ORIGINALISM AND PERSONAL JURISDICTION: SEVERAL QUESTIONS AND A FEW ANSWERS

Lawrence B. Solum & Max Crema

ORIGINALISM AND PERSONAL JURISDICTION: SEVERAL QUESTIONS AND A FEW ANSWERS

*Lawrence B. Solum** *& Max Crema***

INTRODUCTION

The modern law of personal jurisdiction in the United States is largely the product of living constitutionalism. The most important decision is *International Shoe*, which famously stated:

> Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[1]

International Shoe's adoption of the minimum-contacts and fairness standard as the test for compliance with the Due Process of Law Clauses is a paradigm case of living constitutionalism.[2] The Supreme Court made no attempt to derive the minimum-contacts formula from the constitutional text, nor did the cases it cites, as we show in a footnote.[3]

As we shall see, the original meanings of the Due Process of Law Clauses of the Fifth and Fourteenth Amendments were not general commands that all legal procedures (including the assertion of personal jurisdiction) conform to a conception of procedural fairness. In the case of the Fifth Amendment, the

---

* William L. Matheson and Robert M. Morgenthau Distinguished Professor of Law & Douglas D. Drysdale Research Professor of Law, University of Virginia School of Law.

** Judicial law clerk. Georgetown University Law Center, Class of 2020.

1. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citation omitted).

2. *Cf.* Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U.N.H. L. REV. 261, 305–06 & n.195 (2020) (book review) (citing *International Shoe* for the proposition that "no court has ever adopted originalism as its primary or exclusive constitutional methodology in major cases regarding the relationship between the government and the law").

3. *International Shoe* cites *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), for "the traditional notions of fair play and substantial justice" standard, as well as *McDonald v. Mabee*, 243 U.S. 90, 91 (1917), which *Milliken* cited as well. 311 U.S. at 463. *McDonald v. Mabee* invalidated service of process, with Justice Holmes reasoning in part that great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. 243 U.S. at 91. Neither *Milliken v. Meyer* nor *McDonald v. Mabee* purports to derive the "fair play" standard from the text of the Due Process of Law Clause.

original meaning of that phrase in 1791 was focused on "process" in a narrow sense that is close to the modern meaning of that term in the phrase "service of process."[4] The Fourteenth Amendment is more complicated, as we explain below,[5] but it seems very unlikely that *International Shoe*'s "fair play and substantial justice" standard can be grounded in the original meaning of the 1868 text.

With the rise of constitutional originalism[6] and the presence of a significant number of originalist Justices on the United States Supreme Court,[7] the question of whether *International Shoe* can survive an originalist critique is timely. A full answer to that question would require the application of a rigorous originalist methodology to at least three constitutional provisions: the Full Faith and Credit Clause of Article IV, the Due Process of Law Clause of the Fifth Amendment, and the Due Process of Law Clause of the Fourteenth Amendment.

In this Article, we will provide a conceptual framework for such an investigation and then focus on the constitutional limits on personal jurisdiction in the federal courts. In *The Original Meaning of the Fifth Amendment Due Process of Law Clause*, we established that the original meaning of the phrase "Due Process of Law" is best captured by what we call the "Process Theory."[8] The kind of "process of law" that was "due" before a deprivation of life, liberty, or property consisted of formal notification of legal proceedings issued by a court of law; in other words, the Fifth Amendment's Due Process of Law Clause requires service of process.[9] In this Article, we explore the implications of our findings for the federal law of personal jurisdiction.

Although there has been some academic discussion of the implications of originalist constitutional theory for personal jurisdiction,[10] such discussion has

4. *See infra* Part 0.

5. *See infra* Part 0.

6. David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 743–44 (2021) (discussing the rise of originalism); Michael D. Ramsey, *Courts and Foreign Affairs: "Their Historic Role"*, 35 CONST. COMMENT. 173, 174 (2020) (reviewing MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS (2019)) (noting the modern rise of originalism).

7. *See* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. L. REV. 855, 860 (2020); Joseph S. Diedrich, *A Jurist's Language of Interpretation*, 93 WIS. LAW. 36, 36, 39 (2020); Orin S. Kerr, *Decryption Originalism: The Lessons of Burr*, 134 HARV. L. REV. 905, 907 (2021); Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1255 (2019).

8. Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 VA. L. REV. (forthcoming 2022).

9. *Id.*

10. *See* Cody J. Jacobs, *In Defense of Territorial Jurisdiction*, 85 U. CHI. L. REV. 1589, 1640 (2018) ("While scholars may disagree on whether *Pennoyer*'s incorporation of territorial jurisdiction rules into the Due Process Clause was consistent with that clause's original meaning, there is 'not a shred of evidence' that the Due Process Clause empowered judges to determine the validity of state procedures using a vague standard of 'fairness' or through anything resembling the minimum contacts test.") (footnote omitted); Earl M. Maltz, *Personal Jurisdiction and Constitutional Theory—A Comment on* Burnham v. Superior Court, 22 RUTGERS L.J. 689,

been rare.[11] There is a significant body of originalist scholarship on the meaning of the Due Process of Law Clauses in general,[12] but apart from Stephen Sachs's *Pennoyer Was Right*,[13] there has been no sustained, in-depth originalist analysis of the constitutional law of personal jurisdiction. Because Sachs's article is not based on comprehensive research into the meaning of the phrase "due process of law" in either 1791 or 1868, his article does not answer the question we raise here: what are the implications of the original meaning of the constitutional text for the constitutional law of personal jurisdiction?

* * *

At this point, we address a reaction to our claim that we believe many readers will share—skepticism. Perhaps you share some of the thoughts expressed by an imaginary reader:

> Crema and Solum cannot be right! We all know that the Fifth Amendment Due Process of Law Clause applies to legal procedures generally and not just service of process. Their claim is wildly implausible. Why in the world would the Fifth Amendment include such a trivial provision? Isn't it obvious that the First Congress would have wanted to guarantee fair procedures for every stage of a legal proceeding? Including notice, of course! But due process also includes an opportunity to be heard and a neutral adjudicator, and much else. Besides, no other interpretation of the Due Process of Law Clauses makes sense.

What are the sources of this skepticism? We believe that one important factor is linguistic drift.[14] *Words and phrases change meaning over time. As we will explain in summary fashion below, and in greater detail elsewhere, the meaning of the phrase "due process" began to shift in the mid-nineteenth century. We speculate that the shift first occurred in the linguistic subcommunity of those learned in the law but gradually spread to the larger linguistic community. A once-obscure term of art is now common parlance. These days, ordinary folk demand due process in a wide variety of contexts. Readers are skeptical because the 1791*

---

696 (1991) ("From an originalist perspective, both *quasi in rem* and transient jurisdiction should doubtless be viewed as constitutionally unobjectionable."); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 24 (2007) ("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.").

11. Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633, 636 (2019) (stating personal jurisdiction is "an area in which originalist sources have often had little significance").

12. *See, e.g.*, Rosenthal, *supra* note 10.

13. Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249 (2017).

14. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meani*ng, 91 NOTRE DAME L. REV. 1, 17–18 (2015). For a book filled with examples, see SOL STEINMETZ, SEMANTIC ANTICS: HOW AND WHY WORDS CHANGE MEANING (2008).

technical legal meaning of "due process of law" is quite different from the ordinary meaning of the phrase due process in the twenty-first century. After immersion in the evidence, this kind of skepticism is likely to dissolve.

There is another reason for skepticism among readers who are learned in the law. Living constitutionalism is baked into the legal culture. There are no empirical studies of which we are aware, but we believe that most law students acquire knowledge of constitutional law in classrooms dominated by living constitutionalist perspectives. Originalism might be discussed briefly in a constitutional law class, but except for the Second Amendment, the substance of constitutional law will be discussed from a living constitutionalist perspective that centers Supreme Court cases and moves the constitutional text to the periphery. Moreover, the centering of doctrine may be even more pervasive in courses on civil procedure: for example, we suspect that very few law students are exposed to an originalist critique of International Shoe.

Given the living constitutionalist orientation of the legal culture and linguistic drift in the meaning of the phrase "due process of law," it is not surprising that many readers simply assume that the "meaning" of the Due Process of Law Clauses simply must be entwined with our beliefs about justice and fairness. From an originalist perspective, this assumption is false. The meaning of words and phrases is a function of linguistic facts; meanings derive from consistent patterns of usage. Meaning in the sense of communicative content is a fact, not a value. The contrary assumption that the meaning of the constitutional text is a function of moral philosophy is strongly associated with Ronald Dworkin's living constitutionalist approach to constitutional interpretation and construction.[15] *The fact that Dworkinian ideas about meaning are widely shared in the legal academy does not make them true or correct—but that is, of course, a topic for a different article.*

We offer one more thought for skeptics. Even if the original meaning of the Due Process of Law Clause is narrow, that clause is not the only provision that provides constitutional limits on federal civil and criminal procedure. The Fourth Amendment provides limits on searches and seizures and warrants.[16] *The Fifth Amendment requires indictment or presentment by a grand jury, forbids double jeopardy, and prohibits compulsory self-incrimination.*[17] *The Sixth and Seventh Amendments require trial by jury in all criminal cases and most civil cases.*[18]

The question whether originalism or living constitutionalism is the best approach to constitutional interpretation and construction is a large one. Moreover, that question is entwined with related questions about the interpretation and construction of statutes, rules, and regulations. The aim of this Article is modest. We explore the implications of the original meaning of the Due Process of Law Clauses for the constitutional law of personal jurisdiction. For the purposes of that exploration, we ask living constitutionalist readers to suspend disbelief. Come along for the ride! You can get off the boat once you finish reading. We hope

15. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2–3 (1996).

16. U.S. CONST. amend. IV.

17. *Id.* amend. V.

18. *Id.* amends. VI, VII.

that we have persuaded at least some skeptics to consider our evidence for the original meaning of "due process of law" with an open mind. From an originalist perspective, open-minded skepticism about the evidence is a necessary step in the evaluation of claims about the original meaning of the constitutional text.

* * *

One more thing before we begin: because we are exploring the implications of the Due Process of Law Clauses for personal jurisdiction in civil cases, we do not discuss the implications of an originalist approach to the clause for criminal procedure. The Due Process of Law Clauses include deprivations of "life, liberty, or property,"[19] and deprivations of "life" and "liberty" almost always occur in the context of criminal prosecutions in which imprisonment and the death penalty are possible punishments. We believe the implications of originalism for criminal procedure are important, but we cannot engage in this focused investigation of the implications of due process of law for personal jurisdiction.

Here is the roadmap. Part 0 provides a brief overview of "Public Meaning Originalism" (PMO) and originalist methodology. Part 0 outlines four competing theories of the meaning of the phrase "due process of law." Part 0 provides the backdrop for an originalist understanding of the Due Process of Law Clause via a discussion of the doctrinal and theoretical status quo—that is, a living constitutionalist approach to due process. Part 0 lays out the original meaning of the Fifth Amendment Due Process of Law Clause and then explores its implications for personal jurisdiction in the federal courts. Part 0 sketches a research program for an originalist analysis of personal jurisdiction in state courts. Part 0 takes another step back and speculates about the implications of an originalist analysis of personal jurisdiction for constitutional theory. The Article concludes by restating our central finding: the Supreme Court's personal jurisdiction doctrine, as applied to the federal courts, is inconsistent with the original public meaning of the Due Process of Law Clause of the Fifth Amendment.

I. PUBLIC MEANING ORIGINALISM

Our investigation of the relationship between the law of personal jurisdiction and constitutional originalism is guided by the theoretical framework provided by Public Meaning Originalism (PMO). This Part begins by contrasting originalism with living constitutionalism, proceeds to outline the major components of PMO, and concludes with a discussion of the relevance

19. *Id.* amends. V, XIV.

of the original public meaning of the constitutional text for living constitutionalists.

A. Originalism and Living Constitutionalism

We begin with the basics. What is originalism? And what is living constitutionalism?

1. What is Originalism?

Originalism is best understood as a family of constitutional theories that are unified by two ideas. First, the "meaning" of the constitutional text is fixed at the time each provision is framed and ratified; this is the Fixation Thesis.[20] Second, that fixed original meaning ought to constrain constitutional practice, including the decision of constitutional cases and the articulation of constitutional doctrines; this is the Constraint Principle.[21] Although there are other forms of originalism (listed in a footnote)[22], PMO is the predominant form, both in academic discourse[23] and on the bench.[24] The key distinguishing feature of this version of originalism is the claim that the best understanding of the original meaning of the constitutional text is that the Constitution was written for the public using ordinary language when possible and limiting technical terms to cases of necessity.

In more colloquial terms, originalism claims that the meaning of the constitutional text is its fixed original meaning and that meaning is binding; Supreme Court Justices should not override the constitutional text in the guise of interpretation. Why? Characteristically, originalists argue that the original meaning of the constitutional text should be binding on the basis of the values of democratic legitimacy and the rule of law.

---

20. *See infra* text accompanying note 30.

21. *See infra* text accompanying note 31.

22. The most important rivals to PMO are: (1) original intentions originalism, (2) original methods originalism, (3) living originalism, and (4) original law originalism. For an overview, see Solum, *supra* note 7.

23. Ian C. Bartrum, *Wittgenstein's Poker: Contested Constitutionalism and the Limits of Public Meaning Originalism*, 10 WASH. U. JURIS. REV. 29, 29 (2017) ("'Public meaning' originalism is probably the most influential version of originalism in current theoretical circles."); Kyra Babcock Woods, *Corpus Linguistics and Gun Control: Why* Heller *Is Wrong,* 2019 BYU L. REV. 1401, 1406 (2019) (stating "public meaning originalism has become the dominant theory in originalist camps").

24. Christopher Fitzpatrick Cannataro, *The New Scalia? An Aristotelian Analysis of Judge Gorsuch's Fourth Amendment Jurisprudence*, 17 GEO. J.L. & PUB. POL'Y 317, 318 n.2 (2019) ("Neil Gorsuch, Antonin Scalia, and other scholars employ a theory called 'new originalism' or 'original public meaning originalism' . . . ."); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1306 (2019) (observing that at his confirmation hearing, Justice Brett Kavanaugh used the term "constitutional textualism" to summarize his commitment to public meaning originalism); Woods, *supra* note 23, at 1407 ("[T]he Supreme Court asserts it has both currently and traditionally leaned toward the public meaning originalism approach in interpreting the Constitution . . . .").

