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Due Process as Choice of Law: A Study in the History of a Judicial Doctrine

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DUE PROCESS AS CHOICE OF LAW: A STUDY IN THE HISTORY OF A JUDICIAL DOCTRINE

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ABSTRACT

This Article argues that procedural due process can be understood as a choice-of-law doctrine. Many procedural due process cases require courts to choose between a procedural regime characteristic of the common law—personal notice, oral hearing, neutral judge, and jury trial—and summary procedures employed in administrative agencies.

This way of thinking about procedural due process is at odds with the current balancing test associated with the Supreme Court's opinion in *Mathews v. Eldridge*. This Article aims to show, however, that it is consistent with case law over a much longer period, indeed, most of American history. It begins with a reading of due process cases in state courts before the Civil War, and argues that, in many of these cases, courts were asked to negotiate the institutional conflict between themselves and various summary bodies, including non-common-law courts, magistrates, commissioners, corporations, and even legislatures, which played a significant role in the administration of government. The Article then reconstructs federal due process cases in the period from 1870 to 1915, arguing that the Supreme Court limited the use of summary procedures by testing their fit with the so-called public interest, or public right, ostensibly at issue. Finally, the Article turns to the due process "revolution" and "counter-revolution," showing how the traditional choice-of-law framework broke down, resulting in the *Mathews* decision.

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INTRODUCTION

The current test of procedural due process is set out in the case of *Mathews v. Eldridge*.[1] According to *Mathews*, to determine what process is due, one must consider three factors: (1) the private interests affected by official action; (2) the risk of "erroneous deprivation" of this interest and the value of additional procedures; and (3) the government interests, including the "function involved" and the burden of providing additional procedures.[2] The inquiry is usually described as a balancing test. As Justice O'Connor framed it in *Hamdi v. Rumsfeld*,[3] for example, "*Mathews* dictates that the process due . . . is determined by weighing 'the private interest . . .' against the Government's asserted interest," followed by "a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' . . . ."[4]

The balancing test is subject to a number of familiar criticisms. From one perspective, it is said that the test is not appropriately judicial but involves courts in making what are really legislative or administrative decisions.[5] The relationship between interest balancing and the procedure eventually prescribed is unclear,[6] suggesting that judges, upon discovering less process than they would prefer, simply make something

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[1] 424 U.S. 319 (1976).

[2] *Id.* at 335.

[3] 542 U.S. 507 (2004).

[4] *Id.* at 529 (quoting *Mathews*, 424 U.S. at 335); *see also, e.g.*, STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 649, 657 (6th ed. 2006); E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW 87–88, 92–95 (2013).

[5] Although it predates *Mathews*, perhaps the best citation for this proposition is Justice Black's dissent in *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970) ("I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient.").

[6] *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1138 (1984).

up—an approach Justice Scalia memorably described as "a Mr. Fix-it Mentality."[7] In the context of judicial review of administrative action, the test seems to require that courts develop regulatory procedural regimes in areas where they lack expertise.[8] Grasping for a hold, courts may inject formality into proceedings best left informal, non-adversarial, or non-hierarchical. From another perspective, the test is said to focus exclusively on "instrumental" process values—the value of accuracy, principally—at the expense of the dignitary or participatory values of process.[9] Still other commentators have described *Mathews* as a balancing test "without a floor," because it does not foreclose the possibility that, in some circumstances, a person has a substantive right at stake but no procedural rights at all.[10] I could go on.

The aim of this Article is to describe another way of thinking about procedural due process, one perhaps less subject to these criticisms. The nub of the idea is this: the doctrine of due process is, in part, a set of rules for choosing between procedural norms employed by different institutions of government. The first group of norms is associated with proceedings in a common-law court: the familiar complaint, personal notice, public hearing, neutral judge, local jury, and so on. The second group of norms is associated with summary proceedings before an administrative body. Summary proceedings can take a variety of forms, of course, from paper filings, to *ex parte* hearings, to inquisitorial examinations without confrontation or cross-examination, but all are missing something characteristic of the common law. That is what makes them summary. Due process is a doctrinal device for choosing between these groups of norms, and, in this respect, a branch of choice of law.

Of course, as it is usually understood, choice of law, or conflicts of law, is a field that concerns, as Joseph Beale put it, "the application of laws in space," by which he presumably meant geographic space (not outer).[11] A leading contemporary scholar of conflicts of law has argued (and I think successfully) that the field is

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[7] *Hamdi*, 542 U.S. at 576.

[8] *See, e.g.*, Adrian Vermeule, *Deference and Due Process*, HARV. L. REV. (forthcoming 2016) (manuscript at 27–29), http://ssrn.com/abstract=2611149.

[9] This point is usually associated with Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46–57 (1976), but see also Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII 132–33 (J. Roland Pennock & John W. Chapman eds., 1977).

[10] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 472 (1986).

[11] 1 JOSEPH HENRY BEALE, A TREATISE ON THE CONFLICT OF LAWS 1 (1916). Joseph Story's definition of the field is less abstract, but not dissimilar in implication. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 2 (Boston, Little, Brown & Co. 4th ed. 1852) (describing "questions . . . as to the operation of the laws of one nation upon the rights and remedies of parties in the domestic tribunals").

better understood not as limited to geographic conflicts, but as including purely domestic cases as well, at least cases potentially governed by different substantive laws.[12] So conceived, at the center of the field is really just the issue of interpretation.[13] To decide which of two laws properly applies to a case, to determine their respective boundaries, I must interpret each law. Similarly, to decide which of two procedural regimes should govern a decision, I have to give a construction to those regimes that shows where their boundaries lay. The latter choice can have significant implications for the institution whose procedures are in question. Think about our modern, American administrative state, with its plethora tribunals located under the auspices of Article I or Article II of the Constitution.[14] These tribunals, and the agencies that house them, have their own procedural norms, some of which conflict with basic common-law norms, as well as their own understanding of what the Constitution requires.[15] When these native agency norms conflict with the procedural norms of the common law, then, which prevail? This is a question of *procedural* choice of law, rather than geographic and substantive choice of law, and it is this question that the doctrine of procedural due process answers.

Squinting a bit, one can see this thought lurking in a number of important studies of due process. Thus, for example, in an oft-cited article, Laurence Tribe argued that we should recognize a doctrine of "structural due process," which brings the Constitution to bear on the procedures that structure legal change.[16] In certain areas, especially those involving sensitive conduct, we tend to feel that "governmental policy-formation and/or application are constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure."[17] The doctrine that Tribe imagines would thus articulate constitutional constraints on our choice of procedures to formulate policy—in effect, on our choice of procedural law. I agree, but I see no need to coin a term for the doctrine, which is procedural due process in a very basic sense. In another well-known study, Ed Rubin argued that judicial determinations of the minimum requisite procedure ought to be thought of, in the first instance, as a choice among "a few basic archetypes of fair procedures,"

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[12] *See* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 283 (1990).

[13] *See id.*; Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1214–17 (1946) (describing the use of "teleological," or purposive interpretation, in choice-of-law cases).

[14] *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1905–06 (2013).

[15] *See id.*; Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 487–505 (2010); *see also* Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 343–45, 361–68, 378 (2012) (examining the emergence and use of rights talk in the administration of federal public assistance); Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 399–400 (2012) (administrative agencies combine prosecutorial and adjudicatory functions in violation of the no-one-is-a-judge-in-his-own-case maxim).

[16] Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

[17] *Id.* at 291 (emphasis omitted).

which could then be fine-tuned in light of the particular interests at stake.[18] Again the thesis bears an obvious similarity to choice of law. Rubin thought it a sound approach to addressing questions of administrative due process, which he dated to the 1950s,[19] but I will argue that the approach is in fact much older and more pervasive.

One can also find traces of the position defended here in a leading line of scholarship on *substantive* due process. These studies describe a pivot point between procedural and substantive due process in the doctrine of separation of powers, which was brought to bear in the early nineteenth century against legislative efforts to adjudicate property rights.[20] What was at issue, according to one framing of the matter, was the deficiency of legislative procedures for resolving such disputes.[21] Yet rather than read these cases as vindicating a commitment to the functional separation of powers, as, say, Nathan Chapman and Michael McConnell do—a doctrine that does not now, and never has, adequately characterized the Anglo-American representative assembly—we can read them as vindicating a commitment to a recognized slate of procedural protections in cases involving vested property interests. In at least some of these cases, the leading concern was not choice of *institution*, but choice of procedural *law*, whose determination did not strip the legislature of jurisdiction altogether.[22]

None of these authors, then, quite describes due process as a choice of law doctrine, and, in what follows, I lay out an historical case for speaking in these terms.[23] My aim is to convince you that this was our law, at least until relatively recently. To do that I have to suggest revisions to the usual history of procedural due process methodology, which begins with an historical inquiry into settled usage, and moves gradually toward a flexible and open-ended test centered around due process values.[24]

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[18] Rubin, *supra* note 6, at 1149.

[19] *See id.* at 1082–83.

[20] *See, e.g.*, JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 45–46 (2003); FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 29–46 (1986); Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679, 1703–26 (2012); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 126–28 (1956).

[21] *See* Chapman & McConnell, *supra* note 20, at 1704–05.

[22] Early due process holdings only stripped the legislature (e.g., the *body*) of the power to determine property disputes where that body also lacked adjudicatory subject matter jurisdiction. This was not always the case. Thus, for example, in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Paterson noted the customary judicial powers of the Connecticut legislature, and remarked that had "the Legislature of the state . . . acted in their customary judicial capacity," there would have been "an end of the question." *Id.* at 395. Paterson considered the act "as the exercise of a legislative and not a judicial authority" to reach the plaintiff's claims. *Id.* at 396.

[23] Noah Feldman employs this terminology in the title of his essay, *Choices of Law, Choices of War*, Essay, 25 HARV. J.L. & PUB. POL'Y 457 (2002), but, apart from the title, he does not engage the ideas explored here.

[24] *See, e.g.*, Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 320–21 (1957). For recent narratives along these lines, see *Pac. Mut. Life Ins. v. Haslip*, 499 U.S. 1, 28–37 (1991) (Scalia, J., concurring); SULLIVAN & MASSARO, *supra* note 4, at 81–88.

I divide the development of due process doctrine into three periods. Part I examines what Roscoe Pound called the "formative era of American law," which runs from the turn of the eighteenth century to the Civil War.[25] Part II covers the roughly fifty-year span between the Civil War and World War I. Part III treats the due process revolution and counter-revolution, a period that, depending on how one draws the boundaries, may be considerably shorter than the first two periods. For reasons that I will explain, I begin with the "loyalty program" cases of the 1950s, and I end with *Mathews* in 1975.

Each period suggests a different answer to the question of procedural choice of law. In the first period, prior to the Civil War, the focus was usually on *characterizing* the summary proceeding at issue. Courts did this using a variety of period interpretive techniques, including reference to natural law, policy, but especially history.[26] If a proceeding could be characterized as (or analogized to) an historically accepted summary form of proceeding, then it dissolved the apparent conflict between that proceeding and the common law. This also dissolved the choice-of-law issue. In the second period, between the Civil War and World War I, courts regularly asked whether a challenged form of proceeding was an appropriate means of advancing a public interest or public right.[27] Public interests were defined by public law, a body of law that derived from historically recognized categories of legitimate law-making power. Where a summary proceeding advanced an important public interest, it was thought to lie outside the scope of common-law procedures, thus dissolving the conflict between the two regimes. The third period, from about 1950 to 1975, began with a similar form of analysis, but moved quickly toward balancing public interests against private interests.

My approach in the discussion that follows will be to frame cases in their institutional context, and then to describe in detail the legal concepts and arguments employed by judges to settle on constitutionally required procedures. I devote only limited attention to political and economic context, so as not to drain the legal arguments of independent significance. My interest is a *forensic doctrine* of procedural due process, and I assume that this doctrine, although indeterminate (as all doctrine is), can be a reason for deciding a case one way or another.

I. DUE PROCESS BEFORE THE CIVIL WAR

A doctrine of due process was worked out first in the states. Many of the early state constitutions contained "law of the land" clauses fashioned after the Magna Carta.[28] The New York Constitution of 1777, for example, "ordain[ed], determine[d], and

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[25] ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 3 (1938).

[26] Mendelson, *supra* note 20, at 125–26.

[27] *See id.* at 125–27.

[28] *See* RODNEY L. MOTT, DUE PROCESS OF LAW: A HISTORICAL AND ANALYTICAL TREATISE OF THE PRINCIPLES AND METHODS FOLLOWED BY THE COURTS IN THE APPLICATION OF THE CONCEPT OF "LAW OF THE LAND" 14–27 (1926).

declare[d] that no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers."[29] The Massachusetts Constitution of 1780 explicitly connected this guarantee to deprivations of property, providing that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."[30] Similar guarantees were included in second-wave constitutions in a number of states. Some constitutions utilized the expression "due process," rather than "law of the land," and some utilized both.[31]

We should not mistake the significance of these clauses. The fact that framing conventions inserted them did not imply that they were inserted for purposes of judicial application.[32] Judges still had to lay claim to the clauses in legal proceedings—assuming, that is, they thought doing so would be prudent or even desirable. And if a state's constitution *lacked* such a clause, it did not imply that its courts were powerless to invoke the Magna Carta or fundamental precepts of the common law.[33] More important to the development of due process doctrine than the existence of law of the land clauses were the state legislatures themselves. Legislatures were very active in this period.[34] They undertook what today seems a wide range of governance tasks.[35] On the most divisive issues, like debt and paper money, the treatment of loyalists and the distribution of their property, and, somewhat later, the stimulation of commerce and the development of infrastructure, state legislatures acted aggressively and

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[29] N.Y. CONST. of 1777, art. XIII.

[30] MASS. CONST. of 1780, art. XII.

[31] *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 353 (Boston, Little, Brown, & Co. 1868); *see, e.g.*, N.Y. CONST. of 1821, art. VII, §§ 1, 7; N.Y. CONST. of 1846, art. I, §§ 1, 6. Following the Fifth Amendment to the United States Constitution, the due process clause of the New York Constitution was included in a section that largely concerned criminal process, while the law of the land clause had a more general application. State courts did not emphasize the difference between the clauses, however. *See, e.g.*, Wynehamer v. People, 13 N.Y. 378, 383 (1856); MOTT, *supra* note 28, at 25 ("[T]he courts have uniformly declared that these phrases are synonymous.").

[32] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 39–40 (2004); Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1, 7–8 (1979).

[33] *See, e.g.*, State Bank v. Cooper, 10 Tenn. (2 Yer.) 599 (1831) ("[T]here are eternal principles of justice which no government has a right to disregard. It does not follow, therefore, because there may be no restriction in the constitution prohibiting a particular act of the legislature, that such act is therefore constitutional. Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. The common law, says lord Coke, adjudgeth a statute so far void." (citation omitted)).

[34] *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 120–29 (2d ed. 1985).

[35] *See id.*

triggered constitutional objections to their authority.[36] Here, I will be concerned with *lawsuits* challenging legislative regulation, which, naturally, were structured by the procedures and substantive rules available in the forum of a court of law. Usually such suits boiled down to complaints about the effect of legislation on property interests, in part because a law of property was ready at hand, and in part because property was easy to connect to the dominant ideologies that structured political dispute.[37] Here was the ground in which a forensic doctrine of due process took root.

Perhaps the classic view of early due process doctrine is that courts transplanted natural-law limitations on legislative authority into law of the land and due process clauses in state constitutions.[38] But leading cases from this period can also be read as an effort to determine the relative priority of different institutional norms in the administration of government. On one hand were the courts themselves. By the late eighteenth century, each state had a court of common pleas and a court of general sessions (sometimes combined), where common-law procedures largely held sway and that heard causes of action to vindicate common-law rights.[39] These institutions were increasingly housed in purpose-built courtrooms designed to give effect to common-law procedural norms.[40] Common-law courts employed these procedures

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[36] *See* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* DUE PROCESS: NOMOS XVIII, *supra* note 9, at 14 ("States . . . in particular through the promotion of transportation enterprises—bridges, turnpikes, canals, harbors, railroads—took, or allowed others to take, property, issued bonds, granted franchises and privileges, and in general vested legal rights in corporations. Legislatures . . . sometimes revoked these grants, and state courts attempted to protect property through just compensation and sometimes law-of-the-land clauses." (footnotes omitted)); *see, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 47–53 (1977) (discussing legislative "mill acts" and their treatment by judges under a variety of common-law property doctrines); *id.* at 63–70, 84–85 (discussing takings and just compensation doctrine); *id.* at 109–14 (discussing corporations and vested rights).

[37] *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 596–99, *reprinted in* III–IV THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanley N. Katz eds., 1988).

[38] *See, e.g.*, BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT 297–99 (Russell & Russell, Inc. 1962) (1931); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 376 (1911); Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures*, 2 TEX. L. REV. 257, 272–74, 282–84 (1924) [hereinafter Haines, *Part I*]; *id.* at 2 Tex. L. Rev. 387, 397 (1924) [hereinafter Haines, *Part II*]. For a contemporary account, see R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 142–54, 169, 176–77 (2015).

[39] *See* FRIEDMAN, *supra* note 34, at 22; *see generally* SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787 (2011) (describing the organization of the judiciaries in the first thirteen states).

[40] *See* Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311, 318–22 (2012).

not only to resolve cases, but to administer and enforce basic governmental functions.[41] On the other hand were the varied bodies utilizing summary procedures, including legislatures, legislative and executive committees (often distinguishable only *eo nomine*), justices of the peace and magistrates, non-common-law courts, and novel, legislatively created commissions, boards, departments, and corporations.[42] The latter institutions played a significant role in government, even in the first decades of the nineteenth century, and their increasing share of administration and police generated a kind of conflict with the common-law courts.[43] An officer who summarily deprived an individual of property rights held at common law could be sued, and the court's decision in such a suit articulated a procedural framework for securing property and liberty against government.[44] Likewise, a number of the early judicial

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[41] Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 206–08 (1991). Woolhandler's point should be distinguished from the claim that the colonial judiciary had mixed executive, adjudicative and legislative functions. In the latter proposition, "judiciary" refers not to the common-law courts but to justices of the peace, magistrates, sheriffs, and sometimes juries. *See, e.g.*, WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 12–13 (2000) (observing that late eighteenth-century colonies had no bureaucracies, but relied on local magistrates, who "maintained order, protected life and property, apportioned and collected taxes, supervised the construction and maintenance of highways, issued licenses, and regulated licensees' businesses"). Woolhandler, in contrast, points out that to enforce the law, executive officers sometimes had to bring suit *in court*—by which she means, at least in some cases, a common-law court. *See* Woolhandler, *supra*.

[42] On the role of legislatures and justices of the peace, see James A. Henretta, *Magistrates, Common Law Lawyers, Legislators: The Three Legal Systems of British America*, *in* 1 THE CAMBRIDGE HISTORY OF LAW IN AMERICA: EARLY AMERICA (1580–1815) 556–69 (Michael Grossberg & Christopher Tomlins eds., 2008).

