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## An Originalist Theory of Due Process of Law

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# AN ORIGINALIST THEORY OF DUE PROCESS OF LAW

*Randy E. Barnett\**

As the sole originalist on the program, my first task is to define what originalism is so that we are all on the same page.<sup>1</sup> Originalism can be summarized in one sentence: the meaning of the Constitution should remain the same until it's properly changed—by amendment.

Originalism is not a single theory. It is a family of theories, and that family shares two common precepts. The first is called the Fixation Thesis: the meaning of a text is fixed at the time that that text is promulgated. The Fixation Thesis is a descriptive claim about how language works and can be disputed, of course, by making the claim that this is not how language works. That language works a different way.

The second precept is normative. It is the Constraint Principle, which is the claim that the constitutional actors *ought* to follow the original meaning of the Constitution. Unlike the Fixation Thesis, the Constraint Principle is a normative claim, and must be defended or challenged on normative grounds. There are various normative grounds that are not mutually inconsistent on behalf of the claim that constitutional actors should follow the original meaning of the Constitution but, of course, it can be disputed on normative grounds.

In my allocated time, I cannot defend these two precepts, but I thought it would be useful to know what method I am employing when I answer the question about the original meaning of “due process of law.”

Let me start by addressing the question of whether the original meaning of the Constitution protects unenumerated rights. Here's a hypothetical. Suppose a state statute mandating that all children be taken immediately after their birth to be raised by state-controlled nurseries, as Plato recommended in the *Republic*, is enacted by the requisite majority of each chamber of a state legislature and signed into law by the governor. Would a federal or state judge have the power to declare that such a statute is unconstitutional? Or let me pose the question this way: Do you have a constitutional right to raise your own children when the Constitution says nothing about such a right?

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1. This Article is based on Randy Barnett's oral remarks at the National Civil Justice Institute 2023 Symposium, *The Future of Substantive Due Process: What Are the Stakes?*, delivered on March 31, 2023.

In my book, *Restoring the Lost Constitution*,<sup>2</sup> I offer the following answer: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>3</sup> Oh, wait, that is not me who said this. This is a whole amendment to the Constitution. You all will recognize that this is the Ninth Amendment. In my 20 minutes, I only have time to identify five provisions of the Constitution, the original meaning of which protects the unenumerated rights retained by the people. I am then going to explain how these rights can and should be protected by the judiciary.

These provisions are the Necessary and Proper Clause,<sup>4</sup> the Ninth Amendment,<sup>5</sup> and the Due Process of Law Clause in the Fifth Amendment.<sup>6</sup> These clauses protect against federal infringement on unenumerated rights. Unenumerated rights are protected from state abridgment by the Fourteenth Amendment Privileges or Immunities Clause and the Due Process of Law Clause.<sup>7</sup>

At the federal level, the Necessary and Proper Clause requires that laws passed by Congress to execute its enumerated powers not only be necessary but also proper. Recall that for two years we had a Constitution, but no enumerated right to the freedom of speech or press. Yet, when the First Amendment was proposed and debated, no one suggested that its adoption would change the constitutional status of these preexisting fundamental rights. Rather, the Amendment was added, in Madison’s words, “for greater caution.”<sup>8</sup> Before there was a First Amendment, was there any basis in the text for considering a federal law restricting the freedom of speech or press to be unconstitutional? I submit that such a law would have been “improper.” Indeed, in both the cases of *Printz v. United States* and *NFIB v. Sebelius*, a majority of the Court found that a federal law that may be necessary, can still be unconstitutionally improper.<sup>9</sup>

Then there is the Ninth Amendment, which I have already quoted. In my scholarship, I have endeavored to demonstrate that the rights retained by the people in the Ninth Amendment refer to those preexisting individual rights that persons have in the state of nature, that is before government is instituted among them and which they retain after a government is instituted. These rights can be called liberty rights. These are the “Lockean rights” a person has to do what he or she wills or desires with what properly belongs to that person. Such liberty rights are limited by the liberty rights

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2. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2013).

3. U.S. CONST. amend. IX.

4. U.S. CONST. art. I, § 8, cl. 18.

5. U.S. CONST. amend. IX.

6. U.S. CONST. amend. V.

7. U.S. CONST. amend. XIV, § 1.

8. *Madison Speech Proposing the Bill of Rights June 8, 1789*, <https://www.let.rug.nl/usa/documents/1786-1800/madison-speech-proposing-the-bill-of-rights-june-8-1789.php> [https://perma.cc/QJJ3-DQYG].

9. *Printz v. United States*, 521 U.S. 898 (1997); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

of others. They do not include so-called positive rights or government benefits because there is no government in the state of nature.

So that there is no confusion, however, I should stress that just because the rights that “the people” “retain” when they enter civil society are negative or liberty rights, that does not mean that the only constitutional rights one has are negative or liberty rights. For example, under the original meaning of the Equal Protection of the Laws Clause,<sup>10</sup> states have a positive duty to provide protection to all persons within its jurisdiction.

