LEARNED HAND, THE BILL OF RIGHTS 30 (1962).

Amendment, and no one knows what these words meant to the draftsmen of the Fourteenth Amendment.”¹⁹⁵ Perhaps it is time to give these admissions their due.

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

¹⁹⁵ Arthur Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 286 (1965)