One more thing about originalism. Some readers may assume that originalism is all about the original intentions of the Framers. These readers may believe that originalists ask the question, "[w]hat would James Madison do?,"[25] in order to determine the original meaning of the constitutional text. That belief is false. Contemporary originalist constitutional theory aims to recover the original meaning of the constitutional text and not the subjective constitutional preferences of the Framers.[26]

2. What is Living Constitutionalism?

The constitutional theory pie can be sliced and diced in many different ways, but for the purposes of this essay, we are defining "living constitutionalism" as the family of constitutional theories that reject the originalist claim that the original public meaning of the constitutional text ought to be binding.[27] Characteristically, living constitutionalists claim that the content of constitutional law ought to change in response to changing circumstances and values, but there are many different forms of living constitutionalism, differing radically from each other. In Part III, we identify and discuss representative forms of living constitutionalism.[28] Importantly, different versions of living constitutionalism will approach the Due Process Clauses and their application to personal jurisdiction differently. Some forms of living constitutionalism could endorse the *International Shoe* approach. Others would reject *International Shoe* outright. Some living constitutionalist theories are consistent with a restrictive approach to personal jurisdiction; others would require expansion.[29]

B. The Building Blocks of Public Meaning Originalism

Public Meaning Originalism provides the theoretical framework that we employ in Part 0 in which we explore the original meaning of the Fifth

25. *See* Pamela S. Karlan, *Constitutional Law as Trademark*, 43 U.C. DAVIS L. REV. 385, 396 (2009).

26. *See* Cannataro, *supra* note 24. There are exceptions; see Larry Alexander, *Simple-Minded Originalism*, *in* THE CHALLENGE OF ORIGINALISM 87 (Grant Huscroft & Bradley W. Miller eds., 2011); see also Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006).

27. There is a small group of living constitutionalists who reject the Fixation Thesis, maintaining that linguistic drift changes the meaning of the constitutional text for the purposes of constitutional construction. For ease of exposition, we are bracketing their views. For an example of this approach, see Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAPMAN L. REV. 269 (2013). Similarly, Hillel Levin has developed a Contemporary Meaning Theory of statutory interpretation. *See* Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103.

28. *See infra* Part III.B.

29. *See infra* Part III.B.

Amendment Due Process of Law Clause. In this Part, we briefly describe four key ideas that ground our approach. A full exposition would be lengthy, so we limit ourselves to brief statements and provide the reader with references to more complete statements in the footnotes.

> *Fixation Thesis*: The meaning of the constitutional text is fixed at the time each constitutional provision is framed and ratified. The Fixation Thesis implies that linguistic drift does not change the meaning of the constitutional text. For example, "domestic violence" now refers to violence within a family, but as used in Article IV, domestic violence refers to political violence, including riots, rebellions, and insurrections within the boundaries of a state.[30]
>
> *Constraint Principle*: Constitutional practice, including the articulation of constitutional doctrines and the decision of constitutional cases, ought to be constrained by the original meaning of the constitutional text.[31]
>
> *Public Meaning Thesis*: The best understanding of original meaning is the content communicated by the constitutional text to the public at the time each constitutional provision was framed and ratified.[32]
>
> *The Sufficient Determinacy Hypothesis*:[33] After the application of a rigorous originalist methodology to the interpretation of all the provisions of the constitutional text, the content communicated by the text will be sufficiently determinate to provide significant constraint on many or most constitutional questions. In other words, the original public meaning of the constitutional text is not radically indeterminate.[34]

When these four ideas are combined, they yield Public Meaning Originalism—the constitutional theory that holds that the fixed original public meaning of the constitutional text is binding and sufficiently determinate to provide meaningful constraints on constitutional practice.

In addition to these four key ideas, our approach employs an important conceptual distinction between "constitutional interpretation" and

---

30. Solum, *supra* note 14, at 1.

31. Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 2–3 (Mar. 24, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

32. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953 (2021).

33. We use the word "hypothesis" to designate this idea because the claim has not yet been established. Demonstration of the claim of sufficient determinacy would require a clause-by-clause investigation into the original meaning of each and every provision of the constitutional text. That enterprise is far beyond the scope of this paper.

34. *Cf.* Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (discussing indeterminacy in the law generally). The Sufficient Determinacy Hypothesis can only be demonstrated by doing rigorous originalist research on a large number of constitutional provisions. It is a research hypothesis and not a demonstrated fact.

"constitutional construction."[35] For the purposes of this Article, we will stipulate the following definitions:

> *Constitutional Interpretation*: Constitutional interpretation is the activity that discovers the communicative content (roughly, linguistic meaning in context) of the constitutional text.
>
> *Constitutional Construction*: Constitutional construction is the activity that determines the legal effect given to the constitutional text, including the development of constitutional doctrines and the decision of constitutional cases.

Some readers may be bothered by use of the words "interpretation" and "construction" as the names for these two concepts. Ultimately, the importance of the interpretation–construction distinction is conceptual, not terminological. Readers are free to employ different terminology (such as "linguistic interpretation" and "legal interpretation"). We note that the interpretation–construction distinction has a long history in American legal theory, dating back at least as far as 1839, and that the use of these terms in contemporary constitutional theory has become common since the late 1990s.[36]

Importantly, interpretation involves a factual inquiry: when we ask what a constitutional provision means, our question is answered by linguistic and contextual facts—for example, facts about patterns of usage at the time a constitutional provision was framed and ratified. But construction is, by definition, constitutional action. Originalists affirm the Constraint Principle, which requires constitutional practice to conform to original meaning, but that principle must be justified by normative arguments.

C. Originalist Methodology

Our work on the original meaning of the Fifth Amendment Due Process of Law Clause employed the original methodology outlined by one of us

---

35. *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100–08 (2011).

36. For the history of the interpretation-construction distinction see Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 487 (2013); *see also* Greg Klass, *Interpretation and Construction 1: Francis Lieber*, NEW PRIV. L. (Nov. 19, 2015), http://blogs.harvard.edu/nplblog/2015/11/19/interpretation-and-construction-1-francis-lieber-greg-klass/; Greg Klass, *Interpretation and Construction 2: Samuel Williston*, NEW PRIV. L. (Nov. 23, 2015), https://blogs.harvard.edu/nplblog/2015/11/23/interpretation-and-construction-2-samuel-williston-greg-klass/; Greg Klass, *Interpretation and Construction 3: Arthur Linton Corbin*, NEW PRIV. L. (Nov. 25, 2015), http://blogs.harvard.edu/nplblog/2015/11/25/interpretation-and-construction-3-arthur-linton-corbin-greg-klass/; Ralf Poscher, *The Hermeneutical Character of Legal Construction*, *in* LAW'S HERMENEUTICS: OTHER INVESTIGATIONS 207 (Simone Glanert & Fabien Girard eds., 2016), http://ssrn.com/abstract=2696486.

(Solum) in two recent articles.[37] This approach to originalist research employs three complementary methods. The first method is a study of the constitutional record, including but not limited to the records of the Philadelphia Convention, the ratification debates, implementation of the Constitution by the first Congress, and early judicial decisions.[38] The second method employs the resources of corpus linguistics to study patterns of usage before, during, and after the time a constitutional provision was framed and ratified.[39] The third method is originalist immersion, which requires deep engagement with the linguistic world during the relevant period.[40] These three methods can be combined by triangulation, checking the results obtained by each method against the other two. When the three methods agree, we have good reasons to believe that we have recovered the original meaning of a given constitutional provision.

Underlying all three methods is the idea of inference to the best explanation or "abduction."[41] A theory of the original meaning of the Due Process of Law Clause is well supported if it provides the best explanation of the relevant facts. For example, if usage of the phrase "due process of law" in a variety of contexts in and around 1791 is well explained by the Process Theory but inconsistent with rival theories, then the Process Theory provides the best explanation for the patterns of usage.

D. The Relevance of Original Meaning for Living Constitutionalists

Our primary aim in this Article is to present the evidence for the Process Theory of the original meaning of the Fifth Amendment Due Process of Law Clause and then apply that theory to the constitutional law of federal personal jurisdiction from an originalist perspective. For originalists, the original meaning is binding. Living constitutionalists reject the Constraint Principle, but they may accept a role for the original meaning of the constitutional text. This is clearest in the case of Constitutional Pluralism, which employs multiple modalities of constitutional argument. One of these modalities is argument from the constitutional text. When employing this modality, a constitutional pluralist would consider the original public meaning of the Due Process of Law Clauses as a relevant, but not decisive, consideration. As a practical matter, almost all judges and Justices of the Supreme Court consider the original public

37. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621 (2017) [hereinafter *Triangulating Public Meaning*]; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) [hereinafter *Originalist Methodology*].

38. *Triangulating Public Meaning*, *supra* note 37, at 1654–66.

39. *Id.* at 1643–48.

40. *Id.* at 1649–54.

41. *See generally* Igor Douven, *Abduction*, STAN. ENCYCLOPEDIA PHIL. (May 18, 2021), https://plato.stanford.edu/entries/abduction/.

meaning of the constitutional text to be relevant. So far as we know, no current Justice takes the position that the meaning of the constitutional text is irrelevant and that the Supreme Court is free to ignore it altogether.[42]

It seems clear that the original meaning of the constitutional text is an important factor in constitutional adjudication. Given the presence of originalist Justices on the Supreme Court and the relevance of original meaning for many living constitutionalists, no analysis of the constitutional law of personal jurisdiction is complete until the original meaning of the phrase "due process of law" has been taken into account.

II. FOUR THEORIES OF THE MEANING OF DUE PROCESS OF LAW

In this Part, we briefly outline four theories of the meaning of the phrase "due process of law" as it appears in the Fifth and Fourteenth Amendments. Three of these theories are directly relevant to the application of the Due Process of Law Clauses to personal jurisdiction—a fourth approach arises in the context of so-called substantive due process.

A. The Fair Procedures Theory

We call the first theory the "Fair Procedures Theory." The core idea of this theory is that due process of law means legal procedures that are consistent with procedural justice. The Fair Procedures Theory is the mainstream living constitutionalist understanding of the clause, reflected in *International Shoe* in the context of personal jurisdiction and decisions like *Goldberg v. Kelly*,[43] *Mathews v. Eldridge*,[44] and *Connecticut v. Doehr*[45] in the context of the opportunity to be heard. This understanding of due process is sometimes described as textualist,[46] but this line of cases does not undertake any serious inquiry into the meaning of the phrase "due process of law." *Mathews* articulated a balancing test for procedural

42. For a general discussion of the role of originalism in constitutional jurisprudence of the Supreme Court, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2391 (2015) ("[O]ur current legal commitments, as a whole, . . . can be reconciled with originalism. . . . [O]riginalism seems to best describe our current law.").

43. 397 U.S. 254 (1970).

44. 424 U.S. 319 (1976).

45. 501 U.S. 1 (1991).

46. Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 153 (1997) (reviewing RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) and DENNIS PATTERSON, LAW AND TRUTH (1996)) ("The best textual argument . . . is the familiar claim that the Due Process Clause only requires that when liberty is deprived, the deprivation must follow fair procedures—i.e., that due process means only what has come to be known as procedural due process, and not (the somewhat oxymoronic) substantive due process." (emphasis omitted)).

fairness[47] but made no attempt to explain how that test related to the meaning of the phrase "due process of law." The Fair Procedures Theory implicitly stipulates that the word "due" meant fair, but so far as we know, no court or theorist has mounted a serious argument that this was the original meaning of the clause.[48] The Fair Procedures Theory does not ignore the text altogether, but its intuitive plausibility is grounded on the contemporary meaning of the phrase *due process* and not on the evidence of the meaning of the phrase "due process of law" in either 1791 or 1868.

B. The Legal Procedures Theory

We call the second theory the "Legal Procedures Theory." The core idea of this theory is that the word "process" refers to legal procedures generally and that the word *due* expresses a principle of legality. In other words, the phrase "due process of law" refers to those procedures that are required by the positive law—procedures that are *due* as a matter *of law*. Something like this theory was advanced by Raoul Berger,[49] and it has recently been discussed by Andrew Hyman.[50] This theory is reflected in contemporary dictionary definitions, including the following from the Oxford English Dictionary:

> due process, n. . . . Also more fully due process of (the) law. The observation of the proper legal procedures in a particular context. Now: *spec.* the administration of justice in accordance with the established rules and principles of the land, typically in the context of protecting the rights of the individual; the principle of guaranteeing that this is observed in the courts.[51]

In the context of the constitutional law of personal jurisdiction, we believe that there are two versions of this theory, which we will call "static" and "dynamic." The static version of the theory is that the procedures that are *due* are those that were provided by the positive law at the time each of the two clauses was framed and ratified. Thus, the Fourteenth Amendment Due Process of Law Clause would require that contemporary legal procedures conform to those that were required by the positive procedural law in 1868. Similarly, the Fifth Amendment would require conformity with the requirements of 1791.

The dynamic theory rejects the idea that the Due Process of Law Clauses are time-indexed to the procedural law of either 1791 or 1868. Instead, the dynamic theory forbids deprivations of life, liberty, or property that do not

47. *Mathews*, 424 U.S. at 334–55.

48. We discuss the original meaning of the phrase below. *See infra* Part IV.B.

49. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 193–214 (1977).

50. Andrew T. Hyman, *The Little Word "Due"*, 38 AKRON L. REV. 1, 10–23 (2005).

51. *Due Process*, OXFORD ENGLISH DICTIONARY ONLINE, https://www.oed.com/ (visited January 3, 2022) (emphasis omitted).

conform to the positive law in force at the time at which the deprivation occurred; if property is taken on January 1, 2022, legal procedures in effect on that date must be followed to avoid a Due Process of Law Clause violation.

We associate the dynamic version of the Legal Procedures Theory with Justice Hugo Black's concurring opinion in *International Shoe*[52] and more generally with his discussion of the meaning of the Due Process of Law Clause in *In re Winship*.[53] We believe that something like the static version was implicit in Justice Antonin Scalia's opinion in *Burnham v. Superior Court*.[54]

C. The Process Theory

The core idea of the Process Theory is that the word "process" in the phrase "due process of law" refers to legal process in the technical sense associated with phrases like "service of process." We have argued at length that the Process Theory best captures the meaning of the phrase "due process of law" as it was used in the Fifth Amendment.[55] This sense of the phrase is approximated by William Blackstone's summary in his Commentaries:

> The next step for carrying on the suit, after suing out the original, is called the process; being the means of compelling the defendant to appear in court. This is sometimes called original process, being founded upon the original writ; and also to distinguish it from mesne or intermediate process, which issues,

---

52. The dynamic theory is not stated in so many words in Justice Black's loosely written concurrence, but we believe that the gist of the theory is found in the following passage:

> I believe that the Federal Constitution leaves to each State, without any "ifs" or "buts", a power to tax and to open the doors of its courts for its citizens to sue corporations whose agents do business in those States. Believing that the Constitution gave the States that power, I think it a judicial deprivation to condition its exercise upon this Court's notion of "fairplay", however appealing that term may be. Nor can I stretch the meaning of due process so far as to authorize this Court to deprive a State of the right to afford judicial protection to its citizens on the ground that it would be more "convenient" for the corporation to be sued somewhere else.