[43] *See* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 93–94 (2005) ("Eventually special courts emerged, particularly in large cities, to dispose of police cases. This new summary disposal system managed by statutory courts occasionally came into tension with the traditional system of common law courts."). In the case of justices of the peace, these officers had long played a significant role in administering statutes by means of summary process. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 119–20 (2010) ("Most seventeenth-century prisoners had been jailed by summary process, not by indictment or presentment . . . despite the politically charged claims . . . that indictment and presentment were the only means to imprison by the 'law of the land.' . . . JPs imprisoned more people—and imprisoned more people contrary to law . . .—than any other officers of the monarchical state.").

[44] On the role of common-law suits in securing judicial review of federal administrative decisions in the federalist period, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1321–31, 1334–36 (2006). This framing should be familiar to students of English institutional history. By the early seventeenth century, the contrast between "ideals about the personnel, structure, and mode of proceeding of [common-law] courts" and those of what came to be called the "prerogative courts" had acquired a salience in English politics and legal commentary. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 157, 165–66, 237 (2014). *Cf.* Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV.

review cases concerned whether a common law procedure, the jury trial, ought to be given effect over summary procedures employed by justices of the peace.[45] Courts of law heard challenges to the use of these summary procedures and issued orders defining the jurisdictional limits and requisite process for determination of property rights.[46]

Below I study these developments in four jurisdictions: South Carolina, North Carolina, New York, and the United States. In South Carolina, I use the leading case of *Zylstra v. Corporation of Charleston*[47] to illustrate how a due process case can be read in choice-of-law terms—i.e., as posing a choice between summary and common-law procedural regimes, to be resolved using judicial techniques of interpretation. The other jurisdictions present variations on this theme. In North Carolina, due process was applied directly to the legislature to prevent its transfer of property, effectively treating enactment as a form of summary legal proceeding.[48] New York courts went further, holding in a series of cases that property could not be taken for a private purpose without the consent of the owner, thus imposing a substantive limit on legislative power.[49] Finally, *Murray's Lessee v. Hoboken Land & Improvement Co.*[50] illustrates

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(forthcoming 2016) (describing seventeenth- and eighteenth-century English fire courts, which were empowered by Parliament to act without juries). Where an injury could be remedied before a common-law court (King's Bench, Common Pleas, and Exchequer) or a non-common-law court (principally equity, admiralty, various ecclesiastical bodies, individual justices of the peace, and even Parliament), it might trigger a conflict over substantive and procedural law. Such conflicts troubled the English crown periodically for some time. *See* HAMBURGER, *supra*, at 169–74; Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, *in* 3 LAW: A CENTURY OF PROGRESS, 1835–1935, at 356–57, 375 (1937). To pick one example directly relevant to the English due process tradition: When could a case be initiated by the dreaded writ of subpoena, and when was a common-law writ required, which at least disclosed the identity of the complainant and the cause of action? *See* Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 270–71 (1975). In England, these conflicts might be resolved in the high court of Parliament, in the Privy Council, or even in King's Bench, through a writ of habeas corpus.

[45] *See* William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 557 & n.31 (2005) ("Judicial review thus . . . was about policing the boundaries between governmental entities, and courts viewed their role here expansively."). See, for example, the *Ten Pound Act Cases* and *Trevett v. Weeden*. PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 423–49 (2008) (describing these cases and their political contexts); HAMBURGER, *supra* note 44, at 151–54. The point can be broadened; Mary Bilder has essentially put choice of law at the center of her historical account of judicial review. *See* Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502, 502, 508–09, 543–45 (2006) (arguing that judicial review emerged out of a practice of examining colonial law for repugnancy to the laws of England, and interpreting early state cases in this light). On the connection between due process and the subsequent growth of judicial review in the mid-nineteenth century, see Haines, *Part I*, *supra* note 38, at 271–73.

[46] *See infra* notes 55–162 and accompanying text.

[47] *See* 1 S.C.L. (1 Bay) 382 (S.C. Ct. Com. Pl. 1794).

[48] *See generally infra* Part I.B.

[49] *See generally infra* Part I.C.

[50] 59 U.S. (18 How.) 272 (1855).

the Supreme Court's embrace, in principle, of due process limits on the power of the national legislature to abrogate common-law procedures, although with greater deference than state courts of prior decades had shown their legislatures.[51] Deference aside, the methodology Curtis prescribes in *Murray's Lessee* looks much the same; the choice of procedures is treated as a question of constitutional interpretation to be resolved by examining the text, supplemented by judicially constructed history.[52]

A. South Carolina: Zylstra v. Corporation of Charleston

We can see these developments in a line of familiar cases from South Carolina. Begin with *Zylstra*, which was decided in the South Carolina Court of Common Pleas and General Sessions in 1794.[53] In *Zylstra,* the question was whether the City of Charleston's Court of Wardens could fine a defendant one hundred pounds for keeping a tallow chandler's shop within city limits, in violation of the bylaws.[54] Procedure in the Court of Wardens was, observed counsel, "in a summary way, without a jury," and the state legislature had only extended the court's jurisdiction to suits in which twenty pounds was in controversy.[55] There were no limits, however, on what fines the city council might impose for violating bylaws, and Wardens had a good claim to this jurisdiction as the city's court.[56]

We can discern two separate questions in the court's analysis of the case. The first question was an interpretive one: Could the laws creating a Court of Wardens and vesting it with jurisdiction be construed to encompass fines in excess of twenty pounds? Judge Grimke concluded the matter in a sentence; jurisdiction could not extend so far, at least without "express words in the act of incorporation . . . giving [such a] power."[57] Judge Burke agreed, adding that such a jurisdiction would be "repugnant to the genius and spirit of our laws" and to the constitution.[58] Judge Waties, however, disagreed, emphasizing the purpose for which the Court of Wardens had been established.[59] If the city council could "affix and levy fines" of any amount, then the grant of power to the Court of Wardens to "commit for fines and penalties" implied a jurisdiction over the cases involving large fines.[60] While normally a grant of jurisdiction had to be express, in this case, Waties thought, such a "construction may seem too rigid a one."[61]

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[51] *See generally infra* Part I.D.
[52] *See generally Murray's Lessee*, 59 U.S. (18 How.) at 272.
[53] *Zylstra*, 1 S.C.L. (1 Bay) 382, 382 (S.C. Ct. Com. Pl. 1794).
[54] *Id.*
[55] *Id.* at 383.
[56] *See id.* at 383–84.
[57] *Id.* at 388–89.
[58] *Id.* at 388.
[59] *Id.* at 389–98.
[60] *Id.* at 390.
[61] *Id.*

The construction forced Judge Waties to take up a second question. If "the legislature intended to confer this large jurisdiction on the court of wardens,"[62] should it be given effect? The common law required a jury trial where one hundred pounds was at issue, and Waties's court could vindicate this requirement by issuing a writ of prohibition against Wardens. Waties turned to the state's new constitution, whose law of the land clause guaranteed that no "freemen" would be deprived of property "but by the judgment of his peers, or by the law of the land."[63] Might the clause bar these proceedings? What did the words "law of the land" mean? As Waties put it, "Do they mean *any law* which may be passed, directing a different mode of trial?"[64] If so, then the legislature could have expanded Wardens' jurisdiction to suits involving large fines.[65] But if law of the land did include any procedural regime the legislature saw fit to create, it would effectively "tak[e] away all the security which [the words] intended to give [the jury trial privilege]."[66] The language thus *had* to "bar . . . innovations of the legislature."[67] And yet, at the same time, it could not possibly bar all non-common-law-based proceedings. A number of well-established summary jurisdictions predated the state constitution of 1790, and no one thought that they had been made unlawful by the law of the land clause.

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[62] *Id.*

[63] S.C. CONST. of 1790, art. 9, § 2. The constitution of 1790 was the first in the state to be drawn and ratified by a constitutional convention. The constitution of 1776 was a temporary measure adopted by the state's provincial congress, and the constitution of 1778 was drafted and enacted by the state general assembly. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 68–70 (Rita Kimber & Robert Kimber trans., The Univ. of North Carolina Press 1980) (1973).

[64] *Zylstra*, 1 S.C.L. (1 Bay) at 391; *cf.* HALLIDAY, *supra* note 43, at 137 ("How many were the laws of the land: common law, statute, local customs, equity? How many were its institutional forms: assizes and quarter sessions, common law courts in Westminster Hall; Chancery and Exchequer on their equity sides; courts of admiralty and the earl marshal; church courts, too?").

[65] *See Zylstra*, 1 S.C.L. (1 Bay) at 390–92.

[66] *Id.* at 391. In light of Waties's express invocation of the law of the land clause, and the lengthy analysis that follows it, it is difficult to credit Raoul Berger's reading of the case. *See* Berger, *supra* note 32, at 18–19 ("Judge Burke held the bylaw void because 'jury trial . . . is . . . guaranteed to us expressly by our constitution,' *in which view Judge Waties joined*." (emphasis added)). As Berger himself said (rather unkindly) of political scientist Rodney Mott: "[W]e overlook what we do not want to see." *Id.* at 6.

[67] *Zylstra*, 1 S.C.L. (1 Bay) at 391; *cf. id.* at 395 ("[T]he trial by jury is a common law right; not the creature of the constitution, but originating in time immemorial; it is the inheritance of every individual citizen, the title to which commenced long before the political existence of this society; and which has been held and used inviolate by our ancestors, in succession, from that period to our own time; having never been departed from, except in the instances before mentioned. *This right, then, is as much out of the reach of any law as the property of the citizen; and the legislature has no more authority to take it away, than it has to resume a grant of land which has been held for ages.*" (emphasis added)).

This pointed to a conclusion. Waties wrote:

> [T]hese words also authorise [sic] *other kinds of courts*, on account of their great public expediency, which do not admit this method of trial, and whose proceedings are different from those of the common law. These, in *England*, are the *court of chancery*, the courts *ecclesiastical*, *maritime*, and *military;* and certain other inferior judicatories, some of which are sanctioned by common law, others by statutes . . . .
>
> [W]hat are these other kinds of courts which are authorised [sic] in this state, by the same words [i.e., "law of the land"] in our constitution?
>
> I answer, the court of equity, the court of admiralty, the courts of ordinary, courts-martial, and courts of justices of the peace.[68]

Waties thought these authorized courts should be distinguished from the Court of Wardens.[69] The first three courts were, he reasoned, necessary parts of the state judiciary, "without which the administration of justice would be incomplete."[70] After all, common-law courts were "incompetent to afford remedies for all the variety of public and private wrongs."[71] The fourth, Courts Martial, were necessary because common-law proceedings by jury "would effectually destroy that subordination which is so necessary to the safety of an army."[72] Finally, Courts of Justices of the Peace were "sanctioned by long use" and popular approval and by their social utility for "the poorer class of citizens" who needed a speedy and inexpensive way to recover debts.[73] In contrast, arguments from "*necessity and great expediency*" did not support an expansive jurisdiction for the Court of Wardens.[74] Its matters could be handled in Common Pleas itself. In fact, Wardens' assumption of jurisdiction over such matters was rooted in the corruption of the city council, which had made a practice of appointing "their own members" as "commissioners to carry [bylaws] into effect," and, "as judges, to determine on any breaches of them which may have been committed."[75]

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[68] *Id.* at 392.
[69] *Id.* at 392–94.
[70] *Id.* at 392.
[71] *Id.*
[72] *Id.* at 392–93.
[73] *Id.* at 393.
[74] *Id.* at 395.
[75] *Id.* at 397. Here Waties's reasoning sounded in the separation of powers, but it was the older theory of separation of *persons*, applied now to the legislature instead of the governor

Reasoning from history and policy, Waties simultaneously interpreted the law of the land clause and characterized Wardens as an unknown form of summary jurisdiction. Cases following *Zylstra* employed the same analysis, but different judges placed different weight on the relevant considerations. In *White v. Kendrick*,[76] for example, the question was whether a legislative act expanding the jurisdiction of justices of the peace to controversies involving $30 complied with the state constitution's law of the land clause.[77] Writing for a majority that included Judge Waties, Judge Wilds began by observing that the people of South Carolina could have decided trial by jury should be "abandoned, modified, or entirely adopted, as may be deemed expedient"; since they opted instead to protect it in their constitution, it followed that "legislative innovation on the trial by jury shall cease."[78] Again the issue was how to construct the law of the land clause. Was it law of the land for justices of the peace to decide controversies in which $30 was at stake? As Wilds framed the matter (innovation, he said, shall cease), the court had to determine whether such a jurisdiction was included in the summary forms recognized at the time the constitution was adopted.[79] This meant the relevant evidence was historical. As matters had stood in 1790, no such jurisdiction existed in justices of the peace, so the act "must be a violation of the constitution."[80]

Another class of cases resolved under these principles involved the construction of roads on private land. In *Lindsay v. East Bay Street Commissioners*,[81] decided in 1796 in the state's Constitutional Court of Appeals, the question was whether commissioners appointed by the Charleston City Council could take property for roads without the consent of the owner or a trial by jury.[82] In a jointly written opinion, Judges Grimke and Bay refused the property owners' request for a writ of prohibition against the road commissioners on grounds of eminent domain.[83] The act authorizing the commissioners' appointment, they said, was "authorized by the fundamental principles of society," namely, the sovereign's power "to appropriate a portion of the soil of every country for public roads and highways."[84] The power was part of the law of the land. Rather than "interfering with, or contradicting this

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or king, not a Montesquieuian theory of separation of *functions*. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 16–18 (2d ed. Liberty Fund, Inc. 1998) (1964).

[76] 3 S.C.L. (1 Brev.) 469 (1805).

[77] *Id.* at 470.

[78] *Id.* at 471.

[79] *Id.* at 471–72.

[80] *See id.* at 472–73 ("So stood the laws on this subject, at the time our State constitution was adopted . . . . If this examination and view of the subject be correct, the act giving magistrates a jurisdiction as far as $30, a jurisdiction never before possessed, must be a violation of the constitution.").

[81] 2 S.C.L. (2 Bay) 38 (S.C. Con. Ct. App. 1796).

[82] *Id.* at 38.

[83] *Id.* at 56–58.

[84] *Id.* at 56.

high and important privilege of the legislature," the constitution's law of the land clause "confirmed and secured it."[85] Judge Waties agreed, writing that law of the land could not mean "any law which the legislature might pass," because that would authorize it "to destroy the right, which the constitution had expressly declared, should for ever [sic] be inviolably preserved."[86]

Zylstra and its progeny illustrate three important features of early due process cases. First, the cases evidence institutional conflict articulated by the court in terms of conflicting procedural regimes employed by the institutions in question. Did a juryless Court of Wardens have jurisdiction over the matter, or should it instead be tried to a jury in the Court of Common Pleas?[87] Second, courts resolved the conflict between competing procedural regimes by interpreting the laws on which those regimes rested. It is important to understand that constitutionalizing the law of the land did not obviate the interpretive inquiry; it framed that inquiry. What was the law of the land? Was it the common law? The common law and statutory law? Constitutionalizing the law of the land did predetermine which regime should govern if a

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[85] *Id.* at 57.

[86] *Id.* at 59. The legislature's discretion was confined, and in this case, quite narrowly. The only permissible procedure for "taking private property for public uses" was the "ancient" one, which, as Blackstone described, required "full indemnification for it." *Id.* at 59–60 (quoting Blackstone). Waties saw due process as imposing a just compensation requirement on the state's exercise of eminent domain. *See id.* at 58–62. The *Zylstra* framework remained viable through mid-century. In 1844, for example, the South Carolina Court of Errors cited both cases in an order granting a writ of prohibition against the seizure of slaves in a proceeding before a magistrate. *See* State v. Simons, 29 S.C.L. (S.C. Ct. Err. 2 Speers) 761, 767 (1844) ("This due course of law is most usually and satisfactorily administered by a trial by a jury of twelve good and lawful men of the vicinage. To this there are some exceptions. But to be such it must appear they are caused by the 'law of the land.' First then, what is meant by the law of the land? In this State, taking as our guide *Zylstra's* case, there can be no hesitation in saying, that these words mean the common law and the statute law existing in this State at the adoption of our constitution." (citation omitted)).

[87] To be sure, not every due process case can be made to fit this mold. In South Carolina, direct legislative interference with property rights was usually addressed under the due process doctrine of "vested rights." *See* COOLEY, *supra* note 31, at 357–60; Haines, *Part I*, *supra* note 38, at 272–90. In the case of *Osborne v. Huger*, 1 S.C.L. (1 Bay) 179 (S.C. Ct. Com. Pl. 1791), for example, a newly elected sheriff asked the state Court of Common Pleas to award him fees collected by the outgoing sheriff on sales of property that were incomplete at the time of his election. *Id.* at 179–80. The common law governed the disposition of such fees, but its framework had been displaced by an act of the legislature. *Id.* at 180. The question was whether applying the act to the outgoing sheriff deprived him of common-law rights to fees on incomplete sales, rights that counsel described as "vested." *Id.* One judge concluded that the act did impair the old sheriff's vested rights, and he refused to apply it. *Id.* at 205–06. For other cases in this line, see *Bowman v. Middleton*, 1 S.C.L. (1 Bay) 252 (S.C. Ct. Com. Pl. 1792); and *Ham v. M'Claws*, 1 S.C.L. (1 Bay) 93 (S.C. Ct. Com. Pl. 1789). Vested rights and the choice-of-law strand of due process are, however, closely related. If one thinks of the legislature as a kind of court, then vested rights is a doctrine limiting the use of legislative procedures to determine property rights. *See infra* notes 93–127 and accompanying text.

conflict was found (at least where it was accepted that the legislature could not alter the constitution).[88] Third, under *Zylstra*, courts interpreted the law by considering the policies and history behind a statutorily created summary regime. These factors helped courts to identify or characterize that regime, which was constitutionally permissible only if it could be described as law of the land.

*B. North Carolina: "*State*,"* UNC v. Foy*, and* Hoke v. Henderson

We can observe the operation of a similar doctrine in North Carolina, in cases involving the summary transfer of property. Several of these suits are familiar. *Bayard v. Singleton*,[89] for example, fits here; the basic question in that case was the constitutionality of an act requiring the dismissal of suits to recover estates confiscated from loyalists upon the production of a certain affidavit by the defendant.[90] Judges Ashe, Spencer, and Williams "gave their opinion [sic] separately but unanimously" that the act was void for failure to provide a jury trial.[91] *Bayard* is well known as an early instance of judicial review, but it is also an early instance of the vindication of common-law processes against summary processes for deprivation of property.[92]

A lesser known example is *State v.* _____ [hereinafter *State*], heard in the Superior Courts of Law and Equity in 1794, around the same time as *Zylstra* in South Carolina.[93] *State* was an *ex parte* hearing on a motion by the North Carolina Attorney General to enter judgment against delinquent receivers of public money.[94] The procedure required neither notice nor a jury trial on grounds that the "delinquencies should be sufficient notice to [the receivers] that they were to be proceeded against."[95] Judge Williams denied the motion.[96] The procedure it created was "unconstitutional,"

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[88] The South Carolina legislature had claimed the authority to do so. *See supra* note 67 and accompanying text.

