DUE PROCESS, REPUBLICANISM, AND DIRECT DEMOCRACY

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Voters in twenty-four states may propose and enact legislation without any involvement from representative branches of government. In recent decades, voters have used popular lawmaking to eliminate groups’ liberty and property interests on topics such as marriage, education, public benefits, and taxes. This Article contends that these deprivations undermine principles historically associated with procedural due process, thus raising serious questions about the constitutionality of initiatives that eliminate groups’ protected interests.

The Fourteenth Amendment’s Due Process Clause embodies principles of fairness that include deliberation, dignity, and equality. The historical salience of these principles is evidenced in colonial charters and state constitutions, the Federalist Papers, antebellum cases interpreting state due process clauses, antebellum cases governing popular lawmaking, and legislative debates leading up to the Fourteenth Amendment’s ratification. These principles should inform the doctrine’s approach to defining procedural fairness.

When deprivation of liberty or property is at stake, the republican system of representative government protects these principles of fairness better than most contemporary plebiscites. Indeed, in a series of vastly understudied cases in the decade leading up to the Fourteenth Amendment’s ratification, at least eight state courts expressed normative doubts about popular lawmaking. While these cases were not premised on due process clauses, these courts nonetheless invoked principles associated with due process and republicanism, providing some evidence of the dominant understanding of these terms during that era.

What is more, the requirement of due process of law, at a minimum, prohibits deprivations of liberty or property that violate other constitutional provisions. There is an enduring debate about whether the initiative process violates the non-justiciable Republican Form Clause. This Article seeks in part to inform that debate. And if, in fact, the initiative process violates the nonjusticiable Republican Form Clause, initiatives that deprive individuals of liberty or property violate the justiciable Due Process Clause.

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INTRODUCTION

The Fourteenth Amendment’s Due Process Clause is generally understood to embody certain principles of procedural fairness. Guided by these principles, courts have crafted procedural requirements designed to guard against the state’s unwarranted elimination of property and liberty interests. Legislation, however, is ostensibly exempt from scrutiny under procedural due process analysis. That is, when legislatures deprive populations of liberty or property, the jurisprudence of procedural due process is not implicated. Alongside practical concerns, federal courts have reasoned that the normal system of representative government involves deliberative procedures designed to protect private rights. Under this view, well-ordered republican process is due process.

This Article questions this absence of procedural scrutiny with respect to certain uses of direct democracy, that system of legislative change which sometimes eliminates rights but eludes representative process. Through initiatives, voters may pass laws directly without open deliberation in a legislative forum. Further, in many states there

1 U.S. CONST. amend. XIV, § 1.
3 See infra Part I.C (discussing judge-made law on the exemption of legislation from many procedural due process requirements).
4 See id. (addressing the courts’ reasoning in several cases on the value of a deliberative legislative body in the context of procedural due process considerations as they pertain to legislation).
5 I use the term “direct democracy” to refer primarily to the initiative process, in which proposed legislation is placed before voters and enacted without approval from legislative bodies. While some scholars also refer to the referendum process as direct democracy, that process is less “direct” because it requires legislative action before the popular vote. See Elizabeth Garrett, Direct Democracy, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 137, 137 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (calling initiatives, referenda, and recalls “direct democracy” and providing helpful distinctions among the three). In this sense, I use the term “direct democracy” in a manner roughly synonymous with what Julian Eule called “substitutive democracy.” See Julian N. Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1510, 1551 (1990) (“Substitutive direct democracy is direct democracy in its purest current form. Here the voters can completely bypass the legislative and executive branches of government.” (emphasis omitted)). For clarity, when referring collectively to both initiatives and referenda, I use the term “popular lawmaking.”
6 See Garrett, supra note 5, at 137 (explaining the mechanism by which a proposal is placed on the ballot via direct initiative).
are substantial restrictions that prevent elected representatives from amending or repealing laws enacted by popular vote.7

The initiative process gained prominence in the United States around the dawn of the twentieth century.8 Twenty-four states have implemented the process, initially as a means of wresting control away from oligarchs and plutocrats who were viewed as having undue influence on the political system.9 In recent decades, however, voters have sometimes also invoked popular votes to restrict liberty in areas ranging from marriage rights to public benefits for immigrants.10 My inquiry is whether (or when) the elimination of liberty and property interests—without the protections of representative government—undermines republican values historically associated with procedural due process.