Int'l Shoe, 326 U.S. at 324–25.

53. In re Winship, 397 U.S. 358, 378 (1970) (Black, J., dissenting) ("'Due process of law' was originally used as a shorthand expression for governmental proceedings according to the 'law of the land' as it existed at the time of those proceedings.").

54. Justice Scalia's view seems implicit in this somewhat enigmatic passage discussing *Pennoyer* and Justice Story's understanding of the law governing territorial jurisdiction: "Accurate or not, however, judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding was shared by American courts at the crucial time for present purposes: 1868, when the Fourteenth Amendment was adopted." Burnham v. Superior Ct. of Cal., 495 U.S. 604, 611 (1990). Given Justice Scalia's originalism, the obvious inference is that the original meaning of the Fourteenth Amendment Due Process Clause is indexed to the law as of 1868. Scalia's position is complex, because his *Burnham* opinion allows for the expansion of personal jurisdiction from the 1868 baseline but does not allow contractions. *See* Lawrence Rosenthal, *supra* note 10, at 25 ("Accordingly, for Justice Scalia, due process originalism is a one-way ratchet; it permits innovation but shields from constitutional attack those procedures that were accepted at the framing.").

55. Crema & Solum, *supra* note 8.

> pending the suit, upon some collateral interlocutory matter; as to summon juries, witnesses, and the like. Mesne process is also sometimes put in contradistinction to final process, or process of execution; and then it signifies all such process as intervenes between the beginning and end of a suit.[56]

In this sense, *process of law* refers to a legal instrument, the formal document that provides a defendant or other person notice of a legal obligation. In the context of personal jurisdiction, the relevant kind of process is the formal document that is served on a defendant. For example, Rule 5 of the Federal Rules of Civil Procedure requires that a defendant be served with a summons that names the court and the parties and states the time within which the defendant must appear.[57] The summons must issue from the court and be accompanied by a copy of the complaint.[58] States have similar requirements. For example, California requires that the summons include the title of the court, the names of the parties, and the time within which the defendant is required to respond.[59]

Because process issues from a court and directs the defendant to respond in court, the Process Theory requires that deprivations of life, liberty, or property take place through judicial procedure. That is, the Due Process of Law Clause forbids such deprivations by unilateral executive action. In the case of the federal government, the clause does not require any particular form of judicial procedure, but two other constitutional provisions do. The Sixth Amendment requires a jury trial in criminal cases: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[60] The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[61]

A full description of the implications of these provisions is beyond the scope of this Article, but the requirement of a jury trial in all federal criminal cases and most civil cases quite obviously provides significant limits on the procedures to be followed after the requirement of due process of law has been satisfied.

---

56. 3 WILLIAM BLACKSTONE, COMMENTARIES *279 (emphasis omitted) (citation omitted).
57. FED. R. CIV. P. 5.
58. FED. R. CIV. P. 4.
59. CAL. CIV. PROC. CODE § 412.20(a)(1)-(3) (West 1872).
60. U.S. CONST. amend. VI.
61. *Id.* amend. VII.

D. The No-Theory Theory

We would be remiss if we did not discuss an alternative approach that has no "theory" of the meaning of the Due Process of Law Clauses. Our focus is on the role of the Due Process of Law Clauses in the context of personal jurisdiction in particular and civil procedure in general. But the clauses play many other roles in American constitutional law. For example, the Due Process of Law Clauses are invoked as the constitutional basis for the incorporation of the individual rights specified in the first ten constitutional amendments against the states, including substantive rights such as the First Amendment freedom of speech[62] and procedural rights such as the Fourth Amendment prohibition of unreasonable searches and seizures[63] and the Fifth Amendment right against self-incrimination.[64] The clauses also served as the basis for the unenumerated right to economic liberty in *Lochner v. New York*,[65] the right to choice in *Roe v. Wade*,[66] and the right to same-sex marriage articulated in *Obergefell v. Hodges*.[67]

These expansive uses of the Due Process of Law Clauses are not grounded in any theory of the meaning of the phrase "due process of law." For example, in *Palko v. Connecticut*,[68] the Supreme Court grounded the incorporation of the Bill of Rights on the basis that they are "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[69] Similarly, in *Lochner*, the Court announced, "The right to purchase or to sell labor is part of the liberty protected by [due process], unless there are circumstances which exclude the right."[70] Our reading of these cases is that they make no serious attempt to discern the original meaning of the phrase "due process of law" in the Due Process of Law Clauses. Instead, we believe that such cases are best explained as based on the view that the meaning of the

62. Cornell Law School, *Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Feb. 13, 2022).

63. *Id.*

64. *Id.*

65. Lochner v. New York, 198 U.S. 45, 53 (1905), *overruled in part by* Day-Brite Lighting Inc. v. Missouri, 342 U.S. 421 (1952), *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

66. Roe v. Wade, 410 U.S. 113, 164 (1973) ("A state criminal abortion statute of the current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." (emphasis omitted)), *holding modified by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

67. Obergefell v. Hodges, 576 U.S. 644, 645 (2015) ("The fundamental liberties protected by the Fourteenth Amendment's Due Process Clause extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.").

68. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

69. *Id.* at 325.

70. *Lochner*, 198 U.S. at 53.

phrase "due process of law" is simply irrelevant. The presence of the word *liberty* in the clauses provides sufficient warrant for the Court to incorporate select provisions of the Bill of Rights or to proclaim the existence of unenumerated constitutional rights. That is, we believe that the Court's substantive due process jurisprudence is based on no theory of the actual meaning of the phrase "due process of law."

Because the No-Theory view is only marginally relevant to the application of the Due Process of Law Clauses to the constitutional law of personal jurisdiction, we will bracket the many deep and important issues raised by the No-Theory Theory for the remainder of this Article. From an originalist perspective, questions about unenumerated constitutional rights are better understood as raising questions about the Ninth Amendment[71] and the Fourth Amendment Privileges or Immunities Clause.[72] Again, we put those questions to the side for the remainder of this Article.

III. LIVING CONSTITUTIONALISM AND THE DUE PROCESS OF LAW CLAUSES

Before we dive into the original meaning of the Due Process of Law Clauses, we will discuss the alternatives to an originalist approach. That discussion begins with a very brief sketch of the constitutional status quo that outlines the shape of contemporary personal jurisdiction doctrine. We then look at both the status quo and the meaning of due process from the point of view of five leading versions of living constitutionalism. Finally, we make some tentative remarks about the future of the constitutional law of personal jurisdiction from a living constitutionalist perspective.

A. The Constitutional Status Quo: A Thumbnail Sketch of the Contemporary Constitutional Law of Personal Jurisdiction

The thumbnail sketch that follows provides a rational reconstruction of the complex and convoluted structure of the Supreme Court's personal jurisdiction doctrine. The order of discussion is conceptual, not historical—although some early cases come first because of their conceptual importance. No claim is made that this sketch is uniquely correct: the pieces of the puzzle could fit together in different ways. This is a thumbnail sketch at a high level of abstraction; fine-grained details are omitted.

71. U.S. CONST. amend. IX.

72. *Id.* amend. XIV, § 1.

1. Pennoyer v. Neff: *In Personam, In Rem, and Quasi in Rem*

The Supreme Court's decision in *Pennoyer v. Neff* articulated an approach to what we now call personal jurisdiction based on a fundamental premise: each state has power over persons and things located in its own territory.[73] That premise translated in two-to-three categories of lawsuits, each governed by a distinct rule:

> *In Personam Actions*: In personam actions made claims against persons and sought personal relief; jurisdiction was proper only if: (1) the defendant was served within the territory of the forum jurisdiction; or (2) the defendant was a citizen of the forum jurisdiction.[74]
>
> *In Rem Actions*: In rem actions made claims concerning property and sought relief that affected the property itself; jurisdiction was proper only if the property was located in the forum jurisdiction and the property was attached at the outset of the action.[75]
>
> *Quasi in Rem Actions*: Quasi in rem actions made personal claims but premised jurisdiction on attachment of property; jurisdiction was proper only if the property was attached at the outset of the action.[76]

Between *Pennoyer* and *International Shoe*, various exceptions were made, including for cases in which the defendant drove an automobile into the forum state, causing an accident, but was not served while in the state,[77] and for corporations that were "doing business" in the forum state but were not incorporated in or physically present in the state.[78]

2. International Shoe*: Minimum Contacts Consistent with Fair Play and Substantial Justice*

International Shoe provided a new doctrinal structure for a subset of cases in the in personam category. The core of *International Shoe* applies to in personam

---

73. *See* FleetBoston Fin. Corp. v. FleetBostonFinancial.com, 138 F. Supp. 2d 121, 132 (D. Mass. 2001); Michael P. Allen, *In Rem Jurisdiction from* Pennoyer *to* Shaffer *to the Anticybersquatting Consumer Protection Act*, 11 GEO. MASON L. REV. 243, 254 (2002).

74. *See* Note, *Jurisdiction in New York: A Proposed Reform*, 69 COLUM. L. REV. 1412, 1413 (1969).

75. WILLIAM L. REYNOLDS & WILLIAM M. RICHMAN, UNDERSTANDING CONFLICT OF LAWS 75, 84 (1984); Thomas R. Lee, *In Rem Jurisdiction in Cyberspace*, 75 WASH. L. REV. 97, 112 (2000).

76. For an overview of quasi in rem jurisdiction, see Michael B. Mushlin, *The New Quasi in Rem Jurisdiction: New York's Revival of A Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1065 (1990); *see also* Paul D. Carrington, *The Modern Utility of Quasi in Rem Jurisdiction*, 76 HARV. L. REV. 303 (1962).

77. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980).

78. Int'l Harvester Co. v. Kentucky, 234 U.S. 579, 585 (1914).

actions against corporations that are not incorporated in the forum state. In this situation,

> due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[79]

Although *International Shoe* itself involved a corporate defendant and its reasoning relied in part on the idea that the physical presence of a corporation in a forum is fictional[80] because corporations are a web of legal relationships and not a corporeal being, the minimum-contacts test used the pronoun *he* (likely in the gender-neutral sense that would now be expressed using *they*), which implied that the minimum-contacts standard applies to natural persons. In subsequent cases, such as *Burger King v. Rudzewicz*,[81] the minimum-contacts approach was applied to natural persons.

3. General Jurisdiction

In *Goodyear Dunlop Tires Operations, S. A. v. Brown*,[82] the Supreme Court explicitly recognized a distinction between "specific" and "general" personal jurisdiction, with different standards applied to each type. The categorical distinction between general and specific jurisdiction hinges on the question whether the contacts of the defendant with the forum arise from or are related to the claim with respect to which personal jurisdiction is sought.[83] If the claim arises from the contacts, then the case is one of specific jurisdiction.[84] If the claim does not arise from the contacts, then the category of general jurisdiction applies.[85]

The Supreme Court has yet to specify an operationalized approach to the question whether a claim arises from or is related to the defendant's contacts. The question was raised in *Ford Motor Co. v. Montana Eighth Judicial District Court*,[86] but Justice Kagan's opinion for the Court did not articulate a test. Instead, Justice Kagan stated the following:

> As just noted, our most common formulation of the rule demands that the suit "arise out of or relate to the defendant's contacts with the forum." The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a

79. *Int'l Shoe*, 326 U.S. at 316.
80. *Id.*
81. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).
82. Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915 (2011).
83. *Id.* at 919.
84. *Id.*
85. *Id.* at 925.
86. 141 S. Ct. 1017 (2021).

> causal showing. That does not mean anything goes. In the sphere of specific jurisdiction, the phrase "relate to" incorporates real limits, as it must to adequately protect defendants foreign to a forum. But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff's claim came about because of the defendant's in-state conduct.[87]

What kind of relationship is sufficient under the "relate to" branch of the test? Justice Kagan does not provide a test, but instead notes that on the facts of *Ford Motor Company* and similar cases, the contacts do qualify:

> Now turn to how all this Montana- and Minnesota-based conduct relates to the claims in these cases, brought by state residents in Montana's and Minnesota's courts. Each plaintiff's suit, of course, arises from a car accident in one of those States. In each complaint, the resident-plaintiff alleges that a defective Ford vehicle—an Explorer in one, a Crown Victoria in the other—caused the crash and resulting harm. And as just described, Ford had advertised, sold, and serviced those two car models in both States for many years. (Contrast a case, which we do not address, in which Ford marketed the models in only a different State or region.) In other words, Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong "relationship among the defendant, the forum, and the litigation"—the "essential foundation" of specific jurisdiction. That is why this Court has used this exact fact pattern (a resident-plaintiff sues a global car company, extensively serving the state market in a vehicle, for an in-state accident) as an illustration—even a paradigm example—of how specific jurisdiction works.[88]

So, we know that in cases like *Ford Motor Company*, the contacts do bear a sufficient relationship to the claim, but we do not know how cases' salient facts that are meaningfully different would be treated.

If the claim arises from or relates to the contacts, we test for specific jurisdiction; otherwise, we test for general jurisdiction. The test for general jurisdiction is more exacting; the test for specific jurisdiction is easier to satisfy. Early cases indicated that the test for general jurisdiction was "continuous and systematic contacts."[89] This approach was articulated by the Supreme Court in *Helicopteros Nacionales de Colombia, S. A. v. Hall*,[90] but in *Goodyear* and subsequent cases, the Supreme Court articulated an even more demanding "at home" test for general jurisdiction over corporations.[91] A corporation is at home in the

87. *Id.* at 1026.

88. *Id.* at 1028 (citation omitted) (quoting Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 414 (1984)).

89. Burnham v. Superior Ct. of Cal., 495 U.S. 604, 610 n.1 (1990) (plurality opinion).

90. *Hall*, 466 U.S. at 416.

91. Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919 (2011).

state in which it is incorporated and the state in which it has its principal place of business.[92] The Supreme Court has not decided a case involving general jurisdiction over a natural person. In such a case, it is possible that the at home approach would limit general jurisdiction to the state in which the defendant maintains a domicile (residence, plus intent to remain indefinitely), but reversion to the more abstract "systematic and continuous contacts" approach is also possible.