[89] 1 N.C. (Mart.) 5 (N.C. Sup. Ct. L. & Eq. 1787). For the best account of the *Bayard* case, and its associated letters and pamphlets, see HAMBURGER, *supra* note 45, at 449–61.

[90] *Bayard*, 1 N.C. (Mart.) at 5.

[91] *Id.* at 6.

[92] The North Carolina Constitution of 1776 contained both a law of the land clause and a guarantee of trial by jury "in all controversies at law" and before conviction of any crime. N.C. CONST. of 1776, art. IX, XII, XIV. Either provision could plausibly be adduced as the basis of the court's decision. Raoul Berger accurately describes the case, but then inexplicably concludes, "none of the pre-1789 'precedents' assert a right to displace legislative discretion, and, of course, they do not appeal to Magna Carta for that purpose." Berger, *supra* note 32, at 16. It is hard to know what Berger means here. *Bayard* expressly refers to the state constitution's law of the land clause, a guarantee the judges note is "unrepealable by any act of the General Assembly"; the judges then refuse to give effect to an act of the legislature providing for summary dismissal of title disputes over loyalist properties.

[93] State v. __, 2 N.C. (1 Hayw.) 28 (N.C. Sup. Ct. L. & Eq. 1794).

[94] *Id.*

[95] *Id.* at 29.

[96] *Id.*

he said, because it operated to "condemn a man unheard" in violation of the state constitution's law of the land clause.[97] As Williams expounded that clause, "these words mean, according to the course of the common law; which always required the party to be cited, and to have day in Court upon which he might appear and defend himself."[98] Williams made his ruling tentative, however, and the next day, North Carolina's distinguished Attorney General, John Haywood, delivered a lengthy argument in defense of the act.[99] As Haywood interpreted the constitution, law of the land meant simply "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature."[100] It was, he insisted, "the whole body of law," including the common law and the statutes that modified it.[101] To deny this would render the common law "immutable" by act of assembly, from which Haywood predicted disastrous results:

> It is easy to see into what a labyrinth of confusion this would lead us—it would contradict the very spirit of the constitution, which in establishing a Republican form of Government, must have been inevitably led to foresee the great alteration that the new state of things would make necessary in the great fabric of the common law; they must have intended such changes therein by the legislative power . . . . [The other construction] would destroy all legislative power whatsoever, except that if making laws in addition to the common law . . . .[102]

There was, Haywood concluded, "no part of this Constitution that directs the process by which a suit shall be instituted, or carried on."[103] The legislature was free to describe whatever procedure they thought best. Haywood was not alone in taking this position; many saw an active role for legislatures in creating new forms of procedure, and, for justification, they appealed to history.[104] Haywood listed examples of summary processes without notice that had been available in England and in the Carolinas, including outlawry, judgment bonds, attachments, bills in equity, and "the confiscation laws," that is, acts of attainder—which were "but proceedings to take away the

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[97] *Id.*; *see* N.C. CONST. of 1776, Decl. of Rights, art. XII.

[98] *State*, 2 N.C. (1 Hayw.) at 29. Williams noted that the summary procedure created by the assembly also violated the provision in the constitution preserving the right to trial by jury. *Id.*; *see also* N.C. CONST. of 1776, Decl. of Rights., art. XIV.

[99] *State*, 2 N.C. (1 Hayw.) at 40.

[100] *Id.* at 33. Notably, the record of the proceedings comes from law reports later published by Haywood himself.

[101] *Id.* at 33.

[102] *Id.* at 33–34.

[103] *Id.* at 34.

[104] *Id.* at 34–35.

property of absentees, who perhaps knew nothing of these intended proceedings."[105] Haywood did not prevail before Judge Williams, but he was successful in a subsequent proceeding.[106]

About a decade later, in the case of *Trustees of the University of North Carolina v. Foy*, Haywood advanced the same argument in defense of the legislature's repeal of a grant of land to the state university.[107] Unsurprisingly, the university took direct aim at Haywood's construction of the law of the land clause, arguing that "[t]he right of trial by jury is a fundamental law made sacred by the constitution, and cannot be legislated away."[108] It followed that "the words *law of the land*," which secured this right, "mean something other than an act of the Legislature."[109] Judge Locke, writing over one dissent, agreed.[110] If law of the land included any act of the legislature, then the legislature could dispense with a trial by jury and determine ownership for itself by process of enactment.[111] Such a construction would empty the clause of any effect.[112] Properly understood, then, the constitution prohibited the legislature from depriving trustees of corporate property by an act. Acts were "subject to the arbitrary will of the Legislature," whereas "trial by jury in a court of justice" proceeded "according to the known and established rules of decision."[113]

Foy is sometimes described as importing separation-of-powers principles into due process. Yet, while the acts in *Foy* were special legislation and concerned only with the university's rights, later courts applied the same reasoning to general statutes, suggesting that particularity was not really the issue. This was the scenario in the 1833 case of *Hoke v. Henderson*.[114] The question in *Hoke* was whether the clerk of a county superior court had been ousted from his office by the election of a new

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[105] *Id.* On the view of the bill of attainder as a summary form of legal process, see Matthew J. Steilen, *Bills of Attainder*, 53 HOUS. L. REV. 767 (2016).

[106] *See State*, 2 N.C. (1 Hayw.) at 40. Edward Corwin cited Haywood's later success as evidence that due process principles did not limit legislative power in this period, Corwin, *supra* note 38, at 371–72, but the conclusion is clearly incorrect with respect to the power of the legislature to establish summary procedural regimes, as *Trs. of the Univ. of N.C. v. Foy* and *Hoke v. Henderson* illustrate.

[107] Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58 (N.C. Ct. Conf. 1805).

[108] *Id.* at 68.

[109] *Id.* at 73–74.

[110] *Id.* at 81.

[111] *Id.* at 87–88.

[112] *Id.* at 88 ("It is evident the framers of the Constitution intended the provision as a restraint upon some branch of the Government, either the executive, legislative, or judicial. . . . To apply [the law of the land clause] to the judiciary would, if possible, be still more idle, if the Legislature can make the *'law of the land.'* For the judiciary are only to expound and enforce the law, and have no discretionary powers enabling them to judge of the propriety or impropriety of laws.").

[113] *Id.* at 88–89. For a subsequent case on the same point, see Allen's Adm'r v. Peden, 4 N.C. (Car. L. Rep.) 442 (N.C. 1816).

[114] 15 N.C. (4 Dev.) 1 (1833).

clerk under a recently passed statute.[115] A lower court had found for the old clerk on the grounds that the election statute violated the state constitution.[116] Writing in the Supreme Court, Chief Justice Ruffin agreed.[117] The office of clerk, he said, was a species of property.[118] Tenure in the office was during good behavior, and, thus, the old clerk had a claim of right in it.[119] The legislature's act giving the new clerk a claim of right in the same office was "essentially a judgment against the old claim of right," and thus, reasoned Ruffin, "not a legislative, but a judicial function."[120] It did not matter that the terms of the act in question were general, for "nevertheless it partakes of that [judicial] character in its operation on the former officers," by "compel[ling] the Courts to deprive the officers without further enquiry [sic] before a jury."[121] Indeed, "[a] determination of conflicting rights between two classes of persons is a judicial act, although pronounced in the form of a statute."[122] Citing *Foy*, *State*, and *Bayard*, Ruffin concluded that such a statute could not be law of the land.[123]

Foy and *Hoke* evidence the operation, in North Carolina, of a doctrine close to the one announced in *Zylstra* and followed in South Carolina.[124] The North Carolina doctrine treated legislative process as another form of summary proceeding, and legislation divesting or transferring property as a kind of summary adjudication.[125] In effect, North Carolina courts viewed the legislature itself as an administrative department.[126] To determine whether the procedures it used were law of the land, courts invoked considerations of precedent and policy (think of Haywood's argument). This understanding of legislation explains why a masterful judge like Ruffin could pivot so easily from special legislation in *Foy* to a general act in *Hoke*.[127]

C. New York: Taylor v. Porter

The same core ideas were carried in a different direction in New York. There, the influence of separation of powers appeared somewhat earlier than in North Carolina,

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[115] *Id.*

[116] *Id.* at 3.

[117] *Id.* at 13.

[118] *Id.* at 17 ("The sole inquiry that remains is, whether the office of which the act deprives Mr. *Henderson*, is property. It is scarcely possible to make the proposition clearer to a plain mind . . . than by barely stating it.").

[119] *Id.* at 10–14.

[120] *Id.* at 13.

[121] *Id.* at 13–14.

[122] *Id.* at 14.

[123] *Id.* at 15–16 (citing all three cases).

[124] *Hoke* remained good law through mid-century in North Carolina. *See* Houston v. Bogle, 32 N.C. (10 Ired.) 496, 504 (1849).

[125] *See Hoke*, 15 N.C. (4 Dev.) at 1; Trs. of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 58 (N.C. Ct. Conf. 1805).

[126] *See Hoke*, 15 N.C. (4 Dev.) at 1; *Foy*, 5 N.C. (1 Mur.) at 58.

[127] Accounts of due process based on the separation of powers have struggled to explain this transition. *See* Chapman & McConnell, *supra* note 20, at 1751, 1754.

under the influence of James Kent.[128] On the other hand, judicial restrictions on the power of the state legislature to establish summary mechanisms for transferring property appeared somewhat later. In the leading case of *Taylor v. Porter*,[129] decided in 1843, the state supreme court considered a challenge to the procedure for laying out and assessing private roads.[130] The law had been on the books for over seventy years without constitutional challenge, but, by the 1830s, the cost of these special assessments had risen sharply.[131] An individual requesting that a road be built had to apply to the local commissioners of highways, who convened a jury to view the property in question and decide whether a road was necessary.[132] Notice was provided to the landowner.[133] If the jury decided in favor of a road, the commissioners directed its construction, and a second jury was assembled to assess the cost to be paid by the applicant.[134]

A two-judge majority held the procedure unconstitutional.[135] Writing for himself and Justice Cowen, Justice Bronson began by distinguishing the case from the construction of a public road, which the constitution permitted as long as "just compensation" was paid.[136] The construction of a road for the benefit of only one person, in contrast, could not be defended as an exercise of eminent domain.[137] This was a

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[128] *See* Dash v. Van Kleeck, 7 Johns. 477, 508 (N.Y. Sup. Ct. 1811) (Kent, C.J.); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture XX, at 426 (New York, O. Halsted 1826). Although *Van Kleeck* is sometimes described as a due process case, Kent does not conclude that the proffered retrospective interpretation of the law in question there would violate the law of the land clause in the state constitution; his argument is that it would violate general principles, *Dash*, 7 Johns. at 501. For his (relatively undeveloped) views on the meaning of "law of the land," see 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW, Lecture XXIV, at 9–10 (New York, O. Halsted, 1827). Kent, however, was convinced of the need to protect vested rights from impairment by legislation and developed a number of doctrines to that end, including the requirements of public use and just compensation as limitations on eminent domain. *See* Haines, *Part I*, *supra* note 38, at 283–85.

[129] 4 Hill 140 (N.Y. Sup. Ct. 1843).

[130] *Id.* Under the constitution of 1821 (as now), the New York Supreme Court was not the highest judicial body in the state, which was then the Court of Impeachment and Correction of Errors. The latter included state senators and the chancellor. N.Y. CONST. of 1821, art. V, §§ 4. Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201, 210–11 (1983).

[131] The severe depression that began in 1842 politicized the issue, which was depicted by conservative Democrats as a state-sanctioned transfer of wealth. *See* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS: 1839–1865, at 104–06, 110–11, 115 (2001); Diamond, *supra* note 130, at 212–13.

[132] *Taylor*, 4 Hill at 141.

[133] *Id.*

[134] *Id.* at 141–42.

[135] *Id.* at 141–48.

[136] *See* N.Y. CONST. of 1821, art. VII, § 7.

[137] *See Taylor*, 4 Hill at 143; *see also In re Albany Street*, 11 Wend. 149, 151 (N.Y. Sup. Ct. 1834) ("The constitution, by authorizing the appropriation of private property to public use, impliedly declares, that for any other use, private property shall not be taken from one and applied to the use of another.").

crucial point for the court in staking out the right to interfere in what looked like a legislative function. After all, for the assembly to transfer the risk of being land-locked away from a bona fide purchaser was, in effect, a policy whose adoption was squarely a legislative matter. For the court to strike down the procedures by which the legislature exercised its power of eminent domain would position it as sitting in review of an exercise of legislative discretion.[138] But, reasoned Bronson, this wasn't eminent domain.[139] It was, in fact, a private deal gone awry, and "[t]he power of making bargains for individuals has not been delegated to any branch of the government."[140] That power, as opposed to eminent domain, could not be implied from the constitution's grant of law-making power to the legislature, for such a construction would run afoul of the law of the land clause.[141] Citing Judge Ruffin's opinion in *Hoke*, Bronson reasoned that if "law of the land" meant any procedural regime the state legislature saw fit to create, it "would render the restriction absolutely nugatory."[142] Already, judicial assertions of ownership over law of the land clauses had come some distance and now supported the authority of the courts to articulate limits on the legislative power. As Bronson constructed those limits, the clause prohibited deprivation of a member's "rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law."[143] What was required, he wrote, were "forensic trial and judgment."[144]

Of course, forensic trial and judgment were impossible where a landowner had done nothing to give rise to a claim at law against him. Such was the case where one person simply desired to build a private road over the land of another. It followed that Justice Bronson's reasoning denied to the government the power to lay out private roads altogether.[145] What was missing—and what no extant procedure could provide—was the *consent* of the landowner.[146] As Bronson put it, the statutory procedure in question was defective because "some interest . . . has been taken from [the landowner] *without his consent*."[147] Unlike eminent domain, the legislature

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[138] *See* Harry N. Scheiber, *The Road to* Munn*: Eminent Domain and the Concept of Public Purpose in State Courts*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY 329, 370 (Donald Fleming & Bernard Bailyn eds., 1971) ("The courts explicitly placed property owners on notice that they must calculate on certain risks against which 'just compensation' doctrines offered no insurance.").

[139] *Taylor*, 4 Hill at 143, 148.

[140] *Id.* at 143.

[141] *Id.* at 145.

[142] *Id.*

[143] *Id.* at 146. Similarly, under the constitution's due process clause—a separate clause under the constitution of 1821—the legislature could not provide for "less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for . . . determining the title to property." *Id.* at 147.

[144] *Id.* at 146.

[145] *Id.* at 148.

[146] *Id.*

[147] *Id.* at 143 (emphasis added). Later, summarizing his opinion, he confessed, "I am of

could not force the owner to sell without consent because seizing land for a private purpose was not a valid exercise of its delegated sovereign powers.[148] Nor could the legislature give consent for the landowner, as it did in the case of taxation, by using the normal procedures for enacting a funding bill.[149] In effect, then, government was incompetent to express the consent needed to acquire the land, and the matter had to be handled privately.[150] The point was a procedural one, but it implied substantive limits on the law-making powers of the legislature.[151] Writing in dissent, Chief Judge Nelson did not contest Bronson's reasoning but labored instead to show that there were vital public purposes for so-called "private" roads.[152]

The frequency with which courts invoked consent in the years that followed, led political scientist Charles Grove Haines to describe New York judges as "champions of a new individualism."[153] The doctrine was applied to invalidate direct legislative transfers of property, including reforms of the law governing marital property rights.[154] By mid-century, the state constitution's due process and law of the land

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[the] opinion that a private road cannot be laid out without the consent of the owner of the land over which it passes." *Id.* at 148.

[148] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *139. In New York, Blackstone's account was endorsed in *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 167 (N.Y. Ch. 1816). Judge Bronson rested this view on considerations of natural law, which he thought implied limitations on legislative power. *See* MCCURDY, *supra* note 131, at 112–13 ("The doctrine of popular sovereignty, institutionalized in New York through ratification of a written constitution framed in convention, derived from the notion that legitimate government arose only from a compact among the people themselves . . . [at the foundation of which was] 'security of life, liberty and property.'").

[149] *See* BLACKSTONE, *supra* note 148, at *139–40. *But cf.* COOLEY, *supra* note 31, at 1117 (describing taxation as taking property without consent).

[150] Porter, who wanted the easement, had tried, but had been unable, to strike a bargain with Taylor. *See* MCCURDY, *supra* note 131, at 111. Judge Nelson might have made something of this point because permitting "hold outs" to prevent a buyer from connecting his property to a public road has significant social costs.

[151] As John Orth termed it, the prohibition on taking property from A and giving it to B was an "ambiguous paradigm," with both procedural and substantive dimensions that were not always distinguished. *See* ORTH, *supra* note 20, at 40–50; *cf.* Tribe, *supra* note 16, at 290 ("In some areas, once the likely *process* of policy-formation comes into focus, it will be arguable that—for a time, at least—government ought to have no policy at all, in the sense that it ought to leave the area entirely to private ordering and choice.").

[152] *Taylor*, 4 Hill at 149–50 ("Private property cannot be taken for strictly private purposes without the consent of the owner, whether compensation be provided or not. But I deny that the statute authorizing the laying out of private ways is at all in conflict with the general rule. The construction of roads and bridges is a power belonging to all governments, in the exercise of which every citizen or subject is deeply concerned."); *see also* MCCURDY, *supra* note 131, at 111.

[153] Haines, *Part I*, *supra* note 38, at 287.

[154] *See* Westervelt v. Gregg, 12 N.Y. 202, 209, 211–12 (1854) (interpreting the act as attempting to "confer upon one person or class of persons the property of another person or

clauses were the source of substantive limits on law-making power. Thus, in the 1856 case *Wynehammer v. People*,[155] Judge Comstock invalidated the state's temperance law by citing due process for the principle that "where rights are acquired by the citizen under the existing law, there is *no power in any branch of the government* to take them away."[156] A choice of law doctrine continued to operate alongside these substantive limits, if somewhat overshadowed by them. Writing in the same case, Judge Selden noted a second defect with the temperance statute; it required a defendant seeking to justify his sale of liquor first to "[a]dmit [to] the sale, which . . . is converted into *prima facie* evidence of guilt."[157] Selden thought that the required admission undermined the common-law rights to appear and defend oneself.[158] "Of what value is this right 'to appear and defend,'" Selden wrote, "if the legislature can clog it with conditions and restrictions which substantially nullify the right?"[159] Selden would not say "[p]recisely how far the legislature may go, in changing the modes and forms of judicial proceeding," but, he reasoned, certainly it could not "subvert [the] fundamental rule of justice which holds that every man shall be presumed innocent."[160] Indeed, the constitution likely guaranteed "*all* those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice."[161]

The *Taylor* case thus had a two-pronged effect on New York jurisprudence. Under the doctrine of consent, it evolved into a judicially enforced substantive limit on law-making power. It also endorsed a construction of the state constitution's law of the land clause that prohibited some forms of summary adjudication. As in the Carolinas, the difficulty was determining precisely which forms were made unlawful. One approach, suggested by Judge Selden in *Wynehammer*, took the clause to preserve "fundamental" rules of procedure, which were rules historically regarded as essential to adjudication.[162]

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class, without their consent" (emphasis added)*;* Perkins v. Cottrell, 15 Barb. 446, 448 (N.Y. Sup. Ct. 1851) ("If it was the intention of the act to apply to property acquired by the wife before and held by her at the time of its taking effect, it was void, as taking away a vested right of the husband, *which could not be done without his consent, or by judgment of law*." (emphasis added)); White v. White, 4 How. Pr. 102, 110 (N.Y. Sup. Ct. 1849) ("I am not prepared to admit that the legislature of a state possesses any such power as would authorize them to take the property of one person and give it to another *against the consent of the owner*. . . ." (emphasis added)).