The Fourteenth Amendment’s Due Process Clause demands that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”11 This provision has inspired a famous and controversial line of cases, in which the Supreme Court has con-
cluded that the Due Process Clause protects substantive fundamental rights, placing them beyond the reach of the state. This project focuses on the Due Process Clause’s less famous line of jurisprudence, in which courts review the scope of procedural rights, rather than substantive rights. In procedural due process cases, the relevant question is: What process is due before a state may deprive a person of life, liberty, or property?

This Article contends that principles of procedural fairness are thwarted when statewide initiatives eliminate liberty or property interests, raising serious questions about the constitutionality of such measures. This is so for two reasons. First, the Fourteenth Amendment’s Due Process Clause has historically embodied principles of fairness. This quest for fairness has led courts to identify and exalt procedural mechanisms such as deliberation and transparency that protect against the arbitrary or undignified deprivation of private rights. And with notable symmetry, representative government has


14 An analysis of which states have various types of citizen lawmaking can be found in Daniel A. Smith & Dustin Fridkin, Delegating Direct Democracy: Interparty Legislative Competition and the Adoption of the Initiative in the American States, 102 AM. POL. SCI. REV. 333 (2008) (undertaking an empirical analysis of the emergence of citizen lawmaking over time); see also Daniel B. Rodriguez, Localism and Lawmaking, 32 RUTGERS L.J. 627, 646–73 (2001) (discussing the distinctions between strategic processes in legislative and initiative lawmaking).

15 See, e.g., Wally’s Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 557 (1831) (stating that the state due process clause was “intended to secure to weak and unpopular minorities and individuals equal rights with the majority”).
traditionally been understood to incorporate these republican values. By contrast, these principles fare worse when an unelected mass removes liberty or property interests from a person or class.16

This view is buttressed by a series of nineteenth-century cases that have astonishingly escaped scholarly attention. In the decades leading up to the Fourteenth Amendment’s ratification, courts expressed doubts about whether popular lawmaking could adequately guard against the unwarranted deprivation of liberty and property—concerns that were particularly acute with respect to electoral minorities. While these cases were based on state constitutional provisions, courts often invoked principles associated with both republicanism and procedural due process when issuing these views. Their reasoning and dicta are valuable because they provide a sense of the dominant understanding of both republicanism and due process during the era, as well as the relationship between these two concepts. State courts rendered such opinions in New York,17 Texas,18 Michigan,19 Iowa,20 Vermont,21 Pennsylvania,22 Indiana,23 and Delaware.24

16 See Sherman J. Clark, Commentary, A Populist Critique of Direct Democracy, 112 Harv. L. Rev. 434, 435–37 (1998) (questioning the assumption that direct democracy represents the “voice of the people”); Eule, supra note 5, at 1520 (explaining that “[l]egislatures have a variety of structures, rules, and norms” and “one must not discount the impact of deliberation and the opportunities for compromise and amendment”); Clayton P. Gillette, Plebiscites, Participation, and Collective Action in Local Government Law, 86 Mich. L. Rev. 930 (1988) (documenting others’ critiques of direct democracy and finding that plebiscites work best in small groups where all interests participate in the deliberation process); Jane S. Schacter, The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy, 105 Yale L.J. 107, 157 (1995) (“[T]he direct lawmaking process is not alone in its capacity to inflame majorities to the detriment of socially subordinated minorities, but the structural attributes of direct democracy powerfully enable this phenomenon.” (footnote omitted)); Cynthia L. Fountaine, Note, Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative, 61 S. Cal. L. Rev. 733, 748 (1988) (“Direct democracy does not give minority groups with limited resources a sufficient opportunity to effectively communicate their position to the general public.”).

17 See Thorne v. Cramer, 15 Barb. 112, 118–19 (N.Y. Gen. Term 1851) (asserting that, with the establishment of constitutional governments, the people “parted with their original right of making laws, and vested that right in a senate and assembly”).