4. Specific Jurisdiction

The test for specific jurisdiction involves two steps: (1) a minimum-contacts threshold test and (2) a balancing test for fairness. Thus, the plaintiff must first establish that the defendant has the requisite threshold level of minimum contacts with the forum. Irrespective of the nature of the claim, the threshold is crossed if the defendant's conduct constituted "purposeful availment" of the benefits and protections of the forum's laws.[93] If the claim is for an intentional tort, then the minimum-contacts test is satisfied if the defendant targeted the plaintiff in the forum jurisdiction.[94] In products liability cases, the Supreme Court has yet to define the standard. In *J. McIntyre Machinery, Ltd. v. Nicastro*,[95] Justice Kennedy expressed the view that purposeful availment is required,[96] but Justice Breyer indicated that "regular and anticipated flow" of the product into the forum jurisdiction where it caused injury would be sufficient.[97]

The second step in the test for specific jurisdiction puts the burden of persuasion on the defendant to establish that the assertion of personal jurisdiction would be unfair in light of a five-factor balancing test:

> A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."[98]

Thus, the general framework under *International Shoe* and its progeny distinguishes specific and general jurisdiction. It is not clear, however, that this framework applies to all assertions of personal jurisdiction. This is true, even in

92. Daimler AG v. Bauman, 571 U.S. 117, 136–37 (2014).

93. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

94. Calder v. Jones, 465 U.S. 783, 789–90 (1984).

95. 564 U.S. 873 (2011).

96. *Id.* at 880.

97. *Id.* at 889 (Breyer, J., concurring).

98. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 113 (1987) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 288 (1980)).

in personam actions. In *Burnham v. Superior Court*,[99] the Supreme Court considered a case in which California asserted personal jurisdiction based on service of process on a defendant who was temporarily present in the state. Again, the Court was unable to agree on the applicable legal norm. Justice Scalia took the position that transitory presence and service of process in the forum was sufficient.[100] Justice Brennan argued that the *International Shoe* minimum-contacts test must be satisfied.[101] Because neither position gained the assent of a majority, the content of the legal norm applicable to service of process based on transitory physical presence of the defendant in the forum in in personam actions remains uncertain.

Likewise, the extent to which *International Shoe*'s minimum-contacts approach governs in rem and quasi in rem actions is not yet clear. *Shaffer v. Heitner* held that *International Shoe*'s minimum-contacts test applies in a quasi in rem action based on the attachment of intangible property deemed to be located in the forum state,[102] but the Supreme Court has not yet addressed the applicability of *International Shoe* to in rem actions or to quasi in rem actions in which tangible property is located in the forum.

5. The Big Picture

As should now be clear, the state of existing law is both complex and uncertain. The following four-step procedure offers a big-picture summary of the current state of the law:

Step One: Categorize the action as in personam, in rem, or quasi in rem.
Step Two: In Personam Actions: If the action is in personam, then apply the following test.

A: If the defendant is a natural person and was served while physically present in the forum jurisdiction, then there are two approaches.

1: Under the *Pennoyer* approach, the action is proper.

2: Under the *Shaffer* approach, go to substep B and apply the legal norms for personal jurisdiction developed by *International Shoe* and subsequent decisions.[103]

B: Otherwise, does the claim arise from, or relate to, the contacts of the defendant with the forum:

---

99. 495 U.S. 604, 607 (1990) (plurality opinion).

100. *Id.* at 611.

101. *Id.* at 630–31 (Brennan, J., concurring).

102. 433 U.S. 186, 196 (1977).

103. The question whether *International Shoe* or *Pennoyer* governs in personam actions in which the defendant is physically present is an open question of law given the lack of a majority opinion in *Burnham*.

1: General Jurisdiction: If the claim neither arises from nor relates to the contacts, then apply the test for general jurisdiction. To do so, categorize the defendant:

a: Corporations: If the defendant is a corporation, then apply the at home test. If the corporation is incorporated in or has its principal place of business in the forum jurisdiction, then personal jurisdiction is proper. Otherwise, personal jurisdiction is improper.

b: Natural Persons: If the defendant is a natural person, then there is an open question of law. Possible tests include (1) systematic and continuous contacts; or (2) at home (domicile).

2: Specific Jurisdiction: If the case does arise from or is related to the contacts, then apply the test for specific jurisdiction.

a: Minimum Contacts Threshold Test: Has the plaintiff met its burden to establish that the defendant has the requisite level of minimum contacts with the forum jurisdiction? Categorize the claim and apply the test:

i. All Actions: If the defendant's contacts with the forum jurisdiction constitute purposeful availment of the benefits and protections of the forum state's laws, then proceed to the balancing test.

ii. Intentional Tort Actions: If the plaintiff's claim is for an intentional tort and the defendant targeted the plaintiff in the forum jurisdiction, then proceed to the balancing test.

iii. Products Liability Actions: If the plaintiff's claim is for products liability, then there is an open question of law regarding the applicable minimum contacts threshold test.

b: Balancing Test for Fairness: If the minimum contacts threshold is met, then the defendant has the burden to establish that assertional jurisdiction would be unfair in light of five factors: (1) the burden on the defendant, (2) the interest of the forum in the dispute, (3) the interest of the plaintiff in the case being heard by the forum, (4) judicial efficiency and economy, and (5) substantive policy concerns.[104] If the defendant establishes that the assertion of personal jurisdiction would be unfair, then it is improper. If the defendant does not meet its burden, then personal jurisdiction is proper.

Step Three: Quasi in Rem Actions. If the action is quasi in rem, then determine whether the attached property is corporeal or incorporeal:

A: Incorporeal Property: If the attached property is incorporeal, then go to Step Two. Apply the *International Shoe* test as elaborated in subsequent decisions.

104. Asahi Metal Indus. Co. v. Superior Ct. of Cal., 480 U.S. 102, 113 (1987).

B: Corporeal Property: If the attached property is corporeal, then there is an open question of law. Under the *Pennoyer* approach, jurisdiction is proper if the property is located in the forum jurisdiction and was attached at the outset of the action. Under the *Shaffer* approach, go to Step Two and apply the *International Shoe* test as elaborated in subsequent decisions.

Step Four: In Rem Actions. If the action is in rem, there is an open question of law. Under the *Pennoyer* approach, jurisdiction is proper if the property is located in the forum jurisdiction. Under the *Shaffer* approach, go to Step Two and apply the *International Shoe* test as elaborated in subsequent decisions.

* * *

This four-step model of the constitutional status quo simplifies an even more complex reality. On the ground, the constitutional status quo is complexified by the hierarchical organization of the thirteen circuits of the United States Courts of Appeal. Each circuit has its own constitutional law of personal jurisdiction. That law is the product of hundreds of decisions by individual three-judge panels and some en banc decisions of the entire circuit. Questions that are open at the Supreme Court level may be governed by well-established circuit law, but that law may differ from circuit to circuit. Each circuit develops its own interpretation of Supreme Court decisions, and over time circuit law may modify, alter, or distort the decisions of the Supreme Court. Moreover, the four-step model simplifies Supreme Court precedent, which in reality contains tensions and inconsistencies that the four-step model ignores.

Moreover, the four-step model simplifies the constitutional status quo in another, more profound way. The four-step model represents a snapshot of constitutional personal jurisdiction doctrine—as it existed at the time this Article was written. But as the narrative presented above demonstrates, the reality is that the doctrine is unstable, with major shifts occurring on a regular basis. Of course, this is to be expected. Living Constitutionalism, the approach to constitutional interpretation that grounds *International Shoe*, rejects the rule of law values of certainty, stability, and predictability as hard constraints on the development of constitutional law; the whole point of a living constitution is that it morphs in response to changing circumstances and values.

B. Living Constitutionalism and Personal Jurisdiction

How do the various theories of the Due Process of Law Clause fare from a living constitutionalist perspective? This question cannot be answered generically because there are many distinct forms of Living Constitutionalism, each with its own approach to constitutional interpretation and construction.

Instead, we examine five approaches selected for their importance. We begin with a short preview provided by the following five stipulated definitions:[105]

> *Constitutional Pluralism*: the legal content of constitutional doctrine should be determined by the employment of multiple modalities of constitutional argument, such as (1) the constitutional text, (2) historical practice, (3) precedent, (4) constitutional values, and (5) institutional capabilities.[106]
>
> *Common Law Constitutionalism*: the legal content of constitutional doctrine should be determined by a process of case-by-case decision-making employing the common-law method.[107]
>
> *Moral Readings Theory*: the legal content of constitutional doctrine should be determined by the moral theory that best fits and justifies the law as a whole.[108]
>
> *Representation Reinforcement Thayerianism*: courts should refrain from engaging in judicial review except in cases in which judicial intervention is required to protect democratic processes (e.g., voting rights and political speech).[109]
>
> *Social Justice Constitutionalism*: courts should engage in case-by-case decision-making so as to best advance the goals of (1) substantive political and economic equality, (2) inclusion of oppressed groups, communities, and persons, and environmental sustainability. In so doing, courts should defer to the knowledge and perspectives of

105. Because these are stipulated definitions, we are not claiming that they accurately represent or fully capture the views of particular authors. The citations that follow identify some (but not all) of the authors and works that inspired the definitions but do not provide "support" for the proposition expressed by the definitions.

106. Our definition of Constitutional Pluralism is inspired by PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991). It has also been influenced by several other authors. *See* Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1753 (1994) ("Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution."); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739 (2013); Richard H. Fallon Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

107. Our definition of Common Law Constitutionalism is inspired by David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015) and DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

108. Our definition of Moral Readings Theory is inspired by Ronald Dworkin, *supra* note 15 and James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMPAR. L. 515, 515 (2014).

109. Our definition of Representation Reinforcement Thayerianism is inspired by JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

> oppressed groups regarding the circumstances of injustice, the value of equality, and the means by which social justice can be achieved.[110]

This list is far from exhaustive,[111] and each of the theories on the list has variants and siblings.[112] Moreover, these simple definitions elide important questions, including the role of vertical and horizontal stare decisis and many other matters.

Importantly, these theories differ radically from each other. Representation Reinforcement Thayerianism is in many ways the polar opposite of Common Law Constitutionalism; the former theory rejects judicial review, whereas the latter embraces it wholeheartedly. Both the Moral Readings Theory and Common Law Constitutionalism make the Supreme Court the ultimate source of constitutional law, but the kind of interstitial policy-driven lawmaking advocated by common law constitutionalists is an entirely different beast than the method of moral philosophy proposed by moral readers. The first four theories represent themselves as "neutral" in the sense that they do not commit to a particular political ideology,[113] but Social Justice Constitutionalism completely rejects the idea that constitutional theory should be neutral as between different comprehensive moral and religious conceptions of the good and embraces instead that constitutional law should advance a particular political ideology (social justice) and reject the moral, religious, and philosophical views of many, if not most, citizens and other members of the American political community.

---

110. The phrase "Social Justice Constitutionalism" is not currently in use, but the ideas expressed in the stipulated definition are certainly "in the air." I use the phrase "Social Justice Constitutionalism" rather than "Progressive Constitutionalism" to distinguish the view discussed in text from other theories that march under the Progressive Constitutionalist banner. *See, e.g.*, Marc Spindelman, *Toward A Progressive Perspective on Justice Ginsburg's Constitution*, 70 OHIO ST. L.J. 1115, 1115–16 (2009) ("Many flavored, the version [of Progressive Constitutionalism] I have in mind . . . maintains that progressive politics—and the freedoms towards which they aim—would stand a better chance of success than they presently do if the Supreme Court were to stand back and give the political processes their head."); Mark Tushnet, *What Is Constitutional About Progressive Constitutionalism?*, WIDENER L. SYMP. J. 19, 20 (1999) ("Progressive scholars have begun to claim that progressive constitutionalism should *not* be associated with the courts."). For a different take, see Alex Gourevitch, *The Contradictions of Progressive Constitutionalism*, 72 OHIO ST. L.J. 1159, 1161 (2011) ("[P]rogressive constitutionalism is more than just a form of popular constitutionalism. Progressive politics is the activity by which those currently denied their equal liberties (e.g., civil rights, economic opportunities, political powers) organize themselves and exercise their political agency to transform society.").

111. For a more complete list, see Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 298–300 (2020). In addition to the five forms of living constitutionalism listed in text are the following: (6) Popular Constitutionalism, (7) Extranational Constitutionalism, (8) the Multiple Meanings Theory, (9) the Superlegislature Theory, (10) Constitutional Antitheory, and (11) Constitutional Rejectionism. *See id.*

112. For example, Thayerianism has two other variants, one that holds Congress should itself be constrained by the constitutional text and another that rejects such constraint. *See id.* at 299.

113. Whether these theories are neutral and whether neutrality is possible are big questions that are beyond the scope of this Article.

The radical diversity of living constitutionalist approaches suggests an important methodological principle for thinking about originalism and living constitutionalism, both at the meta-level and in the context of personal jurisdiction issues.[114] When we discuss whether the constitutional law of personal jurisdiction should be constrained by the original public meaning of the constitutional text, we need to ask a further question: what is the alternative to originalism as a theory of constitutional interpretation? The answer to that question cannot be "generic living constitutionalism" because there is no such thing. The only way to produce clarity in theoretical discussions about the comparative merits of originalism and living constitutionalism is to use the method of "pairwise comparison."[115] That is, we need to compare a specific version of originalism (e.g., PMO) with a specific form of living constitutionalism (e.g., Constitutional Pluralism).

So, how would each of these theories handle interpretation and construction of the Due Process of Law Clause in the context of the constitutional law of personal jurisdiction?

1. Constitutional Pluralism

Begin with Constitutional Pluralism, the theory that holds that constitutional doctrine is and should be the outcome of a complex argumentative practice that employs multiple modalities of constitutional argumentation. Recall that Constitutional Pluralism allows consideration of (1) text, (2) historical practice, (3) precedent, (4) constitutional values, and (5) institutional capabilities.[116] There is no hierarchy of the modalities. Conflicts are resolved within the practice of constitutional argument itself on a case-by-case or issue-by-issue basis. Constitutional pluralism allows for the inclusion of original meaning via the textualist modality, but it denies the Constraint Principle. With respect to some issues, the constitutional text might be decisive. But on other issues, constitutional values or historical practice might trump the constitutional text.

Because of the extraordinary flexibility of Constitutional Pluralism, it can yield a wide range of outcomes for the constitutional doctrines governing personal jurisdiction. On the one hand, a constitutional pluralist could support the *International Shoe* approach, arguing that the constitutional value of procedural fairness is decisive and that *International Shoe* is now supported by precedent and historical practice (in the form of the many long-arm statutes

114. For the distinction between "meta-level questions" and "issue-level questions," see Lawrence Solum, *Legal Theory Lexicon 096: Issue-Level and Meta-Level Questions*, LEGAL THEORY LEXICON (Oct. 11, 2020), https://lsolum.typepad.com/legal_theory_lexicon/2020/10/legal-theory-lexicon-096-issue-level-and-meta-level-questions.html.