Like the rest of what we now call the Bill of Rights, the Ninth Amendment originally applied to the federal government, but its rule of construction against privileging enumerated rights over unenumerated rights applies to the entire Constitution, including later amendments. Such later amendments include the Fourteenth Amendment, which has a Privileges or Immunities Clause, which states that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”<sup>11</sup>

Now, this is an expressed textual limitation on the legislative power of states which bars the abridgment of unenumerated, fundamental rights belonging to all citizens. As explained by Justice Bushrod Washington in *Corfield v. Coryell*, these rights include “[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government must justly prescribe for the general good of the whole.”<sup>12</sup>

This formulation by Justice Washington was a direct copy of a summary of natural rights that was authored by George Mason for the Virginia Declaration of Rights, and then reproduced in the constitutions of four other states. Mason’s draft read: “That all Men . . . have certain inherent *natural Rights*, of which they can not by any Compact, deprive or divest their Posterity; among which are the *Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing and obtaining Happiness and Safety.*”<sup>13</sup>

Justice Washington’s language in *Corfield* was widely quoted by Republicans on Congress when explaining the meaning of the Privileges or Immunities Clause in Section One of the then-pending Fourteenth Amendment. Given that he was the Senate sponsor of the Amendment, of particular importance was the Michigan Senator Jacob Howard’s explanation in his speech to the Senate. After quoting this language from *Corfield*, he continued, “To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise

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10. U.S. CONST. amend. XIV, § 1.

11. *Id.*

12. *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

13. *The Virginia Declaration of Rights—First Draft*, GEO. MASON’S GUNSTON HALL (emphasis added), <https://gunstonhall.org/learn/george-mason/virginia-declaration-of-rights/virginia-declaration-of-rights-first-draft> [https://perma.cc/E4B5-B86N].

nature—to these should be *added* the personal rights guaranteed and secured by the first eight amendments of the Constitution . . . .”<sup>14</sup>

Having identified two provisions of the Constitution that expressly recognize unenumerated rights—the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth—I want to stress that identifying such rights is not the same as explaining how they are to be protected by the judiciary. For this, we need to look at the two Due Process of Law Clauses located in the Fifth and Fourteenth Amendments. These two clauses require a judicial process before a person may be deprived of his life (by a capital punishment), liberty (by imprisonment), or property (by a fine or civil judgment) for violating a federal or state statute. But then, what is the scope of this judicial process?

In my article with Evan Bernick,<sup>15</sup> as well as in our book, *The Original Meaning of the 14th Amendment: Its Letter and Spirit*,<sup>16</sup> we offered the following summary: Before any person may be deprived of their life, liberty, or property, there must be a judicial finding that they are (a) actually guilty of violating (b) a lawful command. Now, this requires a realistic assessment of two questions. First, were they guilty of violating a properly enacted statute? Second, was the statute being applied to them within the proper or just powers of the legislature to enact?

The Due Process of Law Clause requires that no one be deprived of life, liberty, or property except for violating a valid law. As Justice Samuel Chase affirmed in *Calder v. Bull*, a statute that exceeds the proper power of the legislature is a mere legislative act and not a law.<sup>17</sup> The distinction between a law and a mere legislative act can be found not just in *Calder*, but all over founding-era judicial decisions, including several by John Marshall.

Consider this famous statement by Justice Marshall in *McCulloch v. Maryland*<sup>18</sup>:

Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an *act* was not the *law* of the land.<sup>19</sup>

Once you are conscious of the distinction, you will find the differentiation between a mere legislative “act” and a valid “law” to be quite common in founding-era sources and afterward.

14. Jacob Howard, *Speech Introducing the Fourteenth Amendment to the Senate* (1866) (emphasis added), <https://constitutioncenter.org/education/classroom-resource-library/classroom/12.5-primary-source-jacob-howard-speech-introducing-the-fourteenth-amendment-to-the-senate-1866> [https://perma.cc/R72Y-MU7N].

15. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599 (2019).

16. RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT* (2021).

17. *Calder v. Bull*, 3 U.S. 386, 390–95 (1798).

18. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

19. *Id.* at 423 (emphasis added).

For a federal statute, this requires a judicial assessment that a statute is within the enumerated powers of Congress to enact. So, a Commerce Clause challenge is also a Fifth Amendment Due Process of Law challenge. The Fourteenth Amendment's Due Process of Law Clause requires a similar assessment of state laws, but because state legislatures have general powers, this requires an assessment of whether a statute depriving someone of life, liberty, or property is within the police power of a state.

It is, therefore, no coincidence that a theory of the police power was developed in earnest by Thomas Cooley and others starting 1868, the very year the Fourteenth Amendment was ratified.<sup>20</sup> This means that, to implement the original meaning of the Due Process of Law, one needs a theory of the police power of states.

In my book, *Our Republican Constitution*,<sup>21</sup> I offer a summary of the police power of states: “[T]hat all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”<sup>22</sup> Oh, wait, that is not me who said this. That is the Declaration of Independence, which is the officially adopted political philosophy of the United States.