18 See State v. Swisher, 17 Tex. 441, 448 (1856) (finding direct citizen lawmaking “repugnant to the principles of the Representative Government formed by our Constitution”).

19 See People v. Collins, 3 Mich. 343, 351–52 (1854) (determining the constitutionality of a law submitted to the people for their approval). The court divided four to four on whether to declare the law unconstitutional. However, all agreed that legislative power could not be delegated, and those who found the law constitutional stressed that a bill passed by the legislature can become law regardless of the outcome of the popular vote.

20 See Santo v. State, 2 Iowa 165, 205 (1855) (noting a split among state courts on the constitutionality of acts enacted by a vote of the people, as opposed to a representative governmental process).

21 See State v. Parkes, 3 Liv. Law Mag. 13, 13 (Vt. 1854) (concerning the constitutionality of a prohibitory liquor law). The law at issue made the date of the legislation’s enact-
Second, the requirement of due process of law at a minimum prohibits deprivations of liberty or property that violate other constitutional provisions. A debate has long raged as to when or whether the initiative process violates the Republican Form Clause (or Guarantee Clause).25 The Supreme Court ruled that this clause was nonjusticiable contingent upon a vote. Although this was ruled permissible, the court stated “[I]f the mode of proceeding under consideration is equivalent to giving legislative power to the people at large, it is, no doubt, in conflict with the constitution.” Id. at 14.

22 See Parker v. Commonwealth, 6 Pa. 507, 517–18 (1847) (discussing the constitutionality of a liquor law to be enacted upon the popular vote of designated districts), overruled by Locke’s Appeal, 72 Pa. 491 (1873).

23 See Meshmeier v. State, 11 Ind. 482, 488 (1858) (per curiam) (“The [liquor] prohibition enacted, was absolute, unless consent to retail should be given by the voters. . . . The prohibition, then, was to depend upon the votes that might be polled, and this is equivalent to a law which is to take effect only upon being adopted by a vote.”).

24 See Rice v. Foster, 4 Del. (4 Harr.) 479, 486 (1847) (“Popular rights and universal suffrage . . . afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society.”). Of these cases, only Rice has received serious attention. See, e.g., Evan J. Criddle, When Delegation Begets Domination: Due Process of Administrative Lawmaking, 46 GA. L. REV. 117, 132 n.59 (2011) (citing the assertion in Rice that republican government not only provides checks and balances among the branches of government, but also protects the people themselves, particularly minority interests); Jed Handelsman Shugerman, Economic Crisis and the Rise of Judicial Elections and Judicial Review, 123 HARV. L. REV. 1061, 1130 n.423 (2010) (same).

25 See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”); Charles R. Brock, Republican Form of Government Imperiled: Decisions Yielding Political Department Exclusive Power to Enforce Republican Guarantee of Constitution Create Danger and Summon to Patriotic Activity, 7 A.B.A. J. 133, 133 (1921) (critiquing the initiative process in Colorado as a violation of the Republican Form Clause and deploring that the state supreme court had found this not to be a justiciable question); Philip P. Frickey, The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere, 34 WILLAMETTE L. REV. 421, 427 (1998) (identifying policy tensions between direct democracy and republican government, including, inter alia, the apparent inconsistency of direct democracy with the text of the Constitution); Hans A. Linde, When Initiative Lawmaking Is Not “Republican Government”: The Campaign Against Homosexuality, 72 OR. L. REV. 19, 19–20 (1993) (claiming that an antihomosexuality initiative process in Oregon in the early 1990s was unconstitutional under the Republican Form Clause); Glenway Maxon, Is the Referendum Anti-Republican?, 72 CENT. L.J. 378, 379–81 (1911) (discussing the history of the formation of the Republican Form Clause); Anya J. Stein, Note, The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power, 37 HASTINGS CONST. L.Q. 343 (2010) (discussing initiative processes in California, Oregon, and Colorado, and contending that state courts could have found such processes unconstitutional under the Republican Form Clause); see also Kristin Feeley, Comment, Guaranteeing a Federally Elected President, 103 NW. U. L. REV. 1427, 1438 n.60 (2009) (“Direct democracy at the state level may or may not violate the guarantee of republican state government, but direct democracy at the national level, such as a national referendum, almost certainly violates the Guarantee Clause.”). But see Akhil Reed Amar, The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem, 65 U. COLO. L. REV. 749, 749–50, 756–59 (1994) (identifying majoritarianism, which accommodates direct democracy, as the central pillar of “Republican Government”); Robert G. Natelson, A Republic, Not a Democracy?
ciable in the mid-1800s, a conclusion that courts reaffirmed in the early 1900s when plaintiffs challenged statewide initiatives in federal court.\footnote{26} Still, if the initiative process violates the Republican Form Clause—a question this Article is intended to inform, but not to answer conclusively—then initiatives that eliminate liberty or property implicate the Fourteenth Amendment’s Due Process Clause. After all, the Due Process Clause is justiciable.