115. *See* Solum, *supra* note 111, at 302; Solum, *supra* note 7, at 1292.

116. *See supra* note 106 and accompanying text.

that have been modified to conform to the minimum-contacts, fair-play-and-substantial-justice standard).[117] On the other hand, a constitutional pluralist could support the return to the original meaning of the clause on the ground that the original meaning of "due process of law" is clear and that the *International Shoe* approach has proved to be unworkable in practice as the Supreme Court has added layer upon layer of doctrine, creating a baroquely complex rule structure. Constitutional pluralists could support the liberalization of personal jurisdiction doctrine or a more restrictive approach.

2. Common Law Constitutionalism

Common law constitutionalism holds that constitutional law is and ought to be the product of a common law process of judicial decision-making,[118] but this approach does not embrace a rigid doctrine of stare decisis. Like a common law court, the Supreme Court can and sometimes should overrule, confine, or modify the legal norms that appear in its own prior decisions.[119] Common law constitutionalism favors case-by-case constitutional adjudication driven by the principles and values that can be derived implicitly and explicitly from the prior decisions of the Supreme Court. Contemporary personal jurisdiction doctrine is the result of a case-by-case process that has built a baroquely complex doctrinal structure, one step at a time.[120] The status quo is consistent with common law constitutionalism, precisely because the Supreme Court's approach has employed the common law method of interstitial lawmaking. But this does not imply that current doctrine is required by this theory. Because common law constitutionalism permits incremental revisions in constitutional doctrine to accumulate over time, it is consistent with many different approaches to personal jurisdiction. The *Pennoyer* framework itself was articulated through a common law method of case-by-case adjudication.

---

117. *See infra* notes 208–11 and accompanying text.

118. *See* Solum, *supra* note 111, at 298.

119. For example, David Strauss, the leading proponent of common law constitutionalism, says:

> [P]rovisions of the text of the Constitution are, to a first approximation, treated in more or less the same way as precedents in a common law system. The effect of constitutional provisions is not fixed at their adoption—or, for that matter, at any other time. Instead, like precedents, provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward—on subsequent decisions and on judgments about the direction in which the law should develop.

David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 4–5 (2015); *see also* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 276 n.129 (2018) (noting that Strauss's article makes no mention of the doctrine of stare decisis).

120. *See supra* Part III.A.

3. Moral Readings Theory

The Moral Readings Theory requires judges to articulate those constitutional norms governing personal jurisdiction that best fit and justify the law as a whole.[121] In theory, this approach relies on objective moral truths, but in practice, judges must rely on their own moral beliefs. This means that different judges and Justices will adopt different moral readings of the Due Process Clauses, leading to radically different personal jurisdiction doctrines depending on the composition of the Supreme Court. This divergence can be illustrated by the disagreement between Justice White and Justice Brennan in *World-Wide Volkswagen Corp. v. Woodson*.[122]

Justice White's opinion for the Court can be reconstructed as based on the constitutional value of federalism. Thus, Justice White could have argued that the morally best reading of the Constitution must account for the fact that our constitutional system recognizes the independence and sovereignty of the states:

> [T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.[123]

On this moral reading, the minimum-contacts threshold test serves the constitutional value of federalism. Because defendants lacked such contacts, they could not be subjected to personal jurisdiction in the forum state, Oklahoma.[124]

Justice Brennan's dissenting opinion can be reconstructed as a different moral reading of our constitutional history. On Justice Brennan's account, the moral justification for Due Process limits on personal jurisdiction is fairness, not federalism:

> The Court's opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there would be any actual inconvenience to the defendant. The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends "traditional notions of fair play and substantial justice." The clear focus in *International Shoe* was on fairness and reasonableness. . . . The existence of

121. *See* DWORKIN, *supra* note 15.

122. 444 U.S. 286 (1980).

123. *Id.* at 293.

124. *Id.* at 295–99.

> contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.[125]

As a practical matter, both Justice White and Justice Brennan were required by the Moral Readings Theory to rely on their own answers to the question as to which moral reading provides the best justification for the Court's personal jurisdiction jurisprudence. Because different judges have different moral beliefs, they will have different perspectives on this question.

4. Representation-Reinforcement Thayerianism

Representation-Reinforcement Thayerianism counsels the courts to avoid the invalidation of democratically enacted legislation unless judicial review is required to preserve democratic processes.[126] As applied to personal jurisdiction, the implications of this theory are clear and simple. Congress and state legislatures enact statutes that govern the service of process and thereby establish the statutory limits on personal jurisdiction. Judicial supervision of the law of personal jurisdiction is not required to preserve democratic decision-making. Unlike the right to vote or the freedom of political expression, the fairness of assertions of personal jurisdiction can be resolved by legislatures. If there is a need to coordinate the personal jurisdiction of the states, Congress can enact legislation that imposes limits on state legislatures. In other words, a representation-reinforcement approach to personal jurisdiction would simply wipe out the whole body of constitutional jurisprudence, including both the remnants of *Pennoyer* and *International Shoe* and its progeny.

5. Social Justice Constitutionalism

Finally, consider the implications of Social Justice Constitutionalism for the law of personal jurisdiction. This approach to constitutional interpretation eschews neutrality between different political ideologies and instead embraces social justice as the preeminent constitutional value.[127] In the context of personal jurisdiction, a social justice approach might result in significant reform of existing constitutional doctrine. For example, a Supreme Court that shaped personal jurisdiction doctrine to advance the cause of economic equality could adopt constitutional rules that explicitly consider inequalities of wealth and power between plaintiffs and defendants. For example, in cases in which the plaintiff is an individual of modest means, and the defendant is a wealthy

125. *Id.* at 299–300 (Brennan, J., dissenting) (citations omitted).

126. *See supra* note 109 and accompanying text.

127. *See supra* note 110 and accompanying text.

corporation, personal jurisdiction would be allowed in the plaintiff's home state. But in the opposite situation, where the plaintiff's means are substantially greater than those of the defendant, the plaintiff would be required to litigate in the forum in which the defendant resides.

C. Living Constitutionalist Futures

Our brief consideration of five different living constitutionalist approaches to personal jurisdiction illustrates the indeterminacy and contingency of personal jurisdiction doctrine from a variety of nonoriginalist perspectives. The living constitutionalists on the Supreme Court as it is constituted in 2022 might be described as constitutional pluralists or common law constitutionalists, but we can imagine that a shift in the political winds would result in a more Thayerian Supreme Court or one that was guided by something like Social Justice Constitutionalism. In other words, if the Supreme Court is dominated by living constitutionalists, personal jurisdiction doctrine will be shaped by their beliefs about morality, politics, and constitutional theory. And this means that personal jurisdiction doctrine will be shaped by the political forces that influence judicial selection by the President with the advice and consent of the Senate.

IV. THE ORIGINAL MEANING OF "DUE PROCESS OF LAW" IN THE FIFTH AMENDMENT, IMPLICATIONS THEREOF FOR PERSONAL JURISDICTION DOCTRINE

The original meaning of "due process of law" in the Fifth Amendment differs substantially from its modern understanding. It does not include trial by jury, pleadings, summary judgment, discovery, or many of the other myriad elements of legal procedure. Nor does the Due Process of Law Clause require that procedures be fair. At its core, the Clause simply requires that none shall be deprived of certain essential rights (life, liberty, or property) by the federal government or its authorized agents unless that deprivation has been authorized by a lawfully issued writ or precept.[128] This bedrock constitutional principle guarantees the rule of law and protects the people from arbitrary deprivations of their rights. But it does not otherwise constrain the government's powers or entitle citizens to procedural rights not otherwise available under existing law.

We have previously articulated this view of the original meaning of the Fifth Amendment's Due Process of Law Clause, which we call the Process Theory, in greater detail.[129] In this Part, we summarize the case for the Process Theory

128. *See supra* note 56 and accompanying text.

129. Crema & Solum, *supra* note 8.

before discussing its implications for the personal jurisdiction of the federal courts.

A. Three Eighteenth-Century Jurisprudential Concepts: Law of the Land, Due Course of Law, and Due Process of Law

The American colonists saw themselves as the inheritors of the English common law.[130] By history and tradition, three concepts dominated the constitutional and legal framework they claimed as their birthright.

The Law of the Land. In 1215, the barons of England, sword in hand, extracted from a particularly tyrannical king a series of political concessions enshrined in the *Magna Carta Libertatum*, or Great Charter of Freedoms.[131] Of particular importance, *Magna Carta* decreed that no freeman may be "taken," "imprisoned," or "disseized," except "by the lawful judgement of his peers or [and] by the law of the land [*legem terre*]."[132] The English understood this guarantee as a check on the Monarch's arbitrary power over his subjects, ensuring that, henceforth, the King could only deprive his subjects of their rights according to "the law of the land"—that is, "by the Common Law, Statute Law, or Custom[s] of England."[133] In short, the term *law of the land* encompassed the substantive and procedural laws of England, and its import was to prohibit the King from seizing his subjects or their property arbitrarily. As explained by one founding-era court in North Carolina, it ensured that penalties could only be imposed "by the judgment of a court of competent jurisdiction, proceeding by the known and established course of law."[134]

Due Course of Law. The term *course of law* was used at common law from at least the fourteenth century to mean legal procedure, covering the entirety of a legal proceeding from initiation through judgment and execution.[135] For example, an early English statutory elaboration on *Magna Carta* declared that none could be put out of his "franchises" or "freeholds" until he had been

130. *See, e.g., Declaration and Resolves of the First Continental Congress,* AVALON PROJECT, https://avalon.law.yale.edu/18th_century/resolves.asp (last visited Mar. 4, 2022) ("That the respective colonies are entitled to the common law of England. . . .").

131. Vincent R. Johnson, *The Magna Carta and the Beginning of Modern Legal Thought*, 85 MISS. L.J. 621, 623 (2016) ("The terms of the Magna Carta were negotiated on the battlefront during . . . an English civil war between King John and rebellious barons.").

132. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375 (2d ed. 1914).

133. 2 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND 46 (London, M. Flesher & R. Young 1642).

134. Moore v. Bradley, 3 N.C. 142, 142 (N.C. 1801).

135. *See* Statute the Fifth 1351, 25 Edw. 3 c. 4 (Eng.); *Course*, 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828); 3 LAWS OF THE STATE OF NEW YORK 101 (New York, Thomas Greenleaf 1797); *In re* Dorsey, 7 Port. 293, 329 (Ala. 1838).

"duly brought into answer, and forejudged . . . by the Course of the law."[136] And "due *course* of law," as explained in Noah Webster's *Dictionary of the English Language*, simply meant a legal proceeding held in the "usual manner," following a "[s]tated and orderly method."[137] Thus, a 1794 New York statute allowed counterfeiters to be put to death only after having been "convicted thereof, according to the due course of law."[138] As one early American court explained: "Due course of law, as that phrase has been understood ever since *Magna Charta*, means a correct and established course of judicial proceedings."[139] The term thus largely mirrors our own modern understanding of procedural due process.

Due Process of Law. In the common law tradition, "process" meant the "writs and precepts that go forth" from a court.[140] Common law courts placed much stock in process.[141] As remains the case today, parties were summoned through process, property was searched or seized on process, and punishments were ordered—following conviction—through process.[142] Any deprivation of rights enacted without the appropriate process gave a remedy in law to those harmed.[143] To put it another way, it was only by the appropriate process that rights could be deprived or duties imposed. The phrase "due process of law" captures this principle of English law. A government official acted without due process of law if they deprived another of a right without the appropriate authorizing writ.[144] This was true even if that deprivation was preceded by a fair or adequate procedure, for it was the absence of the writ, and not the absence of pre-deprivation procedural protections, which violated this principle.[145]

Of course, not any writ would do. The English understood *due process of la*w to generally mean process issued upon an "indictment or presentment . . . or by writ originall of the common law" rather than other forms of process, such as the arbitrary orders of the King (even if written down in a writ).[146] Because generally only judicial actors could issue *due process of law*,[147] this foundational principle of English law guaranteed that subjects could only be deprived of

136. Statute the Fifth 1351, *supra* note 135.

137. WEBSTER, *supra* note 135.

138. 3 LAWS OF THE STATE OF NEW YORK, *supra* note 135.

139. *In re* Dorsey, 7 Port. at 329.

140. *Process,* 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (London, J.F. and C. Rivington et al., 1783).

141. *See* W.S. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 20 (1925) ("[W]rits have a long history. We can trace their formal origin to the Anglo-Saxon formulae by which the king used to communicate his pleasure to persons and courts.").

142. *See* BLACKSTONE, *supra* note 56; Nathan Levy, Jr., *Mesne Process in Personal Actions at Common Law and the Power Doctrine*, 78 YALE L.J. 52 (1968).

143. COKE, *supra* note 133, at 54.

144. *See id.* at 50.

145. *See* Johnson, *supra* note 131, at 625–26.

146. COKE, *supra* note 133, at 50.

147. *See id.* at 52.

certain essential rights according to law, as applied by the courts, and not according to the King's arbitrary will.

B. The Case for the Process Theory

The phrase "due process of law" entered the common law tradition in 1354, when Parliament decreed "[t]hat no Man of what Estate or Condition that he be" could be deprived of certain essential rights "without [first] being brought in Answer," i.e., subjected to a tribunal's jurisdiction, "by due Process of the Law."[148] From the fourteenth century through the Founding Era and beyond, this guarantee was understood to mean that none could be deprived of their rights without authorization from a court of law.[149] As one popular Founding Era legal handbook (published by Benjamin Franklin) explained, the principle of *due process of law* required that all seizures and commitments be made upon "lawful authority," as conferred by a "Warrant, or *Mittimus*."[150]

This narrow meaning persisted until well after the ratification. Importantly, *due process of law* was not used to mean legal procedure more generally. Indeed, the founding generation used a different term ("due *course* of law") to refer to appropriate or fair legal proceedings.[151] "Due process of law" only began to be used to refer to legal procedure more generally in the 1830s, four decades after the ratification, following the publication of Justice Joseph Story's *Commentaries*.[152] As such, the modern procedural understanding of *due process of law* is not reflective of the original meaning of the Fifth Amendment's Due Process of Law Clause.