[155] 13 N.Y. 378 (1856).

[156] *Id.* at 393 (emphasis added).

[157] *Id.* at 442.

[158] *See id.* at 442, 446 ("Can § 17 be reconciled with this rule?").

[159] *Id.* at 443.

[160] *Id.* at 446.

[161] *Id.* at 447.

[162] *Id.*

D. Federal Law: Murray's Lessee v. Hoboken Land & Improvement Co.

Murray's Lessee is hardly the only federal due process case before the Civil War, despite being regularly treated that way in commentary.[163] It is, however, the first opinion of the Supreme Court applying the Due Process Clause of the Fifth Amendment to a summary administrative proceeding and thus fits into the line of cases I have been examining here.[164] The Court had previously upheld summary proceedings against a challenge based on a state law of the land clause in *Bank of Columbia v. Okely*.[165] That clause, said Justice Johnson, functioned only to prevent an "arbitrary exercise of the powers of government."[166] As for the Seventh Amendment right to a jury trial, defendant Okely had waived it by agreeing to borrow money from a bank authorized by state law to utilize summary procedures for collecting debts. The man, wrote Johnson, "chose his own jurisdiction," which did not include trial by jury, a choice now "among the common incidents of life."[167]

Much later, in *Murray's Lessee*, the Court again considered the constitutionality of a summary debt proceeding, this time against a challenge based in the Fifth Amendment.[168] The process in question, known as a "distress warrant," had been employed to seize and sell the land of a federal customs collector who had embezzled millions

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[163] *See* 59 U.S. 272 (1855). For an example of the attitude one finds in older commentary, which is not entirely misplaced, see Charles M. Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218, 224 (1919) ("[T]he generation that fought the Civil War usually identified due process with common-law procedure; they knew vested rights in property, had a generous definition of liberty . . . , never doubted the fullest liberty to contract, and since the national government then scarcely touched the private citizen in days of peace, had given the Fifth Amendment very scant consideration."). A good discussion of other relevant cases, under the heading of the Contract Clause, can be found in WHITE, *supra* note 37, at 602–73. The principal cases are *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 304 (Pa. D. 1795); *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 581 (1819); and *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627 (1829). There are others as well.

[164] The reputation of the Taney Court among scholars of administrative law is that it almost universally deferred to the decisions of executive officers—a proposition which, if accurate, may explain in part why this issue was not reached and resolved earlier. *See* Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1679, 1685–88 (2008).

[165] *See* 17 U.S. (4 Wheat.) 235, 237 (1816).

[166] *Id.* at 244; *see also* Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 263–64 (1829). Judge Cooley suggested in his treatise that Johnson's language showed that the law of the land clause restricted the legislature, COOLEY, *supra* note 31, at 355, but the reading seems doubtful to me, *see* Berger, *supra* note 32, at 12 (observing that Johnson acknowledged the "paramountacy" of the legislature in remedial matters).

[167] *Okely*, 17 U.S. (4 Wheat.) at 243.

[168] *Murray's Lessee*, 59 U.S. (18 How.) at 274–76.

of dollars in customs revenues.[169] Writing for the Court, Justice Curtis adopted a construction of the Fifth Amendment quite unlike the one Johnson had put on Maryland's law of the land clause in *Okely*.[170] It was "not left to the legislative power to enact any process which might be devised," wrote Curtis, thereby making a procedure due process "by its mere will."[171] What, then, of Justice Johnson's observation in *Okely* that summary procedures had become relatively common? Which summary procedures were due process and which were not? The distress warrant, acknowledged Curtis, was not "an exercise of judicial power"—it could not be, given that Article III vested federal judicial power in courts of law—yet it was, surely, legal process.[172] So when was a form of legal process the due process required by the federal Constitution? To answer this question, said Curtis, "[w]e must examine the constitution itself, to see whether this process be in conflict with any of its provisions."[173] If no such conflict was found, one should "look to those settled usages and modes of proceeding existing in the common and statute law of England," later "acted [up]on . . . after the settlement of this country."[174] Curtis's inquiry, like those announced in the great state cases of the preceding decades, was essentially interpretive. Because Curtis could resort to a written constitution, the best evidence of the meaning of due process was the plain text. Where the text ran out, history had the most probative value, adapted to the present question by analogy and considerations of policy.

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[169] *Id.* at 274. A doctrine of waiver apparently did not apply to the Fifth Amendment in contrast to the Seventh Amendment. It does not appear to have been advanced by counsel, and it was not discussed by Justice Curtis. What was, in effect, a due process waiver argument had been advanced by Chief Justice Parker of the Supreme Judicial Court of Massachusetts in the 1821 case of *Marcy v. Clark*, 17 Mass. 330, 335 (1821) ("[A]ll who are members of the corporation are virtually defendants in the action, and have an opportunity to be heard, in the form they have chosen by joining the company.").

[170] *See Okley*, 17 U.S. (4 Wheat.) at 235. Curtis expressly concluded that "due process" and "law of the land" were synonymous. *Murray's Lessee*, 59 U.S. (18 How.) at 276. This suggests that Curtis rejected the construction of "law of the land" Johnson proffered in *Okely*, although he did not cite the case.

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

[172] *Id.* at 275–76; *see also* Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 791–92 (1986). In the federal context, Article III operates as an independent constraint on the power of government to deprive individuals of a vested right in a nonjudicial proceeding. *See, e.g.*, Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 586–90 (2007). Jerry Mashaw has suggested that in *Murray's Lessee*, Justice Curtis "[f]or most purposes . . . treated these two legal claims [i.e., Article III and Due Process] as synonymous." Mashaw, *supra* note 164, at 1686. Curtis clearly regards the questions as analytically separate. Of course, the inquiries were hardly unrelated; and as I will argue below, the Article III public-private distinction, often traced to *Murray's Lessee*, also became central to due process. *See* Young, *supra*, at 792–93, 809; *see also infra* notes 175–84 and accompanying text.

[173] *Murray's Lessee*, 59 U.S. (18 How.) at 276–77.

[174] *Id.*

In this case, the distress warrant did not conflict with any piece of text in the federal Constitution.[175] The question, then, was what settled usages were, both historically in England and presently in the United States.[176] Usage included summary proceedings like the distress warrant, although not the very same. Indeed, similar proceedings had in fact long been part of the common law, despite the fact that "methods of ascertaining the existence and amount of such debts [due to the Crown], and compelling their payment, have varied widely from the usual course of the common law on other subjects."[177] English law had utilized writs of extent on debts of record in the King's Exchequer, an institution that functioned both as an administrative agency—a treasury, essentially—and as a court of law.[178] For at least a hundred years, these proceedings had omitted any notice to the debtor or proof by testimony,[179] yet they were nevertheless "law of the land."[180] The same divergence between methods of collecting revenue and process afforded to ordinary debtors was "understood in this country," as evidenced by the widespread use of the distress warrant against constables and revenue collectors.[181] Thus, although due process "generally implie[d]" a plaintiff, defendant, judge, "regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings," wrote Curtis, "yet this is not universally true."[182] Usage countenanced summary proceedings in the management of the treasury that had been adapted to the purposes of collecting and accounting government revenue.

The Court thus resolved the apparent conflict between summary procedure and common law by dissolving it altogether; distress warrants did not conflict with the common law because they were part of it, or at least functionally identical to something that was.[183] This resolved the choice of law problem. What distinguished *Murray's Lessee* from the state cases discussed above was the deference Justice Curtis showed legislative judgment. Little in Curtis's opinion suggests that he determined for

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[175] The original Constitution describes judicial procedures in only two places, the Criminal Trials Clause and Treason Clause of Article III. *See* U.S. CONST. art. III, § 2, cl. 3; *id.* at art. III, § 3. Amendments IV, V, VI, and VII contain a number of specific procedural requirements, but they make no mention of summary administrative proceedings like the one at issue in *Murray's Lessee*. *See generally* U.S. CONST. amends. IV, V, VI, VII.

[176] *Murray's Lessee*, 99 U.S. (18 How.) at 277, 279–80.

[177] *Id.* at 278.

[178] *Id.* at 277.

[179] *Id.* at 278.

[180] *Id.* Curtis's usage of this expression isn't entirely consistent. In the second half of the opinion, relating to the Article III question, Curtis uses "law of the land" in a way that suggests they exclude summary proceedings like the distress warrant. *See id.* at 282 ("[P]robably there are few governments which do or can permit their claims for public taxes . . . to become subjects of judicial controversy, according to the course of the law of the land.").

[181] *Id.* at 278–79.

[182] *Id.* at 280.

[183] *Id.* at 284–86.

himself, independently, that the summary proceedings at issue were "necessary" (as South Carolina Judge Waties had put it).[184] Of course, if the summary proceedings were similar to those employed at common law, they would presumably be supported by similar considerations of policy. Perhaps, then, history obviated independent review, at least when the legislature cabined its discretion to historically recognized procedures. Yet if we set aside the issue of deference, the effect of Curtis's inquiry was largely the same. He solved the same problem; namely, how to allocate decision-making authority among different administrative bodies, using accepted techniques of decision-making in a judicial forum. He solved an institutional choice-of-law problem using tools the Court applied to more pedestrian cases. If Curtis himself proved too circumspect to insert "usual" common law procedures between the Treasury and its customs collectors, his successors could at least consider the question anew.

II. PROCEDURAL DUE PROCESS FROM 1870–1915

In the post-war period, students of constitutional law have focused largely on the emergence of a doctrine of substantive due process.[185] The story of its development is well known. At the center stands a series of profound social and economic changes in our country.[186] The decades after the Civil War saw a massive expansion in manufacturing and the settlement and cultivation of the West.[187] At the same time, the country became more centralized and economic activity integrated.[188] Eastern manufacturing was linked to western agriculture by the construction of railroads, and the financing and operation of this transportation network touched off a series of major political struggles.[189] Thus, for example, the Grange movement in the Midwest pitched owners of railroads and grain elevators against their customers, who alleged price gouging, discrimination, and corruption of the legislative process.[190]

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[184] Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 393 (S.C. Ct. Com. Pl. 1794).

[185] *See, e.g.*, Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations of Legislatures*, 3 TEX. L. REV. 1, 1 (1924). As many commentators have observed, judicial doctrines of vested rights and separation of powers existed long before the Civil War; both doctrines differ from modern substantive due process but are clearly related to our doctrine, at least as its efficient cause. *See, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 509 (1997) (describing vested rights); Chapman & McConnell, *supra* note 20, at 1677, 1703–26 (2012) (describing separation of powers).

[186] For a useful sketch of these developments and citations to the historical literature, see Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1368–73 (2010).

[187] *Id.* at 1370–72.

[188] *See id.*

[189] *See generally* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 562–99 (1926).

[190] *Id.* at 574.

The "Granger cry," as legal historian Charles Warren imagined it, was that "[t]he State must either absorb the railroads or the railroads will absorb the State," and from this premise "originated radical legislation" fixing maximum prices for rail transport and grain storage.[191]

The regulatory response to the developments of the late nineteenth century was premised on a new understanding of the place of governmental authority in controlling private forms of social ordering like market exchange.[192] Government did not exist simply to protect "static" rights but should ensure a dynamic use of property that promoted the public good.[193] Those opposed to such fundamental changes responded, in part, by challenging the legislation in courts of law. Just as before the war, their arguments appealed to history, natural law, "general" or "implied" limitations on legislative power, and the doctrines of vested rights and separation of powers, now afforced against state interference by the Due Process Clause of the Fourteenth Amendment.[194]

My aim here is to connect these familiar developments in substantive due process with developments in procedural doctrines.[195] I begin with the distinction between public and private interests, which underlay many of the new substantive due process doctrines.[196] Public interests, or public rights, were "claims that were owned by the government—the sovereign people as a whole."[197] These claims were defined by a body of public law, the central examples of which were criminal law and emerging spheres of "regulatory law."[198] Private interests, or private rights, were principally interests defined at common law, as supplemented by statute.[199] Early substantive due process cases reflected the conviction that public interests were appropriately subject to legislative or administrative control. Thus, for example, according to an account of the police power typical of the period, property became the legitimate object of police regulation when it was used in a way that caused

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[191] *Id.*; *see also* STRONG, *supra* note 20, at 83–85; Haines, *supra* note 185, at 8–10 (discussing legal response to deprivation of property by English monarchs and monopolies created by the monarchy).

[192] *See* William J. Novak, *Law and the Social Control of American Capitalism*, 60 EMORY L.J. 377, 379–84 (2010).

[193] *See generally id.*; Scheiber, *supra* note 138.

[194] *See* Scheiber, *supra* note 138, at 381–82.

[195] *See supra* Part I.

[196] *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 133–34 (1876) (describing the police power); Citizens Savings & Loan Ass'n v. Topeka, 87 U.S. (1 Wall.) 655, 664 (1874) (describing taxation).

[197] Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020 (2006).

[198] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1960, at 10–11 (1992); *see also* Novak, *supra* note 192, at 399–404 (discussing the idea of a public utility).

[199] Private rights were closely related to vested rights, although the terms were not synonymous. A private right might not be vested if it is a mere expectancy. Usually, however, by "vested rights" pre–Civil War sources meant rights under common law not subject to antecedent conditions—*a fortiori*, private rights.

injury to others, giving the property a public character, like a traditional public nuisance.[200] In such cases regulation served a public purpose or advanced the public good.[201] The same distinction operated in the domain of procedural due process. Public interests might be conclusively determined without providing the full panoply of common-law procedures, while purely private interests had to be left to private ordering and controversies involving private interests judicially determined. Where both private interests and a strong public interest were in play, the latter was thought to legitimate the use of summary procedures.[202]

The Court relief on the public-private distinction attempted to dissolve the conflicts at the heart of procedural due process cases. Consider, first, the example of criminal law. In the leading case from the period, *Hurtado v. California*,[203] the Court upheld a California statute permitting the use of information (a formal criminal charge unapproved by a grand jury) to prosecute offenses previously prosecuted by indictment.[204] Prosecuting serious crimes by information was a legislative innovation, but that did not, of itself, imply a failure of due process. Under the rule of *Murray's Lessee*, of course, "a process of law . . . must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country."[205] But, wrote Justice Matthews, "it by no means follows that nothing else can be due process of law."[206] Such a rule would "render [the law] incapable of progress or improvement," and of "wise adaptation to new circumstances and situations" to which novel "forms and processes" were "found fit."[207] The key point was not merely change, then, but adaptation—*purposive change*. Prosecution by information could be thought to advance public interests in safety and security—interests that were

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[200] *See* DUBBER, *supra* note 43, at 109–13; HORWITZ, *supra* note 198, at 24–31.

[201] *See* Scheiber, *supra* note 138, at 373–76, 390–91.

[202] *See* Warren H. Pillsbury, *Administrative Tribunals*, 36 HARV. L. REV. 405, 415–18 (1923) ("[I]n general the right to affect by an order or decree private rights appears to be limited . . . to cases in which the public interest is affected . . . ."); *see also* 1 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION INCLUDING THE LAW OF LOCAL ASSESSMENTS 53 (3d ed. 1903) ("Magna Charta does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for the public use."); Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 226 (defining public rights as "areas of plenary legislative power").

[203] 110 U.S. 516 (1884).

[204] *Id.* at 517 (quoting CAL. CONST. of 1879, art. I, § 8).

[205] *Id.* at 528.

[206] *Id.* One sometimes reads that Justice Matthews largely abandoned *Murray's Lessee*, replacing the inquiry into "settled usages" with an open-ended, indeterminate inquiry based on evolving notions of justice and fairness. *See, e.g.*, Miller, *supra* note 36, at 19–20. I think this overstates the matter. Matthews accurately describes *Murray's Lessee* (settled usage is not, in that opinion, made out to be a necessary feature of due process, and could not be consistent with its reasoning), and there is more structure to the due process calculus following *Hurtado* than is usually understood. *See infra* notes 210–27 and accompanying text.

[207] *Hurtado*, 110 U.S. at 529, 530.

defined by a paradigmatic body of public law, the law of crime. Such a judgment had to lie within the range of legislative discretion. It followed that a person could claim "no property, no vested interest, in any rule of the common law," which was, after all, "only one of the forms of municipal law, and [was] no more sacred than any other."[208] Of course, there were private interests at stake in criminal prosecution as well, and for this reason the legislature was not free to make *any* changes it wanted. At the very least, criminal procedures had to further "the general public good" and preserve basic "principles of liberty and justice."[209]

Although *Hurtado* was decided in 1882 under prevailing norms of judicial deference, the Court took much the same approach to challenges to civil administration, even as it began to scrutinize summary proceedings more carefully. This period saw a vast expansion in administration, both at the state and federal levels. At the federal level, of course, passage of the Pendleton Civil Service Act of 1883, the Interstate Commerce Act of 1887, and the Sherman Antitrust Act of 1890 mark the emergence of the modern regulatory state.[210] A commentator writing at the end of the period described a similar growth in state agencies, listing among new state administrative tribunals: "railroad and public utility boards, workman's compensation boards, boards of health, agricultural and horticultural boards; examining and licensing boards . . . water commissions, boards or officers regulating businesses . . . such as the corporation . . . , banking, and insurance commissioners," as well as others.[211] A major goal of this expansion was to improve the efficiency and effectiveness of administration, and agencies adopted procedural rules to that end.[212] As

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[208] *Id.* at 532–33 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)); *see also* COOLEY, *supra* note 31, at 361–64. Indeed, as the period progressed, the Court tended toward "sustaining any proceeding authorized by a State Legislature which was not arbitrary and which in general preserved principles of justice and fairness." WARREN, *supra* note 189, at 571; *see, e.g.*, Twining v. New Jersey, 211 U.S. 78, 110–12 (1908); Holden v. Hardy, 169 U.S. 366, 383–90 (1898).

[209] *Hurtado*, 110 U.S. at 537. It should be noted that Justice Matthews did not claim for the Court exclusive or final authority to judge whether the procedure it advanced the public good or was in fact adapted to modern needs. Matthews's opinion ultimately upholds the statute in question on the basis of a structural reading of the constitutional text.

[210] *See* WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1900, at 119–33 (1982); Mashaw, *supra* note 186, at 1365. These were followed in the early twentieth century by a dozen more federal statutes regulating major sectors of the American economy. *See* Novak, *supra* note 192, at 388.

[211] Pillsbury, *supra* note 202, at 408.