In reaching these conclusions, I do not intend to gainsay or trivialize problems of representative government.\footnote{27} Indeed, Sanford Levinson has famously argued that there are many normatively problematic antidemocratic practices built into the Constitution.\footnote{28} And sensitivity is required before deepening or expanding such practices. Nor do I take the position that all uses of direct democracy are...

\footnote{26 See, e.g., Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149–51 (1912) (finding that the question of whether citizen lawmaking violated the Republican Form Clause constituted a nonjusticiable political question).


\footnote{28 Sanford Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It), at 6–7 (2006) (identifying, for example, the Electoral College and Senate as potentially undemocratic).}
undesirable. But a now-canonical question in due process jurisprudence is whether the additional procedures a litigant seeks would actually result in fewer erroneous deprivations, as well as “the probable value, if any, of additional or substitute procedural safeguards.”

And despite the problems that plague representative government, in comparison, direct democracy is less effective at protecting against the arbitrary or oppressive deprivation of private rights, especially the rights of electoral minorities. As an empirical matter, it has been documented in political science literature that minorities fare worse in plebiscites than before legislatures.

See, e.g., Jon C. Teaford, The Rise of the States: Evolution of American State Government 87 (2002) (“Direct legislation . . . [is] a legal expression of the people’s lack of faith in their chosen representatives. This skepticism about the state legislature was, in fact, a continuing feature of the twentieth century . . .”). In this spirit, surely there are uses of direct democracy that seek to expand liberty rather than restrict it. Cf. Robert D. Cooter, The Strategic Constitution 143–48, 195 (2000) (describing how direct democracy has sometimes improved policy alignment); Matsusaka, supra note 9, at 84, 91 (noting that initiative states can select policies to bring spending levels into alignment with constituent preferences more quickly than noninitiative states, for which this alignment hinges on the effectiveness of the legislators).


See Frickey, supra note 25, at 438–43 (discussing the use of direct democracy campaigns to prevent state legislatures from enacting laws to protect the civil rights of minorities, especially gays and lesbians); see also Daniel A. Farber, Introduction: “Practical Reason” and the Scholarship of Philip P. Frickey, 98 Calif. L. Rev. 1111, 1115 (2010) (“[A]lthough he did not romanticize state legislatures, Frickey portrayed them as significant forums for deliberation about public policy.”); cf. Dan T. Coenen, The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules, 77 Fordham L. Rev. 2835, 2851–52 (2009) [hereinafter Coenen, Pros and Cons] (observing instances in which the Supreme Court’s jurisprudence has been concerned with who is the best decisionmaker to engage in certain types of lawmaking). It is worth noting, however, that one of the critiques of the federal legislature is that its rules may protect electoral minorities’ interests too much, in ways that undermine the original meaning of Article I. See, e.g., Dan T. Coenen, The Originalist Case Against Congressional Supermajority Voting Rules, 106 Nw. U. L. Rev. 1091, 1130–31 n.188 (2012) (“The essential problem with supermajority rules . . . is that they channel controlling voting power to a minority of legislative dissenters.”); see also Emmet J. Bondurant, The Senate Filibuster: The Politics of Obstruction, 48 Harv. J. On Legisl. 467, 487 (2011) (observing that it is “unlikely” that the Framers meant for either chamber of Congress to be able to adopt internal procedural rules that would allow for the filibuster as it presently exists).