1. Evidence from Before the Framing and Ratification

It is now generally accepted that *due process of law*, in the common law tradition, referred to writs. As Justice Scalia noted, while commenting on the

148. Liberty of Subject 1354, 28 Edw. 3 c. 3 (Eng.).

149. *See* COKE, *supra* note 133, at 52; *infra* notes 153–197 and accompanying text.

150. CONDUCTOR GENERALIS, OR THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE, HIGH-SHERIFFS, UNDER-SHERIFFS, GOALERS, CORONERS, CONSTABLES, JURY-MEN, AND OVERSEERS OF THE POOR 418, 420 (New York, James Parker, 2d ed. 1749) (1711). Although Benjamin Franklin is not listed as the publisher of the New York-printed version of this edition, he was secretly in business with its publisher. *See* John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 288 n.63 (1985) ("Parker learned the printing business from . . . Benjamin Franklin. Franklin became Parker's secret partner and helped him establish a printing shop in New York. In 1749 both Parker in New York and Franklin in Philadelphia printed the [*Conductor Generalis*].").

151. *In re* Dorsey, 7 Port. at 329.

152. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (Boston, Hilliard, Gray, & Co. 1833).

original meaning of the Due Process Clause: "[H]istorical evidence suggests that the word 'process' in this provision referred to specific writs employed in the English courts."[153] Modern scholarship concurs.[154] Take, for example, the text of the due process of law statute of 1354, noted above, which is still in force today in England. It reads: "[N]o Man of what Estate or Condition . . . he be, shall be put out of Land or Tenement, nor taken, . . . nor disinherited, nor put to Death, without being brought in Answer by due Process of . . . Law."[155] As Jurow notes, it is apparent from the text that *due process of law* regulates how someone might be "brought in to answer" rather than regulating the course of the proceeding which follows (as a modern reader might assume).[156]

This narrow understanding of *due process of law* persisted well into the seventeenth and eighteenth centuries. In one famous incident in 1627, King Charles I (later deposed in the English Civil War) imprisoned five English landowners over a political dispute concerning taxes.[157] The landowners sought a writ of *habeas corpus*, arguing that their commitment "by the special command of his majesty"[158] violated the guarantee of due process of law because it did not arise from an "indictment or presentment . . . [or] writ originall of the common law."[159] Although the landowners lost in court after the King claimed Royal Prerogative, they were vindicated the next year when Parliament passed the Petition of Right—"one of England's most famous constitutional documents"[160]—which essentially overruled the court's verdict, declaring it to be "against the tenor" of *Magna Carta* and the 1354 due process of law guarantee.[161]

Leading English legal treaties from that same period also gave *due process of law* a similarly narrow definition. Foremost among these was Sir Edward Coke's *Institutes of the Laws of England*, which remained the leading legal treatise for over a century until its later eclipse in the mid-eighteenth century by Sir William

153. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 28 (1991) (Scalia, J., concurring).

154. *See, e.g.*, HERMINE HERTA MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 128–49 (1977); FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION 1300–1629, at 69, 90–93 (1948); Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 341 n.8 (1987); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 266–71 (1975); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911).

155. Liberty of Subject 1354, *supra* note 148.

156. *See* Jurow, *supra* note 154, at 266–67.

157. The Five Knights' Case (1627) 3 How. St. Tr. 1 (KB).

158. *Id.* at 3.

159. COKE, *supra* note 133, at 50 (citations omitted); *see* The Five Knights' Case, 3 How. St. Tr. at 18 (arguing the law required that "[n]o freeman shall be imprisoned without due process of the law" and that this meant "either by presentment or by indictment"); *id.* at 7 (arguing the return was invalid, given it did not show the imprisonment was based on "presentment or indictment").

160. Jess Stoddart Flemion, *The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory*, 45 J. MOD. HIST. 193, 193 (1973).

161. Petition of Right 1628, 3 Car. 1 c. 1 (Eng.).

Blackstone's *Commentaries on the Laws of England*.[162] According to Coke, *Magna Carta* required that no person be deprived of their rights "[w]ithout being brought in to answere but by due process of the common law" and he defined "due process" to mean "by indictment or presentment . . . or by writ originall of the common law."[163] Matthew Hale's *The History of the Pleas of the Crown* adopted a similar interpretation, citing Coke in explaining that the principle of *due process of law* prohibited the King from, among other things, seizing "the goods of a person accused of felony . . . if the person were not first indicted, or [subject to other due legal process]."[164] Similar views were popularized by polemicists such as Henry Care, whose *English Liberties* (which quoted from and slightly embellished Coke's exposition) circulated in the lead-up to the Glorious Revolution and became a widely read handbook on civil liberties in Founding Era America.[165]

2. Evidence from the Framing and Ratification Period

The founding generation shared this narrow understanding of *due process of law*. The American colonists considered themselves inheritors of the English common law and those with legal education were "intimately familiar" with English legal sources, such as Coke's *Institutes*.[166] Indeed, John Rutledge, the Second Chief Justice of the United States Supreme Court, once described Coke's writings as "almost the foundation[s] of our law."[167] It is thus unsurprising that legally informed colonists, such as Alexander Hamilton,

---

162. *See, e.g.*, Eberle, *supra* note 154, at 341.

163. COKE, *supra* note 133, at 50. Others have offered a different reading of this passage of Coke's *Institutes*, which we have responded to at length in Crema & Solum, *supra* note 8.

164. 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 364 (London, Thomas Dogherty, New ed. 1800) (1736) (citing 25 Edw. 3 c. 14).

165. *See* HENRY CARE, ENGLISH LIBERTIES, OR THE FREE-BORN SUBJECT'S INHERITANCE 27 (London, G. Larkin 1680) ("[N]o man can be taken, Arrested, Attached, or Imprisoned, but by due process of Law . . . [meaning] [t]hat the Person or Persons which commit any, must have lawful Authority. . . . [And] the Warrant or Mittimus [must] be lawful . . . ."). For further information on the circulation of Care's work in Colonial America, and on other similar pamphlets, which also drew extensively on Coke's discussion of due process of law, see Thomas Y. Davies, *Correcting Search-and-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of "Due Process of Law"*, 77 MISS. L.J. 1, 84–86, 86 n.258 (2007).

166. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 29 (1991) (Scalia, J., concurring); *accord* A.E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 130 (1968) (noting Coke's *Institutes* was the "cornerstone" of legal education in Colonial America). For more on the reception of the common law in Colonial America, see Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, *in* POLITICAL SEPARATION AND LEGAL CONTINUITY 91, 95–98, 110 (Harry W. Jones ed., 1976).

167. Klopfer v. North Carolina, 386 U.S. 213, 225 (1967).

understood "due process of law" to mean "indictment or presentment of good and lawful men."[168]

The founding generation did not use "process" to refer to legal procedure more generally. In a prior article, we used corpus-linguistic analysis to show that the founding generation overwhelmingly used the terms "process" and "process of law" to refer to process, i.e., writs, rather than to procedure.[169] We also found the same to be true of "due process of law." For example, one Founding Era New York statute authorized judges "to cause due process of law to be issued" to recover fines or debts owed to the state.[170] Similarly, an early Tennessee case discussed the appropriateness of *ex parte* proceedings when defendants "willfully evade the due process of law," a clear reference to service of process. [171]

The founding generation was often careful to distinguish between process and proceedings more generally.[172] Indeed, they used an entirely different, far more popular term to refer to legal procedure. As explained in Webster's *Dictionary*, "due course of law" was understood to mean a legal proceeding held in the "usual manner," following a "[s]tated and orderly method."[173] Thus, the 1787 Northwest Ordinance guaranteed that citizens of the territory would enjoy "judicial proceedings according to the course of the common law."[174] And the 1776 Maryland Declaration of Rights guaranteed that the inhabitants of that state were "entitled to the common law of England, and the trial by jury,

168. A Letter from Phocion to the Considerate Citizens of New York, *in* 3 THE PAPERS OF ALEXANDER HAMILTON 483, 485 (Harold C. Syrett. ed., 1972).

169. Crema & Solum, *supra* note 8 ("[W]e found 'process' was used in its narrow sense in 84% of occurrences and used in its broad sense in 16% of occurrences . . . . [and] 'process of law' [was used] to mean writs or lawful authority in 74% of occurrences, while only using that term to refer to legal procedure in 26% of occurrences.").

170. Act of Feb. 9, 1786, ch. 9, 1 N.Y. Laws 200, 200; *see also* Act of Feb. 27, 1795, ch. 48, 1794 Mass. Acts 93, 93 (declaring state would begin paying for the upkeep of certain prisoners "committed by due process of Law"); Act of Feb. 26, 1796, ch. 48, 1785 Mass. Acts 439, 440–41 (authorizing any who discovered an oyster poacher in their town to temporarily seize their vessel until it "may be attached or arrested by due process of law"); Act of March 9, 1797, ch. 28, § 10, 1 Vt. Acts & Resolves 280, 283 (authorizing release of prisoners imprisoned upon "due process of law").

171. Nelson v. North, 1 Tenn. (1 Overt.) 33, 34 (1804) ("In civil suits [ex parte proceedings] are unknown to the principles of the common law, but introduced into the court of chancery, respecting . . . persons who willfully evade the due process of law.").

172. *See, e.g.*, Letter from Alexander Hamilton to Henry Lee (Oct. 20, 1794), *in* 17 THE PAPERS OF ALEXANDER HAMILTON 331, 333–34 (Harold C. Syrett ed., 1972) ("The objects of judiciary process and other civil proceedings, will be . . . [t]o bring offenders to Justice."); State v. Stone, 3 H. & McH. 115, 116 (Md. 1792) ("[F]or their disobedience of the said state's process, and their proceedings after the delivery thereof, they are guilty of a contempt of the state's process."); Act of Nov. 2, 1789, ch. 57, § 1, 1789 N.C. Sess. Laws 33, 33 ("And in case any defendant or defendants should not be served with such process, the same proceedings shall be had as in cases of other similar process which has not been executed.").

173. WEBSTER, *supra* note 135.

174. *See* Northwest Ordinance, art. II (1787), *reprinted in* SOURCES OF OUR LIBERTIES 392, 395 (Richard L. Perry ed., 1959).

according to the course of that law."[175] If the founding generation had wanted to guarantee due procedure in the Fifth Amendment, they knew the words with which to do so.[176]

The drafting history of New York's circular ratifying the United States Constitution emphasizes that the Founders understood the phrases "due process of law" and "due course of law" to mean different things. Like other states, New York attached a lengthy list of reservations and requested amendments. But New York's ratification circular is particularly noteworthy because New York was the only state to request that a due process of law guarantee be added to the Constitution.[177] Records from New York's ratifying convention demonstrate that its drafters considered and rejected asking for a due-course-of-law guarantee. As originally proposed, the circular included the following provision: "That no Freeman ought to be . . . deprived of his . . . Life, Liberty or property but by due ~~Course~~ Process of Law."[178] The strikethrough (which appears in the original) signifies that the provision was amended during the convention to read "due process of law."[179] Thus, it is apparent the drafters understood these two terms to bear different meanings.

Ultimately, of course, James Madison included a due process of law provision in his proposed Bill of Rights. Unfortunately, this provision elicited no discussion in the congressional and state ratification debates which followed.[180] These debates, therefore, offer little insight into the original meaning of the Due Process of Law Clause. However, the text of the Constitution itself underscores that the founding generation understood "process" to mean writs. Outside of the Due Process of Law Clauses, the Constitution only uses the word "process" in one other location—the Compulsory Process Clause.[181] This Clause also uses the term "process" to

175. MD. CONST., Declaration of Rights, art. III (1776). A 1726 Connecticut statute provided that any person "convicted by due course of law" of felling trees owned by another while wearing a disguise could be publicly whipped. Act effective Dec. 31, 1726, *reprinted in* 7 THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, FROM MAY, 1726, TO MAY, 1735, INCLUSIVE 80, 81 (Charles J. Hoadly ed., 1873).

176. A similar argument has been made previously by Professor Davies. *See* Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 25–26 (2010) [hereinafter *Post-Framing Adoption*]; Davies, *supra* note 165, at 81–84; Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 394–95, 395 n.521, 410 n.578, 411 n.579 (2002) [hereinafter *Case Study*].

177. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 445 (2010).

178. The New York Convention Debates and Proceedings (July 10, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2118, 2119 (John Kaminski et al. eds., 2008).

179. *Id.* at 2127 n.2.

180. *See* James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 325 (1999) (noting the drafting and ratification history of the Bill of Rights is "remarkably skimpy" and that "a good deal must rest upon historical conjecture").

181. *See* U.S. CONST. amend. VI.

mean writs, guaranteeing to criminal defendants the right to "have compulsory process for obtaining witnesses in [their] favor."[182]

3. Evidence from Post-Ratification History

So foundational was the norm of a lawful rule which the Fifth Amendment's Due Process of Law Clause enshrined in our Constitution that the Clause went completely unnoticed during the ratification of the Bill of Rights. And the Clause continued to languish in obscurity for decades after its enactment. Indeed, only one Supreme Court opinion so much as used the phrase "due process of law" during the three decades following the ratification of the Bill of Rights, and only in passing.[183] The phrase did, however, continue to be used in its traditional, narrow sense in a number of lower court cases during this period.[184] Early congressional statutes also continued to use "process" in its narrow sense.[185] And the same is also true of state statutes and state court decisions.[186]

At the same time, a remarkably vibrant debate erupted over the meaning of *law of the land*, as state courts sought to strike an appropriate balance between individual rights and popular sovereignty.[187] Recall, *law of the land* had long been understood capaciously to mean "the common law, statute law, or custom[s] of England."[188] Seizing on this, state courts began to adopt a rich, substantive reading of the law of the land provisions present in many state constitutions, thereby identifying a textual hook from which to strike down statutes perceived as unduly hostile towards individual liberties.[189] Indeed, such was the trend in authority that by the late 1830s state law of the land provisions had grown into

182. *Id.*

183. *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 689 (1819) ("The crown . . . pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes . . . unless its corporate franchises should be taken away by due process of law.").

184. *See, e.g.*, Motion of U.S. Attorney, United States v. Burr, 25 F. Cas. 1, 2 (C.C.D. Ky. 1806) (No. 14, 692) (moving "that due process issue to compel" Aaron Burr's appearance at Burr's trial); Plaintiff's Complaint, Morehouse v. The Jefferson, 17 F. Cas. 738, 739 (S.D.N.Y. 1803) (No. 9793) ("[T]hese libellants pray due process of law, against the said brigantine . . . ."); Plaintiff's Motion, United States v. the Anthony Mangin, 24 F. Cas. 833, 839 (D. Penn. 1802) (No. 14,461).