In short, the just police powers of government are those powers that are necessary “to secure” the pre-existing natural and inalienable rights retained by the people. What rights are these? They can be summarized as the individual rights to “life, liberty, and the pursuit of happiness.”

What then, may state legislatures do to secure these rights? There's a widespread consensus that the police power includes the protection of the health, safety, and public morals of the people. That is, morals in the public sphere controlled by government. I know of no one who disputes that these are proper objects or ends of state legislature, whether they are the left, the right, or the center. There is then a debate over whether the police power of the states *also* includes bare moral legislative disapproval of acts performed outside of public spaces that violate no one's rights.

In an amicus brief I authored with the Institute for Justice in the case of *Lawrence v. Texas*, Dana Berliner and I argued that the Texas anti-sodomy law exceeded the police power of the state of Texas because it was supported by only a bare moral disapproval by the legislative majority, and that such a police power end is improper precisely because it can only be exercised in an arbitrary manner.<sup>23</sup> In our article and our book, Evan Bernick and I contended that the original spirit of the due process of law was to bar the exercise of arbitrary power.<sup>24</sup> We suggest that any law resting

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20. See generally Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 817 n.3 (2020).

21. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* (2016).

22. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

23. Brief of the Institute for Justice as Amicus Curiae in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

24. See Barnett & Bernick, *supra* note 15; BARNETT & BERNICK, *supra* note 16.

solely on the moral views of a majority of legislators is going to be arbitrary because it is indistinguishable from their bare will.

This claim about the limits of the police power to reach private acts on the sole grounds that they were immoral, however, is controversial and would require much more to substantiate it against those who disagree. Is bare moral disapproval in, or is bare moral disapproval outside the legitimate or just ends of government? This is what would have to be debated.

In practice, however, very few laws are actually justified solely by bare assertions of moral disapproval. What is normally at issue is whether a law was really, and not pretextually, enacted in pursuance of a just police power to provide for the health and safety of the public (or the regulation of behavior in public spaces). To find such a restriction on liberty to be valid requires some realistic assessment of the fit between means and ends. In other words, there must be sufficient empirical support for the claim that the law was enacted as a good-faith effort to protect the health and safety of the public rather than for some other improper purpose.

Before closing, I want to distinguish this traditional approach to the due process of law from the modern doctrine of substantive due process, which is the topic of most of the scholarship for this symposium. Post-New Deal substantive due process puts the onus on judges to identify certain substantive rights, which are then protected by super-duper scrutiny or some heightened review that legislation will rarely pass. In contrast, the traditional pre-New Deal review of statutes for arbitrariness put the onus on judges to examine the substance of statutes to ensure that they were within the proper scope or limit of legislative power.

As Evan and I explain in both our article and book, if the procedure that judges must use to examine whether there has been due process of law includes an examination of the *substance* of statutes, the distinction between “substantive” and “procedural” due process is really unhelpful and confusing.<sup>25</sup> For this reason, while I think Justice Thomas, in his concurring opinion in *Dobbs*, is right to reject the modern theory of substantive due process, he is wrong to equate “due process of law” with whether a law simply emerges from the legislative process.<sup>26</sup> That claim runs afoul of the evidence of the original meaning that Evan and I present in our book.

Let me close now by returning us to my hypothetical statute authorizing a state government to take away our children to be raised collectively. Without a doubt, such a statute restricts the background natural rights retained by the people. So, we must then ask whether such a restriction is within the proper or just police power of a state. This is an easy case for a police power theory that is limited to protecting the rights of each citizen from infringements by others, and the regulation of public spaces. The clear answer is no, it is not within that power. This hypothetical is more challenging for a theory that also empowers the state to mandate the morality of its

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25. See Barnett & Bernick, *supra* note 15; BARNETT & BERNICK, *supra* note 16.

26. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–04 (2022) (Thomas, J., concurring).



citizens. Under such a power, perhaps the state can take away our children to ensure that they are inculcated with proper morals.

As it happens, in the 2000 case of *Troxel v. Granville*, the Supreme Court, by a vote of six to three, found that there was a constitutional right to raise one's child as one sees fit.<sup>27</sup> Justice Thomas, in that case, sided with the majority and even concurred to contend that the Court should protect this right with strict scrutiny.<sup>28</sup> Justice Scalia, on the other hand, dissented.

In his dissent, Justice Scalia conceded that, "In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their creator.'"<sup>29</sup> "And in my view," Scalia continued, "that right is also among the 'other rights retained by the people,' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'"<sup>30</sup>

So far, so good. But then Justice Scalia contended that, "[t]he Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people."<sup>31</sup>

In my view, Justice Scalia was half right and half wrong; and, at least on that day, Justice Thomas was the better originalist.

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27. *Troxel v. Granville*, 530 U.S. 57, 75 (2000).

28. *Id.* at 80 (Thomas, J., concurring).

29. *Id.* at 91 (Scalia, J., dissenting).

30. *Id.*

31. *Id.*