See, e.g., Todd Donovan, Direct Democracy and Campaigns Against Minorities, 97 Minn. L. Rev. 1730, 1741 (2013) (“A number of anti-minority referendums and initiatives provide examples of popular backlash against minority gains achieved via legislatures and courts.”); Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 Am. J. Pol. Sci. 245, 258 (1997) (listing initiatives seeking to repeal existing gay rights laws or prohibit new ones); Donald P. Haider-Markel et al., Lose, Win, or Draw? A Reexamination of Direct Democracy and Minority Rights, 60 Pol. Res. Q. 304, 307–11 (2007) (showing that direct democracy more often resulted in the preclusion or elimination of gay marriage rights, as compared to state legislative bills and amendments). The fact that minorities’ liberty and property interests consistently fare worse in plebiscites than in legislatures “suggests that
In light of the procedural differences between the initiative process and the normal legislative process, the increased risk of deprivations that electoral minorities face in plebiscites is not surprising. As a doctrinal matter, courts have long insisted that liberty and property not be eliminated without procedures that encourage deliberation, transparency, the creation of a record, and judicial review. There are significant barriers to each of these procedural mechanisms in the context of the initiative process.

Commentators have sometimes implicitly recognized these inadequacies using an equal protection lens, as have courts. But far less

33 See Bruce E. Cain & Kenneth P. Miller, The Populist Legacy: Initiatives and the Undermining of Representative Government, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33, 50 (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson, eds., 2001) (highlighting procedural aspects of the legislative process that afford greater minority rights than the initiative process). Those authors attributed the disparity between the outcomes that minorities face in plebiscites as compared with legislatures to “the checks and balances system of representative government.” Id. Procedural differences included “bicameralism, the executive veto, and supermajority voting rules [that] require the building of broad coalitions (larger than a simple majority)[.]” Other procedural differences included “publicly recorded votes and electoral competition [which] build accountability into the system.” Id. Moreover, “the mere presence of minorities in the legislature may deter the worst forms of legislative prejudice.” Id.

34 Derrick Bell penned one of the earliest and most important scholarly contributions advancing the equal protection deficiencies of direct democracy. Derrick A. Bell, Jr., The Referendum: Democracy’s Barrier to Racial Equality, 54 WASH. L. REV. 1, 23 (1978) (arguing that the Supreme Court should recognize and address discriminatory measures within initiatives and referendums). Others have thoughtfully built upon his work. See, e.g., Robin Charlow, Judicial Review, Equal Protection and the Problem with Plebiscites, 79 CORNELL L. REV. 527, 609–25 (1994) (arguing that the Equal Protection Clause justifies different judicial protection for certain minority groups in the plebiscitary process); Priscilla F. Gunn, Initiatives and Referendums: Direct Democracy and Minority Interests, 22 URB. L. ANN. 135, 158–59 (1981) (proposing a heightened level of scrutiny for direct democracy and citizen lawmaking procedures that have a disproportionate impact on minority groups); Sylvia R. Lazos Vargas, Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities’ Democratic Citizenship, 60 O HIO ST. L.J. 399, 410 (1999) (arguing that courts should apply strict scrutiny to successful ballot measures when “the initiative has unduly burdened a minority group’s civic participation”).

frequently have commentators or courts alluded to the deficiencies of nonrepresentative lawmaking using due process jurisprudence. Comparatively, procedural due process is an underdeveloped but important method of addressing these deficiencies when the liberty or property interests of an electoral minority are at stake. This Article initiates and advances such development.

As for methodology, “fidelity to text and principle” or “framework originalism,” a theory of constitutional interpretation advanced by Jack Balkin, informs this analysis. What did the words of the Due
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Process Clause most naturally mean at the time of the Fourteenth Amendment’s ratification? And if the Clause contains principle-based terms of art, what were those original principles and how can we ensure they are carried out today?39

In accordance with this method, the argument is not that the authors of the Fourteenth Amendment intended to ban popular lawmaking. This Article is instead premised on the original principles associated with due process in the years around the Constitution’s ratification and in the decades leading up to the Fourteenth Amendment’s ratification. My inquiry reveals symmetry between principles historically associated with due process and principles historically associated with representative government. Due process jurisprudence has historically emphasized the importance of procedural features designed to reduce the likelihood of arbitrary deprivations of private rights, especially those of electoral minorities. And relatedly, representative government was generally thought to facilitate procedural features—like deliberation and transparency—that would reduce the risk of arbitrary or undignified deprivations of an electoral minority’s liberty or property interests. To the extent popular lawmakers, then, is used to eliminate liberty or property interests, and to the extent popular lawmaking lacks equivalent procedural features, this method of depriving groups of private rights should arouse constitutional suspicion.