185. *See* Judiciary Act of 1789, ch. 20, § 6, 1 Stat. 73, 76 (using "process" in a manner distinct from "proceedings"); *id.* at 79 (requiring as a condition of removal that the defendant present "copies of said process against him"); *id.* at 84 (describing a writ of error as "process"); *see also* H.R.J., 1st Cong. (1st Sess. 1789) at 14 (granting authority to the House's Serjeant-at-Arms and requiring he shall "execute . . . all such process" issued therefrom).

186. *See* Crema & Solum, *supra* note 8.

187. *See* Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1433–45 (1999).

188. COKE, *supra* note 133, at 45.

189. *See* Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 390–92 (1794); Trs. of the Univ. of North Carolina v. Foy, 5 N.C. (1 Mur.) 58, 73–74 (1805).

one of the most dynamic fonts of judicial authority in the American system of governance.[190]

Due process of law, however, continued to languish in relative obscurity. Not once during the first three decades of the Republic did anybody (so far as we know) suggest that the Fifth Amendment's Due Process of Law Clause imposed the same constraints on the federal government as were being discovered in state law of the land provisions.[191]

This changed in 1833 (more than four decades after the ratification). That year marked the publication of Justice Joseph Story's enormously influential *Commentaries on the Constitution*, in which Story conflated the meaning of "due process of law" with "law of the land" and suggested that the rich, substantive meaning of the *law of the land* ought to be read into the Due Process of Law Clause.[192] This was the first time—so far as we are aware—that anybody had ever suggested that "law of the land" and "due process of law" bore the same meaning. Nonetheless, Story's interpretation gained currency, and by the mid-nineteenth century, state court decisions began to equate *due process of law* with *law of the land*.[193]

This process of conflation culminated in 1855, with the Supreme Court's decision in *Murray's Lessee v. Hoboken Land & Improvement Co.*[194] There, for the first time, the Court held that a statutory procedure resulting in the deprivation of life, liberty, or property might be unconstitutional under the Due Process of Law Clause, despite complying with the Constitution's specifically enumerated procedural requirements—such as the jury right.[195] Echoing Story's *Commentaries*, Justice Curtis explained for a unanimous court that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*."[196] So doing, Justice

190. *See* Corwin, *supra* note 154, at 378–85.

191. In one case, decided in 1815, counsel argued that that a retroactive law passed by Congress could not be "[N]ecessary and [P]roper" because, among a plethora of other reasons, "it would be *virtually* taking away private 'property' without 'due process of law.'" United States v. Bryan, 13 U.S. (9 Cranch) 374, 379 (1815) (emphasis added). This was ignored (and implicitly rejected) by the Court, which ruled for the opposing party. *See id.* at 387.

192. STORY, *supra* note 152. We have previously offered a detailed rebuttal to Story's equation of *due process of law* and *law of the land*. *See* Crema & Solum, *supra* note 8.

193. *See* Taylor v. Porter, 4 Hill 140, 146–47 (N.Y. Sup. Ct. 1843) (citing STORY, *supra* note 152) (noting that *due process of law* and *law of the land* bear the same meaning). Six years earlier, a South Carolina state judge adopted this position in a concurring opinion in *State v. Dawson*. 21 S.C.L. (3 Hill) 100, 112 (1836) (Richardson, J., concurring) ("'[T]he law of the land' of our own State constitution; and 'the due process of law' of the United States constitution, are precise synonymes . . . ."). It may also be fair to say *Taylor* was the logical conclusion of the analysis in *In re* John & Cherry Streets, 19 Wend. 659 (N.Y. Sup. Ct. 1839), which did not expressly rest on New York's law of the land provision.

194. 59 U.S. 272 (1855).

195. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997).

196. *Murray's Lessee*, 59 U.S. at 276 (citing COKE, *supra* note 133, at 50).

Curtis then drew extensively on cases interpreting state law of the land provisions to determine the meaning and application of the federal Due Process of Law Clause. Although the *Murray* Court concluded the summary procedure at issue was constitutional due to its historical pedigree, Justice Curtis's decision opened the door to a dramatic reinvention of the Due Process of Law Clause as a check on the federal government's power, turning it into the "most important clause of the United States Constitution."[197]

C. Implications of the Process Theory for the Constitutional Limits on the Personal Jurisdiction of the Federal Courts

What are the implications of the Process Theory for the constitutional limits on the personal jurisdiction of the federal courts? If the Process Theory is correct, then the phrase "due process of law" forbids the federal government to deprive any person of life, liberty, or property if they have not been served process in accord with the law. Thus, if the Process Theory is correct, then the reasoning of *International Shoe* is incorrect. Neither minimum contacts nor fair play and substantial justice is required by the original meaning of the Due Process of Law Clause. Moreover, the distinction between specific jurisdiction and general jurisdiction lacks an originalist constitutional foundation. On the specific jurisdiction side, neither the purposeful availment test nor the balancing test for fairness would be constitutionally required. On the general jurisdiction side, the at home test would not be constitutionally required. Nor would natural persons only be amenable to jurisdiction in the state in which they resided.

In other words, judicial adoption of the Process Theory would wipe out the current structure of constitutional personal jurisdiction doctrine. If the Process Theory is correct, then originalists would require service of process issued by a court of law before any person could be deprived of life, liberty, or property. The Process Theory requires the process that is *due* as a matter of *law*, but what law? We believe that two different answers to this question are possible.

The first answer is found in Justice Scalia's assumption that the content of the Due Process of Law Clauses is defined by those procedures that were in effect at the time each clause was adopted.[198] If the Process Theory is correct, then Scalia's view would mean that the Fifth Amendment Due Process Clause requires compliance with the legal norms governing service of process as of 1791. Thus, if *Pennoyer* was the law in 1791, compliance with *Pennoyer* would be required today. We call this the "static version" of the Process Theory: the legal norms governing service of process are static and time-indexed to the time at which the Clause was adopted.

197. Corwin, *supra* note 154, at 366.

198. *See* Burnham v. Superior Ct. of Cal., 495 U.S. 604, 611 (1990).

The second answer may have been implicit in Justice Black's concurring opinion in *International Shoe*.[199] Although that opinion was brief, we can reconstruct and more fully articulate what may have been his position. The dynamic alternative to Scalia's position is that Due Process of Law requires compliance with the positive law at the time the deprivation of life, liberty, or property occurs. As a practical matter, this means that the constitutional limits on service of process would be defined by statute or by the Federal Rules of Civil Procedure pursuant to the authority delegated to the Supreme Court by Congress. This view implies that the Due Process of Law Clause would allow Congress to authorize worldwide service of process, even if the defendant lacks minimum contacts with the United States. We call this the "dynamic version" of the Process Theory: the legal norms governing service of process can change over time if Congress enacts the change or the change is promulgated by the Supreme Court pursuant to the power delegated to it by the Rules Enabling Act.

Currently, Rule 4(k)(2) allows worldwide service of process in limited circumstances:

> (2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws.[200]

If the static version of the Process Theory is correct, then Rule 4(b)(2)(B) is limited by the laws governing service of process as of 1791. But if the dynamic version is correct, Rule 4(b)(2)(B)'s reference to "consistent with the United States Constitution" is redundant with "consistent with the United States . . . laws." In other words, the dynamic version implies that compliance with the laws of the United States is what the United States Constitution requires.

D. The Transition from Living Constitutionalism to Originalism in the Context of Federal Personal Jurisdiction, Herein of Precedent

Does the transition from the status quo to the original meaning of the Due Process of Law Clause require substantial legal change? The answer to this question is different for the static and dynamic versions of the Process Theory.

First, consider the dynamic version. This version of the theory leaves Rule 4 and federal nationwide service of process statutes in place. As a practical

199. Int'l Shoe Co. v. Washington, 326 U.S. 310, 322–26 (1945) (Black, J., concurring).

200. FED. R. CIV. P. 4(k)(2).

matter, this means that most of the personal jurisdiction law in action would be unchanged. No assertion of personal jurisdiction that is constitutional under current doctrine would become unconstitutional if the original meaning of the Fifth Amendment Due Process of Law Clause were restored—assuming the dynamic version of the Process Theory is correct.

The dynamic version might permit some assertions of personal jurisdiction that would be forbidden under current doctrine. An example is provided by Section 12 of the Clayton Act, which states:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.[201]

The implications of current doctrine for federal worldwide service of process provisions have yet to be defined by the Supreme Court. Assuming that the current doctrinal structure developed in the context of state courts applies, statutes like Section 12 play out differently for cases of specific jurisdiction as opposed to general jurisdiction.[202]

Assume that a Clayton Act claim is brought against a foreign business entity that transacts business in the United States. If the claim arises from or is related to that business, then the minimum contacts threshold test usually requires that the defendant have purposefully availed itself of the benefits and protections of the laws of the United States.[203] But under the dynamic interpretation, § 12 itself would provide the limits on service of process. Thus, if a foreign corporation transacted any business in any judicial district, it would be subject to personal jurisdiction in the United States. But if the defendant had not transacted any business in the United States, then Rule 4(k)(2) would allow service of process and personal jurisdiction if "consistent with the United States Constitution and laws."[204] If no statute prohibits the assertion of personal jurisdiction, Rule 4(k)(2) would seem to authorize worldwide personal jurisdiction given the dynamic version of the Legal Process Theory.

This result is straightforward given the dynamic version of the Legal Process Theory, but Rule 4(k)(2) seems to have been drafted on the assumption that *International Shoe* (or something like it) would govern personal jurisdiction. That is, Rule 4(k)(2) did not contemplate the possibility that service of process would be valid under the Due Process of Law Clause so long as it complied with federal legal norms at the time process was served. Because Rule 4(k)(2)

201. 15 U.S.C. § 22.

202. *See, e.g.*, *In re* Packaged Seafood Prods. Antitrust Litig., 338 F. Supp. 3d 1118 (S.D. Cal. 2018); *In re* SSA Bonds Antitrust Litig., 420 F. Supp. 3d 219 (S.D.N.Y. 2019).

203. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

204. FED. R. CIV. P. 4(k)(2).

itself provides the legal norm governing the validity of service of process, its reference to consistency with the United States Constitution becomes redundant or circular.

The static version of the Process Theory would require that service of process be legally valid under the legal norms as they existed at the time the Fifth Amendment was framed and ratified. We have not undertaken an investigation of those norms, but we can use the *Pennoyer* framework to illustrate the possible implications of the static version. Under the *Pennoyer* framework, service of process on foreign corporations would require service on an agent authorized to accept service of process within the territory of the United States. Therefore, foreign corporations that have no such agents in the United States could not be served at all. And this would entail the further conclusion that assertions of personal jurisdiction by the federal courts would violate the Fifth Amendment Due Process of Law Clause in such cases.

The preceding analysis implies that much hangs on the question of whether the dynamic or static version of the Legal Process Theory is correct. The dynamic version entails that Congress has the power to extend personal jurisdiction beyond the territorial limits of the United States, directly by statute or indirectly via the delegation of rulemaking authority in the Rules Enabling Act.[205] If *Pennoyer* was correct, then the static version would limit the in personam personal jurisdiction of the federal courts to cases in which the defendant or an authorized agent was served within the territory of the United States.

Our research has not uncovered direct and decisive evidence that would answer the question whether the dynamic or static version is correct as a matter of original meaning. On this occasion, we can only state our opinion based on the state of the evidence as of this writing. We believe that the dynamic version is more plausible than the static version. It seems unlikely that the phrase "Due Process of Law" was understood to freeze all the details of service of process as of 1791. But on this occasion, this claim is based on our speculation that the founding generation would have understood that details for service of process had evolved and hence that further evolution was possible or even likely.

205. *See* Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2205 (2017).

V. A RESEARCH PROGRAM FOR ORIGINALIST ANALYSIS OF THE IMPLICATIONS OF THE 14TH AMENDMENT FOR PERSONAL JURISDICTION IN STATE COURTS

What about the Fourteenth Amendment Due Process of Law Clause? To answer this question, we would need to undertake a methodologically sound investigation of the meaning of the phrase "due process of law" circa the mid-1860s, when the clause was framed and ratified.[206] We have yet to undertake such an investigation, so the discussion that follows is speculative.

Our speculation begins with the assumption that the phrase "Due Process of Law" had taken on a broader meaning by the time the Fourteenth Amendment was drafted: roughly, "Due Process of Law" had come to refer to the *due process of law* in the broad sense that is identified by the Legal Procedures Theory.[207] In other words, the Fourteenth Amendment Due Process of Law Clause forbids deprivation of life, liberty, or property unless all of the legal procedures required by state law are followed. Because states have legal norms governing service of process and personal jurisdiction, the Legal Procedures Theory entails that state courts must comply with such norms in order to comply with the clause.

The state-law norms governing personal jurisdiction in state court include state constitutional provisions and state common law, statutes, and rules of procedure that govern service of process. As with the Process Theory, there is both a static and dynamic version of the Legal Procedures Theory. On the static version of the theory, service of process and personal jurisdiction would violate the Fourteenth Amendment Due Process of Law Clause unless the state law norms governing such procedures in 1868 were satisfied. Assuming that *Pennoyer* provides an accurate summary of those norms, then the static version would require the defendant or an agent of the defendant authorized to accept service of process be served within the territory of the forum state. In other words, the static version of the Legal Procedures Theory could result in the restoration of the *Pennoyer* regime and the reversal of *International Shoe*.

The dynamic version of the Legal Procedures Theory would have very different implications. On the dynamic version, the Due Process of Law Clause of the Fourteenth Amendment would require service of process and assertions of personal jurisdiction to comply with state law norms as of the time the defendants were served and when the state court asserted personal jurisdiction over them. Because states have enacted long-arm statutes that allow for service of process outside the territorial limits of the state, such service would comply

206. *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 66–67 (2008).

207. *See* discussion *supra* Section II.B.

with the Fourteenth Amendment Due Process of Law Clause so long as the requirements of the statute were met.

The content of long-arm statutes varies widely. Some statutes allow service of process outside the state so long as it would be constitutional. Consider the following examples:

- *Alabama*: "An appropriate basis exists for service of process outside of this state upon a person or entity in any action in this state when the person or entity has such contacts with this state that the prosecution of the action against the person or entity in this state is not inconsistent with the constitution of this state or the Constitution of the United States . . . ."[208]
- *California*: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."[209]

These statutes were likely based on the assumption that the *International Shoe* minimum-contacts test provided the constitutional limits on personal jurisdiction. But if the dynamic version of the Legal Procedures Theory is correct, then this assumption is false from an originalist perspective. This raises complex questions of statutory interpretation and constitutional law. As a matter of statutory interpretation, there is a question whether the statutes should be interpreted to mean something like "not inconsistent with the Constitution as construed by the Supreme Court in *International Shoe*."[210] On that interpretation, *International Shoe* would continue to govern but as a statutory limit. But if that interpretation is rejected, then the statutes seem to imply worldwide service of process is allowed even if the defendant has no contacts with the United States of any kind. Perhaps, the failure to define a legal standard governing the validity of extraterritorial service is itself a violation of the Due Process of Law Clause.