[212] *But cf.* NELSON, *supra* note 210, at 5 ("The late nineteenth-century reformers were not simply searching for order and rationality . . . , nor did modern American bureaucracy emerge only as a centralizing response to that chaotic world. Instead, the builders of the bureaucratic state strove to prevent centralization and concentration of power and to institutionalize pluralism. Their model was provided not by the sociologists of the twentieth century, with their concern for structure and efficiency, but by the founding fathers of the eighteenth, whose concern was that popular power be limited by popular rights.").

the same commentator observed, "[o]ccasionally jurisdiction has been taken away from the courts and placed in them [i.e., new administrative tribunals]," which were "vested with wide discretionary powers and liberal exemption from rules of evidence and procedure which govern the courts," and followed procedures "uniformly characterized by inexpensiveness, swifter and less complicated modes of trial, and by authority to assert an initiative in the conduct of a case."[213] The result was a kind of conflict in procedural regimes. Bruce Wyman, author of the first American treatise on administrative law, distinguished this internal law governing agencies from the body of "external law" governing their relations to citizens.[214] Internal law comprised, among other things, procedural norms in areas where the agency had been granted discretion, while external law was statute and common law.[215] According to Wyman, a central question in administrative law was how to resolve the apparent conflict between internal law and external law.[216] Describing one such conflict, Wyman paused to generalize: "[H]ow can [an] officer obey both the internal law and the external law when the one commands action, and the other requires inaction . . . ? That is the question where *the law of the land* commands and the law of the administration demands—which?"[217]

The doctrine of procedural due process that developed in the decades following the Civil War described how to resolve these conflicts—conflicts between the procedural norms of an agency and the procedural regime of the common law. Initially, many were resolved using the public-private distinction. Below, I consider the examples of taxation and so-called "special assessments," or taxes levied on specific

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[213] Pillsbury, *supra* note 202, at 407.

[214] BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 4 (1903); *see also* Mashaw, *supra* note 186, at 1412–17 (discussing WYMAN, *supra*).

[215] *See* WYMAN, *supra* note 214, at 16 ("[T]he internal law is all based upon the discretion of a given officer . . . . The internal law of the administration is then no more than the usual order of the exercise of that discretion in the ordinary case . . . ."); *see also* Kevin M. Stack, *Reclaiming "the Real Subject" of Administrative Law: A Critical Introduction to Bruce Wyman's* The Principles of Administrative Law Governing the Relations of Public Officers (1903), at xv (2014) (noting that internal law comprises agency "norms, procedures and practices").

[216] WYMAN, *supra* note 214, at 4.

[217] *Id.* at 4, 5 (emphasis added); *see also id.* at 6 (describing a case where a collector of customs was prohibited from seizing a vessel under statutory law but commanded to seize it by his superior and concluding, "[t]his is an illustration of the supremacy of the law of the land; no test shows more how the law of the land dominates the situation in administration in countries under the common law"). Wyman's answer to the question drew on the distinction between discretionary and ministerial actions—a distinction that was then of central importance, *see* Mashaw, *supra* note 186, at 1399–412, and which was closely connected to the doctrine of vested rights. Notably, however, where a common law action lay to test jurisdiction or compliance with a ministerial duty, Wyman counseled for judicial deference to agency determinations of law and fact—a position uncommon at the time but which characterizes modern administrative law. *See* Stack, *supra* note 215, at ix–xiv.

properties to finance public improvements.[218] Where the legislative power of taxation was used for a public purpose, and not simply to confiscate the property of one person and give it to another, full common-law procedures were not required.[219] The Court's desideratum was that tax assessment and apportionment procedures be appropriate to the case or fit to the public purpose at hand.[220] This was not really a matter of empirical determination; at first, it involved locating the summary procedure within a familiar, historically defined category, maxim, or rule of thumb.[221] If the procedure fit within such a category, then it described a historically acknowledged boundary on the common law. This sort of "fit" analysis had a significant judicial pedigree, sometimes described in English practice as review for reasonableness.[222] In the late nineteenth century, then, prior to the development of arbitrariness review of administrative conduct, the Supreme Court's due process doctrine was not simply a matter of deferring to the legislature or executive agency.[223] It was (at least

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[218] Diamond, *supra* note 130, at 201–02. Diamond observes that some New York judges did not regard special assessments as taxation, in part because they advanced private rather than public interests, *see id.* at 208–10, an argument we saw advanced by Justice Bronson in *Taylor v. Porter*, *see supra* Part I.C—but this view does not appear to have found a wide audience on the Supreme Court in the late nineteenth and early twentieth centuries, perhaps following *Murray's Lessee*. *See* Woolhandler, *supra* note 202, at 229; *see also* Diamond, *supra* note 130, at 232 (noting that the effort to distinguish special assessments from taxes was "largely abandoned" by 1900). Today, the Supreme Court treats the collection of revenue as an exception to the standard requirement of a pre-deprivation notice and hearing, but my interest in taxation doctrine is not for what it reveals about hearings but about the Court's methods in scrutinizing summary proceedings. *See* Fuentes v. Shevin, 407 U.S. 67, 91–92 (1972).

[219] *See* COOLEY, *supra* note 31, at 356 ("In judicial proceedings the law of the land requires a hearing before a condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature attempts to control it through remedial statutes, different considerations prevail . . . , different proceedings are required . . . . Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction . . . ." (footnote omitted)).

[220] I adduce a number of cases in the taxation jurisprudence below. For examples outside that line, see *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 342–43 (1909); *N. Am. Cold Storage Co. v. Chicago*, 211 U.S. 306, 320 (1908).

[221] See, for example, the role of the *sic utere* maxim in determining whether an exercise of the police power had a "real and substantial" relationship to a public purpose. DUBBER, *supra* note 43, at 111; HORWITZ, *supra* note 198, at 28.

[222] *See* HALLIDAY, *supra* note 43, at 190–92.

[223] *See* Woolhandler, *supra* note 41, at 197, 211–12 (describing the deference view and noting that a more substantial form of judicial review could be invoked "to see that the alternative court system accorded procedural due process"). For a strong statement of the judicial deference view, see Mashaw, *supra* note 186, at 1412 ("Judicial requirements of constitutional due process were nonexistent . . . ."). Mashaw has suggested that, at least under the Taney Court, deference grew out of the conviction that departments of the executive were coordinate bodies—that is, equal in constitutional authority to the Court. *See* Mashaw, *supra* note 164, at 1670. This explanation, of course, does not apply to review of state governments. The standard account of judicial deference to state governments in the postwar period focuses on the Justices' desire to preserve the federal structure and prevent

in some areas) a choice-of-law doctrine under which the Court examined the legislative or administrative purpose at issue and the fit between that purpose and the summary procedure utilized. Eventually the approach was applied to streamline procedure in an entire class of cases. Under the standard announced in *Bi-Metallic Investment Co. v. State Board of Equalization*[224] (also a tax case), the Constitution did not require that general assessments affecting many people be made only after notice and hearing.[225] Such procedures were ill-adapted to the reality of rule-making in a complex society, and designed instead for determining individual liability.[226] Legislative procedure was enough. The Court thus dissolved the apparent conflict between common law rules governing disposition of property and summary procedures employed by legislative bodies and their delegates.[227]

A. Early Federal Tax Assessment Cases: Davidson v. New Orleans *and* Hagar v. Reclamation District No. 108

A federal procedural due process doctrine of taxation emerged from a series of cases in the ten-year period from 1874 to 1884. First in these cases is *Loan Association v. Topeka*,[228] known today mostly for its articulation of the public purpose limitation on state taxing power.[229] The opinion was written by Justice Miller, whose concern with preserving the federal structure had resulted in a decidedly narrow view of the Privileges or Immunities Clause two years earlier in the *Slaughter-House Cases*.[230] Yet, here the Court sat in diversity, and Justice Miller was playing state judge, announcing principles of state constitutional law, which apparently quieted his concerns about federalism.[231] His hands freed, Miller maintained that state powers of taxation were impliedly limited by basic principles of natural law.[232] "To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes," Miller wrote, "is none the less a robbery because it is done under the forms of law and is called taxation."[233] Just as with eminent domain

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the development of a supervisory power in the Supreme Court under the auspices of the Fourteenth Amendment, as evidenced by the majority decision in the *Slaughter-House Cases*. *See* Haines, *supra* note 185, at 2–5; WARREN, *supra* note 189, at 598–99.

[224] 239 U.S. 441 (1915).

[225] *Id.* at 446.

[226] *See id.* at 445–46.

[227] *Id.*

[228] 87 U.S. (1 Wall.) 655 (1874).

[229] *Id.* at 664.

[230] 83 U.S. (1 Wall.) 36, 77–78 (1872).

[231] *See* HORWITZ, *supra* note 198, at 24.

[232] *Topeka*, 87 U.S. (1 Wall.) at 663.

[233] *Id.* at 664.

in the antebellum period, taxation had to serve a public purpose, or it would be, simply, confiscation.[234]

A year later, in the *State Railroad Tax Cases*,[235] the Court faced a federal due process challenge to state taxing power.[236] The Illinois Board of Equalization had raised the valuation of taxable railroad property without notice to the companies involved, who argued that the assessment was consequently void.[237] This time Justice Miller expressed impatience, remarking in his opinion for the Court that it was "hard to believe that such a proposition can be seriously made."[238] He found the consequences of the argument particularly unsettling; as Miller pointed out, "If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the State."[239] Nor could notice and hearing possibly be provided to every property owner, given the Board's function of adjusting relative tax assessments on property across the state.[240]

Litigants were undeterred by Miller's skepticism. Two years later, in 1877, the Court decided two more challenges to tax assessment procedures in which the Due Process Clause was prominently featured. Miller again wrote for the Court in both cases. In the first, *McMillen v. Anderson*,[241] he returned to the need for summary procedures in tax collection.[242] "The mode of assessing taxes in the States . . . and by all governments, is necessarily summary, that it may be speedy and effectual."[243] Louisiana's procedure provided for pre-seizure notice by publication and challenge to seizures in a court of law; if it was constitutionally defective for lack of process, then so would the revenue laws of every state.[244] "[D]ue process of law," wrote Miller, "does not mean . . . by a judicial proceeding," and, in truth, the country "has never relied upon the courts of justice for the collection of her taxes."[245] That some states used a quasi-judicial "board of revisers" to determine assessments did not leave the legislature powerless to set assessments themselves.[246] Lawful summary

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[234] *Id.* ("Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for *public purposes*[!]" (emphasis added) (quoting COOLEY, *supra* note 31, at 479)).

[235] 92 U.S. 575 (1875).

[236] *Id.*

[237] *Id.* at 595.

[238] *Id.* at 609.

[239] *Id.*

[240] *Id.* ("Must each one of these [owners] have notice and a separate hearing? . . . [I]f this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible."). The Court made no mention of the possibility of judicial review of the board's determinations.

[241] 95 U.S. 37 (1877).

[242] *Id.* at 41.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *See id.* at 42.

proceedings, adapted to the practical demands of tax collection, did not offend the Constitution, as long as proceedings were not "arbitrary, or unequal, or illegal."[247]

In the second 1877 case, *Davidson v. New Orleans*,[248] Justice Miller again expressed anxiety about the implications of invalidating summary tax collection procedures under the Due Process Clause.[249] Reflecting on the sudden surge of due process challenges before the Court, he found it "not a little remarkable, that while this provision has been in the Constitution of the United States . . . for nearly a century . . . this special limitation upon its powers has rarely been invoked."[250] Yet, now "the docket of this court [was] crowded with cases in which we are asked to hold that State courts and State legislatures" had exceeded such limits.[251] Clearly, litigants saw the Fourteenth Amendment's Due Process Clause "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice."[252] The challenge, as Miller saw it, was to construct the clause in a way that prevented the Court from becoming such a venue—just as he had done, or tried to do, anyway, with the Privileges or Immunities Clause in the *Slaughter-House Cases*.[253] Miller agreed that the Due Process Clause of the Fourteenth Amendment restricted the power of state legislatures to adopt summary forms of proceeding, just as the Fifth Amendment restricted Congress.[254] And he also agreed that the clause did not eliminate legislative discretion entirely by requiring them to utilize common-law proceedings.[255] The question, then, was how to define the space of possibility. Which forms of summary proceeding were permissible, and which not? This time, Miller acted with caution. Quoting language from *Hurtado*, he thought it best simply to "ascertain[ ] . . . the intent and application of such an important phrase [i.e., due process] . . . by the gradual process of judicial inclusion and exclusion."[256] The procedure in this case was clearly sufficient. Where taxes were levied "for the public use," a state could assess them as it chose, if it provided by law for judicial review of the assessment before collection, along with personal notice, "or such proceeding in regard to the property as is appropriate to the nature of the case."[257]

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[247] *Id.* at 41.
[248] 96 U.S. 97 (1877).
[249] *Id.* at 103–04.
[250] *Id.* at 103.
[251] *Id.* at 104.
[252] *Id.*
[253] *Id.*
[254] *See id.* at 102.
[255] *See id.* at 101.
[256] *Id.* at 104.
[257] *Id.* at 104–05 ("[I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of

Justice Bradley concurred in the result but not in Miller's formulation of due process requirements.[258] Bradley had dissented in the *Slaughter-House Cases*, where he had appealed to the Due Process Clause as limiting state legislative power.[259] In *Davidson*, of course, the matter was procedural, not substantive, but still Bradley differed from Miller in his willingness to limit state power.[260] He approached the matter by drawing an analogy to eminent domain.[261] Generally speaking, if state law provided for seizure of land for public use, but without just compensation, it would constitute a deprivation of property without due process.[262] Yet, there were exceptions, and Bradley reasoned, "The exceptions . . . imply that the nature and cause of the taking are proper to be considered."[263] If due process was actually to restrict the legislative power to adopt summary forms of proceeding, then the Court was "entitled" to search for more than what Justice Miller had labeled sufficient.[264] In particular, "in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements."[265] If the process was "found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law;' but if found to be arbitrary, oppressive, and unjust," the Court could hold otherwise.[266] This approach, Bradley suggested, would avoid "interfering with that large discretion which every legislative power has of making wide modifications in the forms of procedure."[267]

Davidson thus offered future courts two due process paradigms for evaluating summary forms of proceeding on tax assessments. The Miller paradigm turned on the availability of judicial review and appropriate notice; the Bradley paradigm turned on an examination of the legislative *purpose* (the "cause and object," Bradley said) and of whether summary proceedings *fit* that purpose (whether they were "suitable and admissible").[268] In 1884, the Court decided the case of *Hagar v.*

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the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.").

[258] *Id.* at 107 (Bradley, J., concurring) ("I think [the Court's opinion] narrows the scope of inquiry as to what is due process of law more than it should do.").

[259] 83 U.S. (1 Wall.) 36, 114–15, 118 (1872).

[260] *Cf.* Miller, *supra* note 36, at 20 ("As in the Slaughterhouse Cases [sic], it was Bradley who saw, if he did not significantly determine, the future of due process litigation.").

[261] *Davidson*, 96 U.S. at 107–08.

[262] *Id.* at 107 ("If a State, by its laws, should authorize private property to be taken for public use without compensation . . . , I think it would be depriving a man of his property without due process of law.").

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.* at 107–08.

[268] Both paradigms found some acceptance. In 1880, three years after *Davidson*, the Court, in an opinion by Justice Swayne, upheld, against due process challenge, the use of distress

Reclamation District No. 108,[269] which went some distance to embrace both the Miller and Bradley paradigms. In *Hagar*, the Court considered the constitutionality of a summary procedure adopted by the legislature of California for reclamation of salt marsh and tidal lands.[270] The California system was not unlike that employed by many other states for public improvements; it required the formation of a reclamation district upon petition, a board of trustees to manage the project and report on progress and costs, and commissioners to assess the taxable value of improvements to property in the district.[271] Delinquent payments could be collected using normal tax mechanisms.[272] Here, the district attorney had brought suit seeking a lien against several properties in order to sell them in satisfaction of tax liability.[273] Writing for the Court, Justice Field began by acknowledging that it was "difficult to define with precision" due process limits sufficient "to cover all cases."[274] Miller had been right in *Davidson* to approach the matter on a case-by-case basis. Yet, when Field turned to formulating the standard in *Hagar*, he clearly synthesized the two paradigms.[275] What was meant by due process "here," wrote Field, was a process "which, following the forms of law, is appropriate to the case, and just to the parties to be affected."[276] Process should follow the law, "be adapted to the end to be attained," and offer a hearing "wherever it is necessary for the protection of the parties."[277]

Field then used these principles to make two key distinctions. First, tax cases were unlike other deprivations of property.[278] In tax, observed Field, "the proceeding

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warrants to seize personal property. *See generally* Springer v. United States, 102 U.S. 586 (1880). Like Bradley, Swayne had dissented from Miller's decision in the *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36, 127–29 (1872), pointing to restrictions that he thought lodged in the Due Process Clause, and, in *Springer*, his analysis mimicked that of Bradley's in *Davidson*. "Why is it not competent for Congress to apply to realty as well as personalty the power to distrain . . . ? It is only the further legitimate exercise of *the same power for the same purpose*." *Springer*, 102 U.S. at 593–94 (emphasis added). In 1876, however, Thomas Cooley's influential treatise on taxation took a position much closer to Justice Miller's. *See* THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 38–40 (Chicago, Callaghan & Co. 1876). The second edition of the treatise, which appeared in 1886, essentially reproduced Miller's opinion in *Davidson*; due process, wrote Cooley, is provided if there is a "right to be heard afterwards in a suit to enjoin the collection." THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION, INCLUDING THE LAW OF LOCAL ASSESSMENTS 51 (2d ed. Chicago, Callaghan & Co. 1886).

[269] 111 U.S. 701 (1884).

[270] *Id.* at 702–04.

[271] *Id.* at 702–03.

[272] *Id.* at 703.

[273] *Id.* at 703–04.

[274] *Id.* at 707.

[275] *Id.* at 707–09.

[276] *Id.* at 708.

[277] *See id.*

[278] *Id.*

is necessarily less formal."[279] Second, however, not all taxes were the same in this respect.[280] Field cited Bradley's concurrence in *Davidson*, commending to the Court an examination of "the cause and object of the taking" and its suitability to the case.[281] In one class of taxes, "no notice can be given to the tax-payer, nor would notice be of any possible advantage to him."[282] These were taxes in which the legislature simply identified specific "things, or persons, or occupations" it wanted taxed.[283] Here, "the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter."[284] A hearing could do nothing to alter a person's tax liability.[285] In a second class of taxes, in contrast, notice and a hearing served a purpose. These were taxes levied "on property not specifically, but according to its value," the estimation of which required the tax officer to "act judicially."[286] It was to the latter class of taxes that the Miller opinion in *Davidson* centrally applied; there, judicial review of an assessment was held sufficient for due process in the absence of administrative review by a board of equalization or revision.[287]

Field's first accomplishment in *Hagar* was to domesticate the Miller and Bradley paradigms. Miller's rule would be applied to *ad valorem* taxes, while Bradley's concurrence would be used as an overarching principle.[288] But instead of evaluating each assessment for the "cause and object of the taking," as Bradley had counseled in *Davidson*, the Court could simply look to the tax officer's function.[289] Judicial assessment would require notice and a hearing, while others might be made without

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[279] *Id.*

[280] *See id.* at 708–09.

[281] *Id.*

[282] *Id.* at 709.