This form of originalism differs, then, from certain well-known models. It differs from that famously advanced a generation ago by L. REV. 1941 (2012) [hereinafter Smith, Awakening] (identifying original principles of the Republican Form Clause and applying them to state sovereign immunity); Fred O. Smith, Jr., Note, Crawford’s Aftershock: Aligning the Regulation of Nontestimonial Hearsay with the History and Purposes of the Confrontation Clause, 60 STAN. L. REV. 1497 (2008) (identifying the original principles animating the Confrontation Clause and exploring ways the doctrine could be more faithful to those principles).

39 This Article is less concerned with the Fifth Amendment’s Due Process Clause, which is not directly implicated here because there are no instances of nationwide direct democracy. See Robert D. Cooter & Michael D. Gilbert, A Theory of Direct Democracy and the Single Subject Rule, 110 COLUM. L. REV. 687, 694 n.31 (2010) (citing Dennis Polhill, The Issue of a National Initiative Process, INITIATIVE & REFERENDUM INST., http://www.iandrinstitute.org/National%20I&R.htm (last visited Mar. 11, 2014)) (discussing the absence of a U.S. national initiative); Schacter, supra note 16, at 154 (“Framing metademocratic interpretive rules for the initiative process requires identifying the ways in which the democratic aspirations of the direct lawmaking process are compromised.”). But see BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 281–89 (1984) (proposing a national initiative process); Ronald J. Allen, The National Initiative Proposal: A Preliminary Analysis, 58 NEB. L. REV. 965, 1001–07 (1979) (same). For the purposes of this project, the older Fifth Amendment Due Process Clause is discussed to the extent it contextualizes what the Thirty-Ninth Congress and ratifying states would have understood when enacting the Fourteenth Amendment.
scholars such as Raoul Berger or Robert Bork. Both explicitly sought to vindicate the original intentions of the Framers themselves. The “fidelity to text and principle” approach comes closer to, but still ultimately differs from, the model of originalism most commonly associated with Justice Antonin Scalia. To be sure, consistent with Justice Scalia’s approach, this Article investigates “the original meaning of the text, not what the original draftsmen intended.” And this meaning may sometimes rely on principles. As I have written elsewhere, “if the Constitution invokes a broad principle (like republicanism), interpreters [should] investigate the reasons the adopters chose specific language, and exercise fidelity to the key concepts embodied in the constitutional text.” The point of departure is that “fidelity to text and principle” places great emphasis on the following idea: “When the Constitution uses vague standards or abstract principles, we must apply them to our own circumstance in our own time.”

What about critics of originalism, those who believe that the definition of constitutional terms can change with time? For at least three reasons, this Article may nonetheless inform scholarly discourse even for those who are skeptical of originalism. First, as a historical matter, literature about direct democracy often accepts as a basic premise that, with the exception of town halls, popular lawmaking was introduced in the United States in the late 1890s. The experiments with

40 See Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 402–10 (2d ed. 1997) (advancing the role of “original intention”); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 17 (1971) (“The first [approach] is to take from the document rather specific values that text or history show the framers actually . . . intended and which are capable of being translated into principled rules.”).


43 Smith, Awakening, supra note 38, at 1950. Jack Balkin describes this methodology as follows:

The method of text and principle requires fidelity to the original meaning of the Constitution, and in particular, to the rules, standards, and principles stated by the Constitution’s text. It also requires us to ascertain and to be faithful to the principles that underlie the text, and to build out constitutional constructions that best apply the constitutional text and its associated principles in current circumstances.