Other statutes impose categorical limits on out-of-state service of process. The New York long-arm statute provides an example:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise

208. ALA. R. CIV. P. 4.2.

209. CAL. CIV. PROC. CODE § 410.10 (West 1969).

210. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

> personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
> 2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
>
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
>
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
>
> 4. owns, uses or possesses any real property situated within the state.[211]

The New York long-arm statute provides specific limits on extraterritorial service of process. A rigorous analysis of the statute is beyond the scope of this Article, but we note that some of its provisions may reach beyond the limits under current Supreme Court personal jurisdiction doctrine. For example, the defendants in *World-Wide Volkswagen* (the New York dealer and regional distributor of the allegedly defective motor vehicle) arguably committed "a tortious act without the state" that caused injury to the plaintiffs in Oklahoma and reasonably should have expected injuries in Oklahoma, while deriving substantial revenue from interstate commerce.[212] Given the dynamic version of the Legal Procedures Theory, compliance with the New York long-arm statute would suffice to comply with the requirements of the Fourteenth Amendment Due Process of Law Clause.

Once again, the difference between the dynamic and static versions of the Clause would have important consequences. On the static version, a wholesale revision of Fourteenth Amendment Due Process Clause personal jurisdiction doctrine would be required. On the dynamic version, categorical long-arm statutes would be constitutional, but statutes that assume that the *International Shoe* test is in force might need to be revised. As before, we are not aware of any decisive evidence, but we believe that it is more likely that the dynamic version is correct.

211. N.Y. C.P.L.R. 302 (McKinney 2008).

212. *See id.*; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287–90 (1980).

VI. IMPLICATIONS FOR ORIGINALIST CONSTITUTIONAL THEORY

Our discussion so far has focused on the implications of constitutional theory for constitutional personal jurisdiction doctrine. In this penultimate section, we focus on the implications of the original meaning of the Due Process of Law Clauses for constitutional theory. There are several unanswered questions about the meaning of the Due Process of Law Clauses of the Fifth and Fourteenth Amendment, but even at this early stage of research and analysis, one important conclusion does seem clear: the *International Shoe* minimum contacts approach to personal jurisdiction cannot be supported by the original meaning of the Due Process of Law Clauses. This raises several important questions for originalist constitutional theory, including the following:

- Should originalist judges and Justices continue to follow long-established precedent that is inconsistent with the original meaning of the Due Process of Law Clauses?
- Assuming that the answer to the first question is no, how should originalist judges manage the transition back to the original meaning of the Due Process of Law Clauses?
- What are the implications of the original meaning of the Due Process of Law Clauses for the normative debate between originalists and living constitutionalists?

These questions for originalist constitutional theory will arise whenever a nonoriginalist set of constitutional doctrines is inconsistent with a longstanding body of precedent. In this Part of the Article, we will sketch the ways in which originalists might begin to answer these questions.

A. Should the Courts Restore the Original Meaning of the Due Process of Law Clauses or Adhere to Living Constitutionalist Precedent?

Justice Scalia famously labeled himself a "faint-hearted originalist;"[213] his general position seems to have been that the Court should continue to follow longstanding precedent even when it conflicts with the original public meaning of the constitutional text. Justice Thomas, on the other hand, might be described as a "lion-hearted originalist" who adheres to the original meaning of

213. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); *see also* Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 13 (2006).

the constitutional text, even when it is contrary to constitutional doctrine supported by many precedents over several decades.[214]

Justice Scalia's deference to living constitutionalist precedent is illustrated by his opinion in *Burnham v. Superior Court*: "judging by the evidence of contemporaneous or near-contemporaneous decisions, one must conclude that Story's understanding [that the courts of a State have jurisdiction over nonresidents] was shared by American courts at the crucial time for present purposes: 1868—when the Fourteenth Amendment was adopted."[215] Nonetheless, Scalia acknowledged the precedent allowing for the assertion of personal jurisdiction in in personam actions without personal service within the territory of the forum state: "As *International Shoe* suggests, the defendant's litigation-related 'minimum contacts' may take the place of physical presence as the basis for jurisdiction."[216] Rather than suggesting that *International Shoe* be overruled, Scalia wrote:

> Nothing in *International Shoe* or the cases that have followed it, however, offers support for the very different proposition petitioner seeks to establish today: that a defendant's presence in the forum is not only unnecessary to validate novel, nontraditional assertions of jurisdiction, but is itself no longer sufficient to establish jurisdiction.[217]

Thus, Scalia preserved the existing legal norm created by *International Shoe* but preserved what he believed was the original meaning of the Fourteenth Amendment to the extent that it was consistent with existing precedent.

Justice Thomas's position on the relationship between originalism and precedent is illustrated by his concurring opinion in *Gamble v. United States*:

> I write separately to address the proper role of the doctrine of *stare decisis*. In my view, the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. It is always "tempting for judges to confuse our own preferences with the requirements of the law," and the Court's *stare decisis* doctrine exacerbates that temptation by giving the veneer of respectability to our continued application of demonstrably incorrect precedents. By applying demonstrably erroneous precedent instead of the relevant law's text—as the Court is particularly prone to do when expanding federal power or crafting

214. I have heard the label "lion-hearted originalist" applied to Justice Thomas on several occasions, but it does not seem to appear in a published article. It did appear in the title of a conference paper presented in February 2020. *See* Logan Olson, Presentation at the University of Montana Graduate Conference: Lion Hearted Originalism and the Second Amendment (Feb. 28, 2020), https://www.umt.edu/ces/conferences/gradcon/images/2020%20GradCon%20Program-Final.pdf.

215. Burnham v. Superior Ct. of Cal., 495 U.S. 604, 611 (1990).

216. *Id.* at 618

217. *Id.* at 619.

> new individual rights—the Court exercises "force" and "will," two attributes the People did not give it.[218]

Lion-hearted originalism requires adherence to the original meaning of the constitutional text, even in the face of longstanding precedent, if that precedent is "demonstrably erroneous."[219]

Although Justice Thomas has not addressed the relationship between originalism and original meaning in the context of personal jurisdiction, he did join Justice Gorsuch's opinion in *Ford Motor Company v. Montana Eighth Judicial District Court*.[220] Justice Gorsuch wrote:

> Before *International Shoe*, it seems due process was usually understood to guarantee that only a court of competent jurisdiction could deprive a defendant of his life, liberty, or property. In turn, a court's competency normally depended on the defendant's presence in, or consent to, the sovereign's jurisdiction. But once a plaintiff was able to "tag" the defendant with process in the jurisdiction, that State's courts were generally thought competent to render judgment on any claim against the defendant, whether it involved events inside or outside the State.[221]

Justice Gorsuch did not take a position on the original meaning of the Due Process of Law Clause, but he did raise the issue:

> None of this is to cast doubt on the outcome of these cases. The parties have not pointed to anything in the Constitution's original meaning or its history that might allow Ford to evade answering the plaintiffs' claims in Montana or Minnesota courts. No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back. The real struggle here isn't with settling on the right outcome in these cases, but with making sense of our personal jurisdiction jurisprudence and *International Shoe*'s increasingly doubtful dichotomy. On those scores, I readily admit that I finish these cases with even more questions than I had at the start. Hopefully, future litigants and lower courts will help us face these tangles and sort out a responsible way to address the challenges posed by our changing economy in light of the Constitution's text and the lessons of history.[222]

Reading the tea leaves, Gorsuch's opinion raises the possibility that the Court's personal jurisdiction jurisprudence may be due for a rethink, especially

---

218. Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (internal citation omitted).

219. *See id.*

220. 141 S. Ct. 1017, 1034 (2021) (Gorsuch, J., concurring).

221. *Id.* at 1036.

222. *Id.* at 1039 (internal citation omitted).

if "the Constitution's original meaning" was raised by the parties in a future case.

From an originalist perspective, the question whether originalist judges and Justices should prioritize the original meaning of the constitutional text over longstanding precedent is an important one. The possibility that *International Shoe* is inconsistent with original meaning illustrates the possibility that a lion-hearted approach would require the rethinking of dozens of Supreme Court decisions and hundreds of decisions in the Courts of Appeals.

The effect of such a rethinking would depend in large part on the question whether the requirements of due process are static or dynamic. A return to *Pennoyer* would have the effect of invalidating many states' long-arm statutes that permit service of process outside state boundaries. But if the original meanings of the two Due Process Clauses are better understood as dynamic, then the disruption of existing statutory provisions would be minimal. This approach would allow state legislatures to expand their long-arm statutes, but it would leave the status quo statutory schemes in place. In light of this fact, even a faint-hearted originalist might conclude that the original meaning of the constitutional text should prevail, despite the fact that the *International Shoe* approach is supported by longstanding precedent.

For a lion-hearted originalist, a return to *Pennoyer* would be required (assuming that the dynamic version of the Legal Procedures Theory is correct and that *Pennoyer* captures the original meaning of the Fourteenth Amendment). This would involve substantial disruption of the law in action, as a return to *Pennoyer* would invalidate state long-arm statutes that allow service of process outside the territory of the forum state. How should such a major transition in the law be managed?—that is our next topic.

B. How Should the Courts Manage the Transition to the Original Meaning of the Due Process of Law Clauses?

Managing the transition to the original meaning of the Due Process of Law Clauses would involve substantial changes in the law in action if it involves a restoration of the regime established by *Pennoyer* and hence the invalidation of state long-arm statutes. That is a big *if*—we believe it is more likely that both Due Process of Law Clauses should be understood as requiring service of process but not as freezing the law governing such process in place as of 1791 or 1868 (the years in which the Fifth and Fourteenth Amendments were adopted). In this Part, we address the possibility that we are wrong and that the static versions of the two clauses best represent their original meaning.

Even lion-hearted originalism does not require what has been called an "originalist big bang."[223] The transition from the living constitutionalist approach of *International Shoe* to a restoration of the *Pennoyer* regime could proceed gradually, allowing Congress, state legislatures, and rule-makers time to adjust personal jurisdiction statutes and the *Federal Rules of Civil Procedure* to the new requirements. One technique for managing the transition would be for the Court to delay granting certiorari in cases in which the question whether state long-arm statutes violate the Fourteenth Amendment Due Process of Law Clause was squarely presented. During this period of delay, originalist Justices might write concurring or dissenting opinions that foreshadowed the possibility that such statutes were in constitutional jeopardy.

What could Congress or state legislatures do in response to such warnings? Comprehensive analysis of that question would require an article of its own, but there is one obvious solution. *Pennoyer* permits a jurisdiction to require a business enterprise to appoint an agent authorized to serve process within the jurisdiction's territory as a condition of doing business there.[224] Such statutes would enable states to assert personal jurisdiction over out-of-state business enterprises that owned property, had employees, solicited business, sold products, or otherwise conducted business within the territory of the state (or the United States in the federal case). The enactment of such statutes would preserve the status quo with respect to personal jurisdiction over large business enterprises, but it would not allow the assertion of personal jurisdiction over individuals or small businesses that did not enter or contract business in the forum jurisdiction.

Given time to enact such statutes, even the restoration of *Pennoyer* could take place in due course, without major disruption of the law of personal jurisdiction in action, even as the law of personal jurisdiction on the books acquired a new and radically different originalist foundation. Just as civil procedure policymakers managed the transition from *Pennoyer* to *International Shoe*, so too could the transition back to *Pennoyer* be managed over time.

C. How Do the Normative Implications of the Original Meaning of the Due Process of Law Clauses Affect the Normative Debate Between Originalists and Living Constitutionalists?

Finally, we address the normative implications of an originalist approach to personal jurisdiction for the great debate between originalism and living

223. Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 462 (2018).

224. *See* Pennoyer v. Neff, 95 U.S. 714, 735 (1878).

constitutionalism. One such implication involves a normative assessment of *International Shoe* itself. If *International Shoe* is a good decision, but it is inconstant with the original meaning of the constitutional text, does this imply that we should reject originalism? An originalist might respond by arguing against *International Shoe* on normative grounds, but that reply would concede that the criterion for a sound constitutional decision is the desirability of the outcome; this is precisely the point that originalists deny. The case for originalism does not rest on the dubious assumption that the original meaning of the constitutional text always leads to the best outcome or the most desirable doctrine. Instead, the case for originalism rests on the idea that judicial adherence to original meaning is required by systemic values, including the rule of law and legitimacy. In the end, it seems likely that an originalist approach to constitutional interpretation will result in a mixed bag, with some results that we like and others that are not so great.

This is not to say that originalists do not care about outcomes. They do. But originalists also care about how outcomes are produced. If the price to be paid for *International Shoe*'s minimum contacts approach to personal jurisdiction is a juristocracy empowered to adopt constitutional constructions that effectively override the original meaning of the constitutional text, then originalists believe that price is not worth paying.

CONCLUSION

As originalism has increasingly become more important in the legal academy and on the bench, questions about its implications beyond the hot-button issues of constitutional law will grow in importance. Civil procedure is a field of study in the legal academy. Many of the issues that arise in the civil procedure course are constitutional. Subject-matter jurisdiction involves Article III. Pleading, summary judgment, directed verdicts, and new trial motions implicate the Seventh Amendment. And the law of personal jurisdiction largely derives from the Due Process Clauses of the Fifth and Fourteenth Amendments. Given the division of academic labor, civil procedure scholars are likely to approach these constitutional topics from their own perspectives, focusing on the values and ideas that have shaped discourse about these issues among proceduralists. Originalism, on the other hand, is the product of a different community of scholars whose perspectives are arguments that have been shaped by the study of a constitutional law. This Article attempts to bring these two realms of discourse into dialog by raising questions about the implications of originalism for the constitutional law of personal jurisdiction.

Although we have raised more questions than we have answered, one thing seems clear: the *International Shoe* approach to personal jurisdiction is based on living constitutionalism and is inconsistent with the original meanings of the Fifth and Fourteenth Amendment Due Process of Law Clauses. That fact

demands attention from scholars who work on personal jurisdiction and lawyers who litigate personal jurisdiction issues, especially in cases before state Supreme Courts, the United States Courts of Appeal, and the United States Supreme Court.