[283] *Id.*

[284] *Id.*

[285] *See id.*

[286] *Id.* at 710.

[287] *Id.* at 710–11. In one of the few treatments of procedural due process in this period, Ann Woolhandler argues that the distinction of most importance in the tax assessment cases of the 1880s, including *Hagar*, was whether the assessment was made by the legislature or an agency to which it had delegated its authority. Woolhandler, *supra* note 202, at 237 & n.53. Woolhandler's analysis is in many respects compelling, but as I read *Hagar*, Justice Field does not emphasize delegation. The point does come up in cases in the 1880s, and Woolhandler does show that, by the mid-1890s, the Court was explicit about the importance of delegation. *See id.* at 237–38 & nn.55–56 (citing Parsons v. District of Columbia, 170 U.S. 45, 51–52 (1898); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 167 (1896)). But even then it is not clear to me that the reason the Court afforded the legislature a privileged position was a presumption of factual correctness, as opposed to simply a regard for the status of the legislature. See the discussion of *Spencer v. Merchant*, 125 U.S. 345 (1888), below, in which Justice Gray conceded that "the process by which the result was reached was not the best attainable, and some other might have been more accurate and just." *Id.* at 353.

[288] *See Hagar*, 111 U.S. at 708–10.

[289] *Id.*

them. By knitting the views together in this way, Field accomplished a second thing as well, which was to construct a coherent forensic doctrine for managing the choice-of-law problem posed by the use of summary proceedings in tax assessments. Miller had essentially declined to do this in *Davidson*, urging instead a case-by-case approach.[290] Field's doctrine turned on the public-private distinction and the test of fit between a proceeding and its ostensible purpose.[291] If a court determined that a summary proceeding did not serve a public purpose, or was not appropriate to the public purpose at stake, it might require common-law procedures—although, in the context of tax, notice was unlikely to be personal and a hearing nothing like the elaborate common-law trial. Field's framework also employed a number of categorical distinctions—public versus private, specific versus *ad valorem* taxes, and judicial versus nonjudicial action—and these categories were hardly self-defining.[292] Field was, in this respect, a judge of his time. From that point of view, if a choice of law was to be made in a judicial forum, then it should utilize formal categories and abstract principles, the tools the judge thought characteristic of judicial reasoning.[293]

B. The Legislative/Adjudicative and Direct/Delegated Distinctions: Londoner v. City of Denver *and* Bi-Metallic Investment Co. v. Board of Equalization

The two decades after *Hagar* saw a proliferation of lawsuits challenging state tax assessments on procedural due process grounds. Several dozen of these reached the Supreme Court, and the procedural jurisprudence that developed was not unfriendly to state power. On a number of occasions the Court employed the Field framework to uphold summary procedures used to levy, collect, and enforce taxes.[294] In the *Kentucky Railroad Tax Cases*,[295] only a year after *Hagar*, Justice Matthews reminded the railroad plaintiffs in error that "proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial," and that therefore due process "does not imply or require the right to such notice and hearing as are considered to be essential [in]. . . judicial tribunals."[296] Citing Bradley's concurrence in *Davidson*, Matthews concluded that statutory notice of meetings was sufficient, even where the board of commissioners meeting had been vested with "discretion."[297]

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[290] *See* Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

[291] *Hagar*, 111 U.S. at 708–12.

[292] *Id.*

[293] *See* GRANT GILMORE, THE AGES OF AMERICAN LAW 60–63 (1977) ("The post–Civil War judicial product seems to start from the assumption that the law is a closed, logical system. Judges do not make law: they merely declare the law which, in some Platonic sense, already exists."); HORWITZ, *supra* note 198, at 16–18 (describing the nature of categorical judicial reasoning in the late nineteenth century).

[294] *See infra* notes 295–301 and accompanying text.

[295] 115 U.S. 321 (1885).

[296] *Id.* at 331.

[297] *Id.* at 335–36.

From another angle, however, governmental function (judicial or nonjudicial) was not the key issue in determining the process due. The Court's opinion in the *Kentucky Railroad Tax Cases* had also emphasized that tax was a legislative power—that is, a legislature's power—and that a legislature could exercise this power without providing notice or a hearing to anyone.[298] Justice Gray extended the point in *Spencer v. Merchant*,[299] where he made delegation, rather than function, the central distinction in the due process calculus.[300] As Gray put it, while a legislature could delegate its powers to determine the amount of a tax and the district to be assessed, it "is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review."[301] It did not matter that such a determination was "of necessity a question of fact," or that, as in the present case, "the process by which the result was reached was not the best attainable, and some other might have been more accurate and just."[302] What mattered, wrote Gray, was that a hearing could do nothing to "open the discretion of the legislature, or be of any avail to review or change it" in the determinations made there.[303] The focus on delegation was a natural consequence of a concern with preserving the authority and independence of the legislature. Decisions of the legislature on matters committed to its discretion should not be revised by property owners for the same reasons that they should not come before juries or judges for review.[304]

These principles were taken up in a pair of cases that have had a significant afterlife, especially in the field of administrative law: *Londoner v. City of Denver* and *Bi-Metallic Investment Co. v. State Board of Equalization*. The effect of the

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[298] *Id.* at 337–39.

[299] 125 U.S. 345 (1888).

[300] *See* Woolhandler, *supra* note 202, at 232.

[301] *Spencer*, 125 U.S. at 353.

[302] *Id.*

[303] *Id.* at 354.

[304] *See* COOLEY, *supra* note 202, at 46–49 ("That is a matter resting altogether in the discretion of another co-ordinate branch of the government."(quoting In re Powers, 25 Vt. 261, 265 (1853))). Whether delegation was supposed to connect to the governmental function being exercised was not entirely clear. On some occasions, the Court seemed to focus on both issues in determining what process was due, while on other occasions its analysis seemed to hinge only on function. Perhaps delegation was important only in a derivative sense because tax officers to whom power had been delegated typically sat in a judicial capacity. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 175 (1896) ("[W]hen as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands . . . will be benefited, and the decision of that question is submitted to some *tribunal* (the board of supervisors in this case), the parties whose lands are thus included . . . are entitled to a hearing upon the question of benefits . . . . Unless the legislature decide [sic] the question of benefits itself, the landowner has the right to be heard . . . ." (emphasis added)); Palmer v. McMahon, 133 U.S. 660, 669 (1890) ("The power to tax belongs exclusively to the legislative branch . . . . The imposition of taxes is in its nature administrative and not judicial, but assessors exercise *quasi* judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.").

cases was to jettison delegation in favor of an exclusive focus on the nature of the proceeding, giving to general administrative action the same insulation previously enjoyed by legislatures.[305] *Londoner* involved a tax assessment for the paving of a public road.[306] Under the procedure used by the City and County of Denver to approve and finance paving, a board of public works, acting on a petition of residents, was empowered to recommend to the city council that it order the paving of a street, and then to assess the street's cost and apportion that cost among property owners.[307] Owners received notice by publication that the apportionment would be considered before the city council, "sitting as a board of equalization," and were permitted to file written objections on which they would be heard before the board.[308] In this case, the record suggested that the city's councilmen had not been entirely faithful to the procedure.[309] Apparently the board of public works had recommended the paving of a street without receiving the necessary petition (a defect the city council later cured by finding, contrary to fact, that a petition had been filed), and then awarded the contract without publishing it beforehand.[310] One catches a distinct whiff of corruption.[311] But what was worse, and what presented the Supreme Court with a serious constitutional question, was the city council's treatment of written objections filed by a party opposed to the apportionment.[312] The objections counted ten errors in the proceedings, including heady challenges to the authority of the city council, board of public works, "and other bodies or pretended bodies," all alleged to have exceeded their jurisdiction.[313] The law required that complainants be given an opportunity to appear before the council, sitting as a board of equalization, but no such hearing occurred.[314] Instead, the board, assembled *ex parte*, noted that "the complaints and objections filed deny wholly the right of the city to assess any . . . property of the city of Denver," and approved the apportionment.[315]

The question presented was whether the council's failure to provide property owners notice and the opportunity to appear on their written objection constituted a deprivation of property without due process of law.[316] Writing for the Court,

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[305] *See* Ronald A. Cass, *Models of Administrative Action*, 72 VA. L. REV. 363, 367–68 (1986).

[306] Londoner v. City of Denver, 210 U.S. 373, 374 (1908).

[307] *Id.* at 375–76.

[308] *Id.* at 376–77.

[309] *Id.* at 378.

[310] *Id.* at 378, 383–84.

[311] *Cf.* Diamond, *supra* note 130, at 224 (observing that, by the late nineteenth century, the "special assessment was evolving into a technique for disguising a raid on the public treasury, an obvious and vulnerable target, given the great profits to be made, particularly in paving contracts").

[312] *Londoner*, 210 U.S. at 381–84.

[313] *Id.*

[314] *Id.* at 384.

[315] *Id.* at 384–85.

[316] *See id.* at 385. The plaintiffs had in fact alleged ten errors in their petition, but this was the only one the Court considered closely. As for the council's finding, contrary to fact, that

Justice Moody held that the council had indeed violated the owners' constitutional rights.[317] His opinion began by reaffirming Justice Field's distinction between specific and *ad valorem* taxes in *Hagar*, as modified by the principle of delegation introduced by Justice Gray in *Spencer*.[318] As Moody put it, "where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom [a tax] shall be levied, and of making its assessment and apportionment," due process required notice and a hearing "before the tax becomes irrevocably fixed."[319] This was especially important where, as in Colorado, the state "denies the landowner the right to object in the courts."[320] The principle had not been satisfied in the present case simply because plaintiffs had made a paper filing. Even in a tax proceeding, the essence of a hearing required an opportunity "to support . . . allegations by argument however brief, and, if need be, by proof, however informal."[321] Moody made no mention of a hearing's possible utility. The city council's clever demarche of refusing a hearing because it would have served no purpose proved insufficient, despite the fact that the rationale fit neatly within the Court's earlier line of cases.

Justice Moody cited *Hagar* for these propositions, and not *Spencer*, but it seems fair to say that his rendering of the relevant principles featured delegation more prominently than any other factor.[322] In the second case, *Bi-Metallic*, Justice Holmes reversed this polarity, and submerged the issue of delegation entirely, in an opinion whose length (and depth) was a fraction of the Court's great scholarly treatments of taxation due process in the 1880s and 1890s.[323] In *Bi-Metallic*, the Colorado State Board of Equalization had ordered an across-the-board increase of 40% in the valuation of property in Denver, which the city's assessor refused to acknowledge as valid.[324] The procedure, as Holmes noted, caused injustice to those whose property "already has been valued at its full worth."[325] In this context, a hearing made some sense because it would allow an owner to present evidence pertaining

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the board of public works had recommended the paving on a petition from the property owners, the Court held that there had been no deprivation of property because the ordinance authorizing the improvement "did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment." *Id.* at 378. Why the ordinance did not necessitate an assessment is unclear; the language of the ordinance, reproduced in the opinion, made it mandatory for the board of public works to prepare a statement and apportion the costs. On the same reasoning, the order of the board of equalization approving the apportionment also did not "necessitate" a city ordinance passing the tax.

317 *Id.* at 386.

318 *Id.* at 385–86.

319 *Id.* at 385.

320 *Id.* at 386.

321 *Id.*

322 *See id.* at 385–86.

323 Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 443–44 (1915).

324 *Id.*

325 *Id.* at 444.

to the valuation of his property. Moreover, under the rule of *Londoner*, reasonably read, there was a right to an opportunity to be heard since the Colorado state legislature had committed the matter of equalization to an inferior administrative body. But as Holmes saw it, this could not possibly be the correct reading of *Londoner*, given its implications for the administration of government.[326] "Where a rule of conduct applies to more than a few people it is impracticable that every one [sic] should have a direct voice in its adoption," Holmes wrote.[327] In "a complex society," the only way to protect individuals from potentially ruinous effects of "[g]eneral statutes" was to give them "power, immediate or remote, over those who make the rule."[328] This was simply necessary "if government is to go on."[329] Properly read, then, *Londoner* stood only for the proposition that where a "small number of persons was concerned," and "exceptionally affected, in each case upon individual grounds," there was a right to a hearing.[330]

By ignoring the issue of delegation in *Londoner* (and in *Spencer* before it), Justice Holmes was able to extend to inferior administrative agencies the same insulation that legislatures had enjoyed in tax matters, at least where an agency formulated a general rule that would affect a large number of people.[331] At first glance, the rule looks like it is premised on a functional distinction between general rules and individual judgments.[332] Yet its basis is really a policy argument, rather than a categorical distinction between adjudication and legislation.[333] "[I]f government is to go on" in "a complex society," Holmes says, individual hearings on matters that affect a multitude are simply impracticable.[334] This argument—that summary proceedings were necessary if the revenue was to be collected—was, more or less, the same argument the Court had advanced throughout its taxation jurisprudence but stripped of the categorical framework Field had suggested in *Hagar*.[335] What mattered from Holmes's point of view was not that the legislative proceedings were, by their nature, different from judicial proceedings. What mattered were the practical demands

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[326] *Id.* at 445.

[327] *Id.*

[328] *Id.*

[329] *Id.*

[330] *Id.* at 445–46.

[331] Ann Woolhandler observed this progression in period cases involving the determination of benefit districts for a special assessment. *See* Woolhandler, *supra* note 202, at 251 ("[A]s was true in cases involving front-foot rules, the Court eventually began to treat municipalities and other delegees as if they exercised the authority of state-level legislatures in designating districts.").

[332] *See, e.g.*, 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.02, 7.04, 7.06 (1958) (distinguishing between legislative and adjudicative facts and citing *Londoner* and *Bi-Metallic*).

[333] *See* Diamond, *supra* note 130, at 232 (for Holmes, the key issue was "practical problems in tax administration").

[334] *Bi-Metallic*, 239 U.S. at 445.

[335] *See supra* note 218 and accompanying text.

of government in a complex society and the public's interest in effective government. In such a society, with such a public interest, the Constitution could not require the legislature to employ common-law procedures designed for a very different task. The fit was wrong. In this way, the Court articulated the boundary of the procedural regime of the common law, leaving the legislature free outside that boundary to choose a different regime suited to the task. Holmes had solved Wyman's choice-of-law problem by dissolving the apparent conflict.

III. THE DUE PROCESS REVOLUTION AND COUNTER-REVOLUTION

In the standard account of the due process revolution, the Supreme Court's rejection of the classic doctrinal distinction between privileges and rights plays a major role. As Richard Stewart put it, "[t]raditionally, the only interests entitled to constitutional protection against government interference were those that would enjoy protection at common law against invasion by private parties."[336] These did not include "advantageous relations with the government" like employment.[337] Such relations were *privileges*, and their deprivations largely treated with deference by the courts. The revolution was a story of abandoning this distinction out of a recognition that the role traditionally played by private property in securing independence was now being played by government largesse.[338]

Almost all those who wrote about the right-privilege distinction during this period recognized that, even in its heyday, the doctrine was applied with something less than rigorous consistency. Certain forms of privilege might be graced with constitutional protection, others not. One form might be graced in certain cases, in other cases not. Speaking of the doctrine's application mid-century to government employ, Kenneth Culp Davis suggested that the Court's decisions "probably should be interpreted as a demonstration of a willingness to subordinate the privilege doctrine to the Court's conception of the needs of justice and of sound policy."[339] Davis was not really being critical; he seems to have thought it a good thing that the doctrine was used in this way.[340] In earlier periods, it is even harder to make out a pattern of deference on the basis of a distinction between rights and privileges, and it is just as easy to make a case that the distinction was invoked instrumentally on policy

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[336] Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1717 (1975); *see also* BREYER ET AL., *supra* note 4, at 605–09.

[337] Stewart, *supra* note 336, at 1717.

[338] *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738–46 (1964); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1451–54, 1458–64 (1968).

[339] Kenneth Culp Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 230 (1956); *see also* Michelman, *supra* note 9, at 144–45, 146 (suggesting that the experience of a moral distinction between different privileges led some to be constitutionally protected but not others); Rubin, *supra* note 6, at 1052.

[340] *See* Davis, *supra* note 339, at 232.

grounds.[341] The privileges to which courts extended constitutional protection in the early nineteenth century look very much like what Charles Reich would describe as "New Property" over a century later.[342]

In the reconstruction offered here, the right-privilege distinction plays only an ancillary role. I will come to it—but later. I begin instead with a well-known series of government employment cases involving dismissals for disloyalty during the red scare of the 1950s. Although many of these cases were decided on non-constitutional grounds, they also evidence a continuation of the basic form of due process analysis used in the tax cases at the turn of the century. That the Court would approach due process by examining the public interest, function, or purpose of a procedural regime is unsurprising given the prominent place the Legal Process school gave to purposive interpretation.[343] The major difference between the 1950s cases and earlier doctrine was the particular public interest at issue, national security, which on a number of occasions simply overwhelmed the analysis.[344] As time passed, however, the summary nature of loyalty investigations began to seem less a necessary adaptation to the threat of sabotage and more an arbitrary exercise of governmental power. Cases where national security interests simply hung in the background, unconnected to the summary process invoked by the government, gave the Justices an opportunity to articulate their support for what the government was largely denying its targets: a fair hearing. The most famous of these opinions, Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*,[345] was in essence a wide-ranging essay on the centrality of the hearing to judicial process in the Anglo-American tradition.[346]

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[341] *See* Woolhandler, *supra* note 41, at 230–37.

[342] *See* WHITE, *supra* note 37, at 598 ("The freeholds held by the ideal republican citizenry had been acquired through industry or lineage: they were private possessions. But another sort of property existed in early America, and its acquisition revealed the presence of a competing theory about the relationship of government to propertyholding. This property had been acquired from the state itself, by state charters to individuals or corporations and state grants of land to individuals or land companies. . . .[S]tates and cities also distributed land and taxed activities in a variety of settings. . . . [This] illustrated that government in America was not conceived exclusively as securing existing private property rights, but also as creating new ones."); Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 349 (1987) ("An expansion of the class of persons and *the types of interests covered* by due process marked the middle period of due process jurisprudence (1821–1838) before the adoption of the [F]ourteenth [A]mendment." (emphasis added)).

[343] *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 699–700 (3d ed. 2001); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[344] *See* Davis, *supra* note 339, at 235–40.

[345] 341 U.S. 123 (1951).

[346] *Id.* at 149–74 (Frankfurter, J., concurring).

It was when the loyalty program precedents were applied to the administration of government entitlement programs that one sees a clear move towards another due process framework, namely, interest-balancing.[347] Beginning around 1970, "interest" in procedural due process cases began to shift from its meaning under Legal Process analysis in the late 1940s and 1950s and Classical jurisprudence in the late nineteenth century. As Henry Paul Monaghan observed of these cases, private interest referred to something of deep concern or value to someone, like having food or shelter or care, rather than merely a right protected by law.[348] Here, then, is the proper placement of the right-privilege distinction. Providing constitutional protection to matters of deep concern to someone suggested that the right-privilege distinction had to be scuttled and replaced. For a time, the Court embraced Justice Frankfurter's standard in *McGrath*, which required due process when a person was "condemned to suffer grievous loss *of any kind*."[349] The due process revolution and counter-revolution were, in a sense, waged over the scope of this new principle, which seemed to require a fair hearing in every part and phase of government. The struggle had very little to do the choice-of-law question previously at the heart of the forensic doctrine of due process but, instead, turned on a disagreement over the value of a hearing.