44 Balkin, Living Originalism, supra note 38, at 3.

45 Balkin, Living Originalism, supra note 38, at 7.

46 See, e.g., Howard R. Ernst, The Historical Role of Narrow-Material Interests in Initiative Politics, in Dangerous Democracy? The Battle Over Ballot Initiatives in America 1, 2 (noting that South Dakota was the “first state to grant its citizens the initiative process in 1898”); Garrett, supra note 5, at 137 (same).
popular lawmaking in the decades before the ratification of the Fourteenth Amendment generally receive nary a mention, and they serve as fertile ground for additional historical investigation.

Second, as a methodological matter, because framework originalism guides this investigation, this Article does not dismiss the possibility that popular lawmaking more faithful to the original principles of due process would arouse less constitutional suspicion. Further, this Article ultimately applies, rather than rejects, doctrinal tools of modern jurisprudence that use new means to align lawmaking with the original principles of due process.46

Third, and relatedly, one does not have to be an originalist to conclude that due process requires procedural protections designed to guard against the arbitrary or undignified deprivation of liberty or property. The Supreme Court continues to emphasize this view in contemporary due process jurisprudence,47 just as courts did at the time of the Founding.48 Likewise, while this Article focuses on historical reasons to privilege representative government over plebiscites when liberty or property are at stake, one does not have to be an originalist to conclude that deliberation and transparency might help reduce the likelihood that a person will be deprived of liberty or property in an arbitrary way, or in a manner that offends individual dignity.

To be sure, that last premise is not self-evident. As acknowledged, the legislative process in the United States faces withering criticism. Trust in Congress is at a historic low.49 Moreover, articles co-authored by Cass Sunstein have observed in recent years that deliberation among members of like-minded groups can push people into extreme positions, causing increased group polarization.50 I offer two

46 See generally infra Part V (applying procedural due process to initiative lawmaking on marriage rights, deprivation of voting rights, and tax reform).
47 See infra Part I.A (discussing Goldberg v. Kelly and Mathews v. Eldridge as innovations to procedural due process that endorsed this emphasis on procedural protections).
48 See infra Part II.B (examining the courts' historical use of due process to invalidate legislation that unduly interfered with vested liberty or property interests).
50 See, e.g., Edward L. Glaeser & Cass R. Sunstein, Extremism and Social Learning, 1 J. LEGAL ANALYSIS 263, 264 (2009); Thomas J. Miles & Cass R. Sunstein, The New Legal
responses at the outset. First, as noted, electoral minorities fare less well in popular initiatives than in legislatures. If this is not attributable to procedural differences between these forms of legislative change—i.e., deliberation, transparency, possibility of amendments—it is not readily apparent what else accounts for this result. Second, Sunstein’s argument focuses on deliberation among those who share a common ideology. He and a co-author actually find evidence that deliberation among ideologically diverse groups does not similarly exacerbate polarization. This evidence, then, does not clearly undermine the idea that deliberation amongst representatives of different groups can be a valuable means of protecting disadvantaged groups.

Part I describes the chief contours of due process jurisprudence. Courts have sought to promote fairness through procedural protections designed to prevent the arbitrary, unequal, and undignified deprivation of private interests. Legislation is generally exempt from these requirements of procedural fairness under the Due Process Clause. The legislative process itself is designed to guard against the unwarranted mass trampling of rights. As four Justices explained in Missouri v. Jenkins, when it comes to lawmaking, citizens “are given notice and a hearing through their representatives.” Yet, while it is true that representative government is designed to protect these important interests, it is not evident that the same is true of direct democracy. Among other reasons, plebiscites are less transparent, less amenable to judicial review, and less prone to deliberation.

__Realism, 75 U. CHI. L. REV. 831, 837 (2009) (discussing the possibility that the ideological bent of a circuit court panel will influence a judge sitting on that panel to vote in a more liberal or conservative fashion); David Schkade, Cass R. Sunstein & Reid Hastie, What Happened on Deliberation Day?, 95 CALIF. L. REV. 915, 916–17 (2007). All three pieces cite, among other sources, ROGER BROWN, SOCIAL PSYCHOLOGY 203–26 (2d ed. 1986).__

51 See Glaeser & Sunstein, supra note 50, at 268–70 (discussing results from experiments with homogenous groups).

52 Id. at 304–05 (discussing ideologically diverse panels of appellate judges).

53 See, e.g., Daniels v. Williams, 474 U.S. 327, 331–32 (1986) (“By requiring the government to follow appropriate procedures when its agents decide to ‘deprive any person of life, liberty, or property,’ the Due Process Clause promotes fairness in such decisions.”).