A. From Bailey v. Richardson *to* Cafeteria & Restaurant Workers v. McElroy

In several key respects, procedural due process in the late 1940s and 1950s resembled the doctrine of thirty years earlier. The Court sought to identify the public interest at stake and to evaluate a summary procedure in light of its ostensible purpose. For example, in the leading case of *Federal Communications Commission v. WJR, The Goodwill Station, Inc.*,[350] the Court considered whether the Fifth Amendment required administrative tribunals to give oral arguments on questions of law to those adversely affected by a decision.[351] The Court held that there was no such blanket right.[352] Congress enjoyed discretion "to devise differing administrative and legal procedures *appropriate for the disposition of issues* affecting interests widely varying in kind."[353] To determine which procedural rights an individual enjoyed was a "case-to-case determination, through which alone account may be taken of differences in

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[347] *See, e.g.*, Redish & Marshall, *supra* note 10, at 470–71. Ed Rubin argues that the loyalty program cases were abandoned by the Court when it turned to the issue of welfare, Rubin, *supra* note 6, at 1060–65, but by this he refers largely to the principles of administrative law employed by the Court to avoid large constitutional questions in loyalty cases, such as requirements that power be appropriately delegated or authorized, and that agency action could not be arbitrary. *See id.* at 1055–57.

[348] *See* Henry Paul Monaghan, *Of "Liberty" and "Property*," 62 CORNELL L. REV. 405, 407–08 (1977).

[349] *McGrath*, 341 U.S. at 168 (emphasis added).

[350] 337 U.S. 265 (1949).

[351] *Id.* at 276.

[352] *Id.*

[353] *Id.* (emphasis added).

the particular interests affected, circumstances involved, and procedures prescribed."[354] In some cases, the Court described itself as balancing public and private interests, but its analysis was usually directed to determining whether the public interest in question, appropriately framed, would be impaired by providing more process.[355]

In the 1950s, these principles were applied in a string of cases challenging dismissals from government employment under the federal loyalty program and similar programs in the states. The federal program was begun by President Truman in 1947 following several major spy scares, which Republicans leveraged to carry themselves to victory in the 1946 congressional elections.[356] Executive Order 9835 directed that "[t]here shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch," and that department and agency heads should assure that current employees were also not disloyal.[357] Over the six-year period ending in 1953 when the program was amended, 4.7 million individuals were investigated.[358] Procedures used in these investigations were summary in part. An employee charged with disloyalty did have a right to an administrative hearing before a federal loyalty board.[359] As Geoffrey Stone has described, however, while the employee might make a personal appearance at this hearing, consult with counsel, and present witnesses and affidavits, "he had no right to confront the witnesses against him or even learn their identity."[360] He could only plead and prove his own case, not impugn the government's. This could make it difficult to prevail, given that standard for removal was a "reasonable belief" of disloyalty "to the Government of the United States."[361] Probative evidence included, among other things, membership in any organization "designated by the Attorney General as totalitarian, fascist, communist, or subversive"—a list that eventually included some three hundred organizations.[362]

The first major test of the loyalty program came in *Bailey v. Richardson*, a case decided in the Court of Appeals for the District of Columbia and affirmed by an equally divided Supreme Court without an opinion.[363] Dorothy Bailey had been a

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[354] *Id.* at 277.

[355] *See, e.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313–14 (1950) ("Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment."). For a similar approach in a government employment case, see United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 96–100 (1947).

[356] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 323–26 (2004).

[357] Exec. Order No. 9835, 12 Fed. Reg. 1935, 1935–37 (Mar. 21, 1947).

[358] *See* STONE, *supra* note 356, at 348. Similar programs were developed in 42 states and some 2,000 counties and cities. *Id.* at 341.

[359] *Id.* at 343.

[360] *Id.*; *see also* Exec. Order No. 9835, 12 Fed. Reg. 1935, Part IV.

[361] STONE, *supra* note 356, at 333.

[362] Exec. Order No. 9835, 12 Fed. Reg. 1935, Part V; *see* Robert Justin Goldstein, *The Grapes of* McGrath*: The Supreme Court and the Attorney General's List of Subversive Organizations in* Joint Anti-Fascist Refugee Committee v. McGrath *(1951)*, 33 J. SUP. CT. HIST. 68, 68 (2008).

[363] 182 F.2d 46 (D.C. Cir. 1950), *aff'd*, 341 U.S. 918 (1951).

clerk-typist in the U.S. Employment Service since 1939.[364] In 1947, she was laid off in a workforce reduction and then rehired, triggering an investigation under the loyalty program that produced evidence that Bailey had been a member of the Communist Party.[365] Bailey denied the claim and obtained a hearing before the regional loyalty board handling the matter at which she presented witness testimony and affidavits on her own behalf.[366] She was not, however, allowed to learn the identity of those accusing her or to cross-examine them.[367] The board found Bailey ineligible for government employment.[368] Judge Prettyman's opinion upholding the program against Bailey's subsequent due process challenge is perhaps best known for invoking the right-privilege distinction.[369] Yet, as Professor Davis observed, it is difficult to conclude, after reading the opinion, that it rested on the privilege doctrine alone.[370] Prettyman referred repeatedly to the public interest in national security he thought at stake in the case.[371] "We must look not only at appellant's but also at the public side of this controversy," he observed, and doing so, "[w]e cannot ignore the world situation in which not merely two ideologies but two potentially adverse forces presently exist."[372] Prettyman thought this state of affairs required the court to review the matter deferentially.[373] The risk that the civil service would be infiltrated by the enemy was "for the President to estimate," and since "[t]he responsibility in this field is his, . . . the power to meet it must also be his."[374] At the heart of the opinion, then, is a conception of the separation of powers that accorded the President the discretion necessary to maintain an active national defense against an existential threat.[375]

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[364] *Id.* at 49.

[365] *Id.* at 49–50.

[366] *Id.* at 50.

[367] *See id.* at 58. Stone reports Bailey was suspicious that opponents in a bitter union struggle had falsely informed on her. *See* STONE, *supra* note 356, at 347.

[368] *Bailey*, 182 F.2d at 50.

[369] *Id.* at 57–58 ("It has been held repeatedly and consistently that Government employ is not 'property' . . . . We are unable to perceive how it could be held to be 'liberty'. Certainly it is not 'life'. . . . Due process of law is not applicable unless one is being deprived of something to which he has a right.").

[370] *See* Davis, *supra* note 339, at 235 (quoting Prettyman's remark that disloyalty "is a matter of great public concern" and suggesting that "[t]his remark may be far more important than anything else that can be said on either side of the privilege idea").

[371] *See Bailey*, 182 F.2d at 64.

[372] *Id.*

[373] *See id.* at 65.

[374] *Id.*; *see also* Davis, *supra* note 339, at 240 ("[W]eighing the urgency of the security program is unusually difficult, for the realities of espionage and intrigue may be only partially known to the courts, and public fears of war and sabotage vary from the responsible and justifiable to the excessive and even hysterical." (footnote omitted)).

[375] For an exploration of the development of this paradigm during the Cold War, see MARY L. DUDZIAK, WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES 63–94 (2012); STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 52–98 (2013).

Judge Edgerton framed the case very differently in dissent.[376] As he saw it, procedure before the loyalty board lacked even "the minimum standards of fairness" associated with due process.[377] A hearing did not serve its basic function where the accused could not cross-examine the witnesses against her.[378] There was, in effect, no hearing at all.[379] Nor did the use of these procedures advance the public interest in national security cited by the majority, since Bailey had been dismissed "from a non-sensitive job [that] has nothing to do with protecting the security of the United States."[380] The summary procedures did not fit the ostensible national security purpose.

Although the Supreme Court did not publish an opinion in *Bailey*, several of the Justices commented on Dorothy Bailey's case in *Joint Anti-Facist Refugee Committee v. McGrath*, which was decided the same day as the *Bailey* affirmance.[381] The question presented in *McGrath* was whether the Attorney General's publication of organizations he had designated as subversive was consistent with the Constitution and with the authority delegated him under relevant executive orders.[382] In litigating the case, the Department of Justice had taken a position suggested by Prettyman's opinion: that the Attorney General's action as an agent of the President on these matters was not subject to review by the courts.[383] The Court rejected the position, but it was Justice Frankfurter who insisted that the Attorney General's conduct was subject to the requirements of due process, developing at length his ideas about the constitutional role of hearings.[384] Like Edgerton, Frankfurter began within the accepted due process framework.[385] Quoting Field's opinion in *Hagar*, Frankfurter recalled that due process "meant one which, following the forms of law, is appropriate to the case" and "adapted to the end to be attained."[386] He then pushed the point outward, observing repeatedly that due process was a context-sensitive determination, not "unrelated to time, place and circumstances," and guided in all cases by a sense of fairness.[387] Frankfurter's language gave the test an elastic quality. Due process, he wrote, was not "a mechanical instrument" or "a yardstick," but "a delicate process of adjustment."[388] Nor was it a determination entrusted to the President or to Congress,

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[376] *Bailey*, 182 F.2d at 68 (Edgerton, J., dissenting).

[377] *Id.* at 69.

[378] *See id.*

[379] *See id.* at 68, 69.

[380] *Id.* at 74.

[381] 341 U.S. 123, 145 n.3, 177, 179–80 (1951).

[382] *Id.* at 124–25.

[383] *See* Goldstein, *supra* note 362, at 72.

[384] Apparently Justice Frankfurter had been advised by a clerk to "withhold relief on the ground that insufficient justification has been shown for interference with this executive function at this particular time and in these particular instances." *Id.* at 78 (quoting one of Justice Frankfurter's clerks at the time).

[385] *See McGrath*, 341 U.S. at 361–63.

[386] *Id.* at 162.

[387] *Id.*

[388] *Id.* at 163.

but to "a judiciary truly independent," and thus insulated from forces now gripping the political branches.[389] Judicial judgment in this area had to be guided by a number of different factors, including the private and public interests at stake, but also the manner in which the private interest had been "adversely affected," "the reasons for doing it, the available alternatives to the procedure," and "the balance of hurt complained of and good accomplished."[390] Considering these factors, along with "a great mass of cases," Frankfurter induced a general presumption in favor of a fair hearing before "being condemned to suffer grievous loss of any kind."[391]

Frankfurter's opinion in *McGrath* has become justly famous for its eloquence and its force, but one reading it for guidance might be frustrated—or take away whatever he wanted. The opinion admixed precedent, bits of policy,[392] an examination of how further process might impair the government interest (or not),[393] and an interpretation of the relevant executive order.[394] All of this was put in the service of, as Frankfurter put it, "striking the balance" between private and public interests and ensuring basic fairness.[395] The performance was a typical one for Frankfurter on the subject of due process.[396] But it left the other Justices with much to consider. As Chief Justice Warren described the doctrinal state of affairs nine years later in *Hannah v. Larche*, "Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon *a complexity of factors*."[397] What had been submerged, apparently, was a distinctive and limited inquiry into the public interest and its relationship to the summary proceeding in question.

Public attitudes about dissent and the propriety of resistance to foreign policy began to shift in the 1960s, and these changes could be felt in the Court's treatment of due process challenges.[398] Thus, in *Greene v. McElroy* in 1959,[399] another loyalty program case, the Court recognized the national security interests at stake but held that, in light of the essential role cross-examination played in hearings, a delegation of authority to omit them had to be express.[400] The delegation at issue in that case

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[389] *Id.*

[390] *Id.*

[391] *See id.* at 165–72.

[392] *See id.* at 164 (describing national security as "the greatest of all public interests").

[393] *See id.* at 172–73.

[394] *Id.* at 172.

[395] *Id.* at 164.

[396] *See* Kadish, *supra* note 24, at 326 ("In recent times the most influential exponents of flexible-natural law due process have been Justices Cardozo and Frankfurter. . . . For [Justice Frankfurter], due process includes those procedures required for the 'protection of ultimate decency in a civilized society.' Where the validity of given procedures is in issue, what is dispositive is 'whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .'" (footnotes omitted)).

[397] 363 U.S. 420, 442 (1960) (emphasis added).

[398] *See* Goldstein, *supra* note 362, at 87.

[399] 360 U.S. 474 (1959).

[400] *Id.* at 495–96, 506–07.

was not.[401] In this respect, *Greene* followed the decision of the Court in *McGrath*, which had turned not on Frankfurter's reasoning, but on Justice Burton's reading of what authority the President had delegated to the Attorney General under executive orders establishing the loyalty program.[402]

Two years after *Greene*, however, in 1961, the Court reached the issue of due process in an employment case that did not present pressing national security interests. *Cafeteria & Restaurant Workers Union v. McElroy* presented the question of whether the Navy had denied due process to an employee working a cafeteria on the grounds of its gun factory by dismissing her without an opportunity to be heard.[403] Justice Stewart, writing for the Court, declined the suggestion that the employee had no constitutionally protected interest in working on a government base.[404] Stewart's approach to the due process analysis, however, was noticeably different from Justice Frankfurter's. Stewart, like Frankfurter, cited *Hagar* for the proposition that due process was sensitive to context, but Stewart limited the relevant factors to a consideration of the private interest and government function in question.[405] Noticeably absent was any effort to balance these interests, or weigh, as Frankfurter had put it, the "hurt complained of" against the "good accomplished."[406] The dispositive factor was, rather, that government had traditionally exercised "unfettered control" as proprietor on its military bases.[407] Here, the record, such as it was, revealed that the superintendent of the base had acted under this authority, finding that the employee failed to meet security requirements.[408]

B. From Goldberg v. Kelly *to* Mathews v. Eldridge

By the early 1960s, the state of the doctrine was uncertain. There seemed now to be several due process methodologies in play whose precise requirements were somewhat uncertain. Justice Frankfurter in *McGrath* had emphasized the relevance of private and public interests but had added to these a grab-bag of factors including the reasons for government action, the balance of good and bad, and a close study of judicial precedent.[409] Justice Stewart, on the other hand, hewed closer to the traditional line but soldered to it a committed judicial deference.[410] Over the following ten years, the Supreme Court wandered between these poles, struggling mightily in a series of cases focused primarily on the availability, timing, and nature of hearings.

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401 *Id.* at 500, 506.
402 *See* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 126–27.
403 367 U.S. 886, 894 (1961).
404 *Id.*
405 *See id.* at 895.
406 *McGrath*, 341 U.S. at 163.
407 *McElroy*, 367 U.S. at 896.
408 *Id.* at 896–98.
409 *See generally McGrath*, 341 U.S. at 149–74.
410 *See McElroy*, 367 U.S. at 886–98.

Hearings had already become a kind of master concept in administrative law where they were mandated in various forms by federal statute as a means of supervising and democratizing the regulatory state. In these cases, however, the Court inserted hearings on due process grounds into "nonregulatory areas," effectively judicializing administration across a wide domain of governmental functions.[411] The loyalty program cases had transformed the hearing into something of a constitutional *idée fixe*.

My task in this last Section is to describe the fate of what remained of the choice-of-law structure of due process. What elements of this due process doctrine survived, if any, and what were replaced? How did the modern interest-balancing test emerge (if at all) out of the traditional materials comprising procedural due process analysis?

I will begin with *Goldberg v. Kelly*.[412] The question presented in *Goldberg* was whether the Constitution required an evidentiary hearing before the termination of welfare benefits.[413] From the perspective of this Article, the Supreme Court's answer to that question is significant for largely for two reasons. The first reason has to do with Justice Brennan's use of the term "interest."[414] Brennan knew that requiring a pre-termination evidentiary hearing was at odds with a substantial body of precedent holding post-deprivation hearings sufficient for due process purposes and even cited some of these cases in a footnote.[415] A pre-termination hearing might, nonetheless, be required if one could distinguish welfare from the property interests at stake in prior cases.[416] Brennan followed this tack, basing much of his analysis on what the lower court had called the "one overpowering fact" that "controls here"—the "brutal need" of the welfare recipient.[417] Welfare was the only means for a recipient to obtain "essential food, clothing, housing, and medical care," and interrupting the flow of these resources denied him "the very means by which to live."[418] The point was a powerful one and a remarkable moment of human empathy in the history of the Court.[419] It also suggested a shift in the vocabulary tracked above. Typically,

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[411] Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1268, 1273 (1975); *see also* Judith Resnik, *The Story of* Goldberg*: Why This Case Is Our Shorthand*, *in* CIVIL PROCEDURE STORIES 476 (Kevin M. Clermont ed., 2008).

[412] 397 U.S. 254, 261 (1970).

[413] *See id.* at 260.

[414] *See, e.g.*, *id.* at 263 (referring to the recipient's "interest").

[415] *See id.* at 263–64 n.10.

[416] *See, e.g.*, *id.* at 262 & n.8 (discussing how welfare entitlements look like property).

[417] *Id.* at 261 (quoting Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (S.D.N.Y. 1968)).

[418] *Id.* at 264–65 (citing Nash v. Fla. Indus. Comm'n, 389 U.S. 235, 239, 264 (1967)).

[419] *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 19–21 (1988) ("The standard rules for reviewing claims of unfair denials of government benefits may have been predictably applied in *Goldberg*, and those rules surely limited the discretion of officials at each stage of the proceedings. Such a product of formal reason, however, did not comport with due process. It did not do so because it lacked that dimension of passion, of empathy, necessary for a full understanding of the human beings affected by those procedures."); *see also* Resnik, *supra* note 411, at 494 (observing that although *Goldberg* says nothing of the plaintiffs and their situations, its readers "do understand their

private interests were defined by a body of law, paradigmatically the state law pertaining to property and entitlements. Here, however, what was at issue was not simply the recipient's interest in the sense of his property right to welfare benefits. That did not distinguish the welfare recipient from beneficiaries for whom a post-deprivation hearing constituted due process. What distinguished the case of welfare was how vital, and how important, that interest was to the recipient.[420] It was his only means of feeding himself and finding shelter and care, and this made its uninterrupted flow a matter of deep and special concern to him.[421]

Using "interest" in this way triggered changes downstream throughout Brennan's opinion. This is the second reason *Goldberg* is especially significant here. If interest did not mean a right held under a body of law but meant, rather, something highly *valued*, then the Constitution ought to mandate process when one was deprived of something highly valued, not just when one was deprived of a property right. To be sure, Brennan did maintain in *Goldberg* that termination of welfare benefits triggered due process because welfare was a statutory entitlement.[422] When it came time to formulate a general standard, however, Brennan stated that process was due anytime an individual was "condemned to suffer grievous loss"—Frankfurter's standard from *McGrath*.[423] The issue in *Goldberg*, and perhaps in many cases to come, was not really a deprivation of property, of a thing over which state law gave a legal claim, but the deprivation of something an individual deeply valued like food, shelter, or care. Surely, deprivation of something like this was a grievous loss, whether or not it was a privilege in the eyes of the law, and perhaps this framing would prove preferable to litigating the right-privilege distinction in every case to come.[424]

One can detect, as well, a connection between Brennan's use of interest and his approach to weighing or balancing that interest against the public or government interest. Although usage on this point can hardly be described as uniform, traditionally the practice of weighing interests entailed an examination of whether a summary proceeding was tailored to a putative public interest or whether additional process could be provided without impairing the public interest actually at stake, and, indeed, Brennan did advance arguments along these lines in *Goldberg*.[425]

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economic marginality and neediness, for the Court quoted liberally from Judge Feinberg's discussion of recipients' 'brutal need'").

[420] *See Goldberg*, 397 U.S. at 264.

[421] *See id.*

[422] *See id.* at 261–62.

[423] *Id.* at 262–63 (quoting Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

[424] *See* Resnik, *supra* note 411, at 484–85 (explaining that Charles Reich's thesis in *The New Property* had emerged from his work as a clerk for Justice Black on a case in which the Court had refused to extend due process protections to a physician whose license had been suspended after refusing to comply with a subpoena from the House Committee on Un-American Activities. Black thought that the deprivation of a license should trigger due process protections, since the right to practice was a "very precious" part of liberty).

[425] *See, e.g.*, *Goldberg*, 397 U.S. at 264 (arguing that "important governmental interests

Elsewhere in the opinion, however, he seemed, instead, to be evaluating the relative importance of conserving public resources and enabling everyone to fulfill his or her basic human needs.[426] The Justice did acknowledge that administrative cost was a relevant factor ("[t]he requirement of a prior hearing *doubtless involves some greater expense*," he wrote), but the language and reasoning here are wooden.[427] It was this treatment of cost, not just the fact of balancing, that raised Justice Black's hackles.[428]

The cases of this period evidence significant disagreement on the Court about Brennan's methodology in *Goldberg*, and, perhaps, some confusion about what form the analysis should take. In *Sniadach v. Family Finance Corp. of Bay View*,[429] for example, decided the term before *Goldberg*, the Court invalidated a wage garnishment procedure that lacked any opportunity for a pre-seizure hearing.[430] Writing for the Court, Justice Douglas observed that similar procedures had been upheld in cases involving extraordinary situations, but that no similar state interest was present here, nor the "statute narrowly drawn to meet any such" interest.[431] The analysis was suggestive of the older due process methodology; later in the opinion, however, Douglas advanced his case by quoting legislative sources describing the injustices of wage garnishment, again inspiring a rebuke from Justice Black in dissent.[432] In *Boddie v. Connecticut*,[433] initially argued the same term as *Goldberg* but decided the following year, Justice Harlan wrote that notice and hearing were required as "appropriate to the nature of the case" (older methodology), and criticized Connecticut for employing a system of filing fees that did little to advance public interests in preventing frivolous litigation and recouping costs (also older methodology).[434] Two months later, in *Bell v. Burson*,[435] Justice Brennan reasoned that it violated due process to suspend the license of a driver involved in an accident without first determining whether there was a reasonable possibility of a judgment against him, given that "*the only purpose* of the [relevant] provisions . . . is to obtain security from which to pay any judgments."[436] Completely missing was any mention of the hardship such a scheme

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are promoted by affording recipients a pre-termination evidentiary hearing"); *id.* at 267–68 (identifying the function of a pre-termination hearing and reasoning from this to its form).

[426] *See id.* at 264–65 (describing a long-standing national commitment to "foster the dignity and well-being of all persons within its borders").

[427] *Id.* at 266 (emphasis added).

[428] *See id.* at 278–79 (Black, J., dissenting) ("The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. . . . [T]he inevitable result of such a constitutionally imposed burden will be that the government will not put the claimant on the rolls initially . . . .").

[429] 395 U.S. 337 (1969).

[430] *Id.* at 342.

[431] *Id.* at 339.

[432] *Id.* at 340–41, 344–45.

[433] 401 U.S. 371 (1971).

[434] *Id.* at 378, 381 (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950)).

[435] 402 U.S. 535 (1971).

[436] *Id.* at 540 (emphasis added).

imposed, and only one sentence conceded that licenses "may become essential in the pursuit of a livelihood."[437] Yet, the next term, in dissenting from a per curiam remand of a disability benefits case—the subject that would later reach the Court in *Mathews*—Brennan filled ten pages of the U.S. Reports with a detailed policy analysis.[438]

The trend of requiring hearings in a broad range of administrative processes clearly triggered anxiety. Some of this was addressed by separating out, as a proper threshold question, whether the state had deprived an individual of a constitutionally protected liberty or property interest. Thus, in *Fuentes v. Shevin*,[439] Justice Stewart wrote that "[t]he right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth Amendment's protection."[440] The language clearly implied there were interests falling outside this protection—perhaps some of the "grievous losses" Brennan had hoped to include.[441] The same year in *Board of Regents of State Colleges v. Roth*,[442] Stewart described one such interest, which posed the question of whether an untenured professor was entitled to a hearing and explanation for the college's decision not to renew his contract.[443] Stewart began by criticizing the district court for "assessing and balancing the weights of the particular interests involved."[444] "Undeniably, the respondent's re-employment prospects *were of major concern to him*," wrote Stewart, but this was not the test for determining whether any process was constitutionally due.[445] The proper test looked "not to the 'weight' but to the *nature* of the interest at stake."[446] As we have seen, considering the weight of litigants' concerns was precisely what Brennan had concluded was relevant to determining "[t]he extent to which procedural due process must be afforded."[447] After *Roth*, however, constitutional protection could only be triggered by deprivation of a protected interest; Stewart's concession was to lengthen the list of qualifying interests.[448] Yet, even these efforts did little to stop the advance

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[437] *Id.* at 539. Professor Monaghan picks out this sentence in his reading, but if one compares the treatment in *Bell* with the attention the Court gave the issue of brute need in *Goldberg*, it seems misleading to do so. *See* Monaghan, *supra* note 348, at 407.

[438] *See* Richardson v. Wright, 405 U.S. 208, 213–28 (1972) (Brennan, J., dissenting).

[439] 407 U.S. 67 (1972).

[440] *Id.* at 84.

[441] The reasoning also worked to limit the proposition that it was not due process for the government to act arbitrarily, whether or not a protectable interest was at stake. *See* Davis, *supra* note 339, at 225–27.

[442] 408 U.S. 564 (1972).

[443] *Id.* at 568.

[444] *Id.* at 570.

[445] *Id.* at 570–71 (emphasis added).

[446] *Id.*

[447] Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970).

[448] The Court briefly adopted the view that a state might strip an entitlement of its constitutional protection by building summary procedures for its deprivation into the provision creating it. *See* Arnett v. Kennedy, 416 U.S. 134, 152–55 (1974). As Justice Rehnquist

of the constitutionally mandated pre-deprivation hearing, which in 1975 was extended to ten-day suspensions from school.[449]

Mathews, of course, was a reaction to this trend. In an article that appeared the summer before the case was argued, Judge Henry Friendly urged caution and observed that "procedural requirements entail the expenditure of limited resources, [and] at some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection."[450] The point was, at bottom, a bit of common sense, but Friendly thought it might be generalized. As he framed this general theory, the "required degree of procedural safeguards varies directly with the importance of the private interest affected" and the procedure's utility, while varying "inversely with the burden . . . of affording it."[451] Justice Powell, writing for the Court in *Mathews*, cited Friendly and incorporated the framework.[452]

It is a mistake, however, to conflate Powell's opinion in *Mathews* with Friendly's cost-benefit test. The opinion hardly reduces to that test, although one gets that impression from much of the commentary. First, note that unlike Friendly's test, Powell's formulation of the due process inquiry does not expressly involve cost-benefit analysis or balancing.[453] The word "balance" does not appear in the test.[454] It is remarkable how often this is overlooked. Powell's mandate is, rather, that determining "the specific dictates of due process generally requires consideration of three distinct factors."[455] He does not describe how those factors should be considered, why they are relevant, or what weight they should have in a decision calculus or cost-benefit analysis. The factors simply have to be considered. A court could presumably consider "the risk of an erroneous deprivation" of the private interest without, on reflection, according the matter any significant weight in its decision.[456] Later in the opinion, Powell does write of "striking the appropriate due process balance" and describes considerations relevant to "[t]he ultimate balance."[457] But the

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famously put it, the employee had to "take the bitter with the sweet." *Id.* at 154. The Court definitively rejected this view in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540–41 (1985).

[449] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975).

[450] Friendly, *supra* note 411, at 1276.

[451] *Id.* at 1278; *see also id.* at 1303 ("It is unfortunate that, five years after *Goldberg*, we have so little empirical knowledge how it has worked in its own field . . . . One would wish also to know the costs, both of administrative expenses that would not otherwise have been incurred and of continuation of unjustified payments, in relation to the benefits of injustices prevented." (footnote omitted)).

[452] *See* Mathews v. Eldridge, 424 U.S. 319, 343, 348 (citing Friendly, *supra* note 411, at 1303).

[453] *See id.* at 335 (outlining a test wherein the Court must consider three factors for a due process claim).

[454] *See id.*

[455] *Id.* at 334–35.

[456] *See id.*

[457] *Id.* at 347–48.

vocabulary here is simply a manner of speaking and has no implications for the analysis itself, as the Court's own previous usage of this term shows.[458]

Second, although Powell's test clearly envisions that courts will consider the financial benefit and cost of additional procedure, it is not limited to such factors.[459] In places this is merely implied; thus, courts must consider "the probable value, if any, of additional or substitute procedural safeguards," but value is not limited to financial cost.[460] A probable value of additional process could be enhancing the participatory dimension of an administrative decision, although Powell himself does not explore that possibility in *Mathews*.[461] Elsewhere, Powell is explicit that other values are at stake. "Financial cost alone is not a controlling weight," he says, although it is relevant.[462] The "ultimate balance involves a determination" of when judicial procedures are necessary "to assure fairness."[463]

Third, the core of the analysis in *Mathews* centers not around cost-benefit analysis but around the appropriateness or need for a pre-termination hearing.[464] Part of this involves a factual dispute between Powell's majority and Justices Brennan and Marshall over whether a pre-termination hearing serves the same error-preventing and corrective functions in the disability benefits context as it does in welfare. But another aspect of this dispute is whether a hearing is necessary for fairness. "All that is necessary," writes Powell, "is that the procedures be *tailored*" to the "capacities and circumstances" of those subject to it.[465] The tailoring criterion is familiar of course; here it is used to ensure a procedure advances both the private and public interests at stake. *Mathews*, then, is more capacious than it is usually presented to be.

CONCLUSION

Today, the doctrine of procedural due process is fractured more than it was at the time *Mathews* was decided. Not only is there significant variation in how the process due is determined (this we might reasonably expect), but there is significant disagreement about the proper scope of the *Mathews* test itself. The Supreme Court has developed a kind of domain-specific approach, treating procedural challenges

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[458] *See supra* notes 305–428 and accompanying text.

[459] *See supra* note 453 and accompanying text.

[460] *Mathews*, 424 U.S. at 335.

[461] Powell's argument focused primarily on "the risk of error inherent in the truth-finding process," exploring safeguards like evidentiary hearings and oral presentations. *See id.* at 344–45.

[462] *Id.* at 348.

[463] *Id.*

[464] The Court focuses on a pre-termination hearing's "safeguards" and "inadequa[cies]" before stating that "more is implicated . . . than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants." *Id.* at 345–46, 348.

[465] *Id.* at 349 (emphasis added) (quoting Goldberg v. Kelly, 397 U.S. 254, 268–69 (1969)).

in criminal proceedings[466] and military tribunals[467] with heightened deference. Lower courts have also employed institution-specific precedents to evaluate due process claims.[468] In 1991, Justice Scalia applied *Hurtado* and *Murray's Lessee* to a due process case involving punitive damages,[469] and over ten years later, in *Hamdi v. Rumsfeld*,[470] he complained vigorously about using *Mathews* ("a case involving . . . *the withdrawal of disability benefits!*") to resolve a due process challenge to military confinement in the "war on terror."[471] There remains, I think, significant disagreement about what the proper test for determining the sufficiency of procedural due process and how federal courts should resolve these challenges. Some of this disagreement is, as they say, merely semantic since *Mathews* is flexible enough to accommodate very different analyses. If *Mathews* commands that courts consider private and public interests, I see no reason a court could not do so by looking principally at history or precedent to define and limit the interests putatively at stake. Nor is *Mathews* purely instrumental, as I have argued above, but it expressly contemplates considering fairness and, impliedly, other process values as well. It follows, I think, that the choice-of-law principles examined here could be fit into the *Mathews* framework, as well as being applied in those domains that presently fall outside the scope of *Mathews* entirely.

This raises an obvious question: If procedural due process is treated as a choice-of-law doctrine, does it answer any of the criticisms of *Mathews* with which I began? There are certainly reasons to be suspicious. Brainerd Currie, probably the father of modern choice of law, thought the problem of the true conflict (a case where the laws of two sovereigns both applied but were contradictory) was essentially political.[472] As he put it, "[W]here several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly."[473] Currie counseled that courts simply apply the law of the forum, that

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[466] *See* Medina v. California, 505 U.S. 437, 443, 446 (1992) (stating that it is appropriate to exercise substantial deference to the legislative judgments in this area); Patterson v. New York, 432 U.S. 197, 201–02 (1977) (noting that the way the states administer justice is subject to due process only where "it offends a [fundamental] principle of justice" (quoting Speiser v. Randall, 357 U.S. 513, 523 (1958))).

[467] *See* Weiss v. United States, 510 U.S. 163, 177 (1994) (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1987)) (writing that the military context proscribes the highest level of judicial deference to Congress's decisions).

[468] *See, e.g.*, Hennessy v. City of Melrose, 194 F.3d 237, 250 (1st Cir. 1999) (applying *Goss v. Lopez*, 419 U.S. 565 (1975), to a school claim).

[469] *See* Pac. Mut. Life Ins. v. Haslip, 499 U.S. 1, 37–38 (1991) (Scalia, J., concurring in judgment). Justice O'Connor applied *Mathews* in dissent. *Id.* at 53–60 (O'Connor, J., dissenting).

[470] 542 U.S. 502 (2004).

[471] *Id.* at 575 (Scalia, J., dissenting) (alteration in original).

[472] *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176 (1959).

[473] *Id.*

is, the law of their own sovereign, and this advice earned him considerable criticism.[474] For many years following, the lost ark in conflicts of law was a properly judicial method for resolving true conflicts, or, equivalently, proof that the issue was not political after all.[475] I have no idea if the ark was ever found, but one might reasonably ask the following question: If resolving a true conflict is a political decision, how could it help to treat due process a choice-of-law problem? Wouldn't that run straight into the criticism that *Mathews* involves judicial usurpation of a legislative function?

The cases surveyed here suggest a somewhat different perspective. Weighing interests, as Currie describes it,[476] is naturally characterized as a political function; indeed, this is the seed of discomfort with *Mathews*. But the devices employed by courts of law to choose between procedural norms in the periods examined here did not reduce to weighing interests or evaluating the merits of competing policies. They were, rather, judicial in pedigree. Thus, in the first period, courts sought to dissolve apparent conflicts between administrative procedures and the law of the land by characterizing the procedural regime in question, which they described as either common law or summary in nature.[477] This characterization relied on the sort of historical and policy considerations familiar in judicial decision-making at common law. Where a true conflict existed—where the agency in question employed summary procedures that were not law of the land—the state's constitution secured the primacy of the common law. The people themselves, through their organic law, decided the question Currie thought political. Much the same can be said for the second period, although federal courts took a somewhat different approach to apparent conflicts during this time. In this period, courts sought to dissolve conflicts between administrative procedures and due process by drawing a distinction between public and private interests, and then assessing the fit of summary procedures with the ostensible public interest.[478] Where regulation served a public interest, procedures adapted to that interest did not conflict with due process. Both the public-private distinction and analysis of fit are familiar forms of legal analysis. And again, where these devices showed the presence of a "true conflict," the Constitution decided it in favor of the common law.

In this sense, the criticism that courts lack the necessary expertise to develop administrative procedural regimes simply ignores what courts can do, and long have done, in examining existing procedures.[479] A regulatory procedure can be measured

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[474] *See id.*

[475] *See, e.g.*, Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1585–86 (1985) ("During the last twenty-five years there has been a revolution in choice-of-law practice in the United States," resulting in widespread judicial interpretations); Kramer, *supra* note 12, at 315 (noting that "state lawmakers usually say nothing about how to resolve conflicts of law," forcing courts to find solutions).

[476] *See* Currie, *supra* note 472, at 177.

[477] *See* Treanor, *supra* note 45, at 557.

[478] *See* FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 276 (1949).

[479] *See* Vermeule, *supra* note 8, at 29.

against its ostensible statutory purpose; that purpose can be compared to historical examples of governmental function or measured against basic maxims or rules of thumb describing the legitimate scope of government power. Deviations from earlier procedures and traditional mechanisms of administration can be scrutinized; and core value commitments can be articulated and employed to measure the acceptability of procedural innovations. These are accepted judicial techniques of checking governmental authority and trench no more than usual on domains of administrative expertise. They should not be conflated with ground-level fabrication of operational procedures for which significant expertise is required. Where courts seek to impose these structures, they should do so using models provided by agencies themselves.

Choice-of-law techniques apply even where the question appears to be one of quantum of process. Consider, for example, a case in which the question before the court is whether a particular adjudicatory proceeding requires a neutral decision maker. On a standard formulation, the interest-balancing approach asks whether the increased accuracy generated by a neutral decision maker, multiplied by the interest of the claimant, is greater than the cost to the government of providing the process.[480] Since one can simply add the accuracy enhancement of additional processes to the first term in the inequality, the approach is generalizable. From a choice-of-law perspective, in contrast, a court could inquire into the nature of the proceeding (civil, criminal, military, disciplinary), drawing on history and analogical reasoning. It could assess whether the addition of a neutral decision maker would disrupt or transform the proceeding given the ostensible or actual public interests it served. This approach is generalizable, as these are questions that can be repeated for any particular process—yet, to the degree that the analysis is recognizably judicial, it does not raise the same concerns as interest balancing. And, in fact, this is something like the approach the Supreme Court recently took when a due process challenge based on the absence of neutral decision makers came before it.[481]

Yet, whether it answers the criticisms of *Mathews* to treat procedural due process as a choice-of-law doctrine, and whether it is feasible to return to such a doctrine, it is surely instructive to recall the history described above. Procedural due process was not always a matter of interest balancing, but neither was it simply a consultation of history for its own sake or to divine an imagined "original meaning." It was, at least in part, a practical task of choosing between procedural regimes, or choosing bits and pieces of both in the manner of dépeçage, performed in the judicial forum, before parties in litigation and before the public, using the resources available to judges. Here we see the core of the effort by American courts of law to take on, and domesticate for their forum, the project of enforcing the organic law of the people in a republic.

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[480] *See, e.g.*, BREYER ET AL., *supra* note 4, at 672.

[481] *See, e.g.*, Weiss v. United States, 510 U.S. 163, 177 (1994) (discussing due process in military proceedings).