54 See, e.g., Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) (holding that it is “impracticable” for all individuals to participate directly in the creation of legislation, and that the court will instead look at whether the proper procedures have been followed).


56 This lack of transparency renders judicial review more difficult. See Bell, supra note 34, at 14–15 (noting the lack of political constraints on individuals in initiatives or referendums, as compared to the legislative process); Eule, supra note 5, at 1561 (discussing courts’ reluctance to inquire into racial prejudice motivating individual voters); Schacter, supra note 16, at 110 (“Consider, for example, the mass size of the electorate; the absence of legislative hearings, committee reports, or other recorded legislative history; and the
are therefore more likely to result in the deprivation of an electoral minority’s interests. 58

Part II canvasses pre-Fourteenth Amendment state court decisions invalidating legislation on procedural due process grounds. These courts overturned legislation that, among other things, unfairly applied retroactively, 59 dissolved vested property interests without a hearing, 60 and disparately singled out “weak and unpopular” minorities for unequal treatment. 61 These cases speak to the ordinary meaning of the words “due process” at the time of the amendment’s ratification, and suggest that any categorical prohibition against examining legislation on due process grounds is historically unsupportable. These cases also further ratify the historical importance of deliberation, equality, and dignity in due process analysis.

Part III examines the historical relationship between representative government and due process. Even before the Fourteenth Amendment’s ratification, representative government was often
understood to protect principles associated with both due process and republicanism: deliberation, equality, and dignity. Colonial and state charters of rights in Rhode Island and Pennsylvania, respectively, expressly identified the relationship between due process and representative government.62 Further, at the Founding, James Madison famously hailed representative government as a means of protecting rights, in part because he believed that deliberation would help protect against self-interested or prejudiced lawmaking. Further, legislators explicitly relied upon notions of republicanism and representative government in enacting the Fourteenth Amendment.63

Part III also presents a series of antebellum state court cases governing more modest attempts at popular lawmaking. A number of state legislatures passed laws requiring a popular vote as an antecedent to enforcement. State courts were asked whether such legislation violated then-existing state constitutions. Eight state courts offered reasoning or dicta that revealed their view that the popular lawmaking undermined republicanism, deliberation, equality, dignity, or the integrity of private rights. It is true that many state constitutions were amended decades later to allow for popular lawmaking. These cases nonetheless offer evidence of what jurists in the mid-1800s thought about popular lawmaking’s compatibility with principles of due process and republicanism. They are important for their evidentiary, rather than their precedential, value.

Part IV opens with a discussion of the Republican Form Clause. Whether the initiative process comports with the Republican Form Clause is a debate with fierce advocates on both sides.64 Indeed, constitutional titans such as Erwin Chemerinsky and Akhil Reed Amar have found themselves on opposite sides of this discourse.65 This Article is not intended to resolve that debate. Rather, this Article

62 See PA. CONST. of 1776, ch. 2, § 17 (providing for the selection of representatives);
ACTS AND ORDERS MADE AT THE GENERAL COURT OF ELECTION (May 19–21, 1647), reprinted in 1 AMERICA’S FOUNDING ChARTERS: PRIMARY DOCUMENTS OF COLONIAL AND REVOLUTIONARY ERA GOVERNANCE 148, 150 (Jon L. Wakelyn ed., 2006) (establishing in Rhode Island regular democratic government as a means of securing the “lawful right and liberty” of man).


64 See infra Part IV (presenting the debate on whether direct democracy runs afoul of republicanism and the implications such an inquiry may hold for procedural due process).

65 Compare Erwin Chemerinsky, Challenging Direct Democracy, 2007 MICH. ST. L. REV. 293, 301 (“[T]he initiative process should be declared unconstitutional because it violates the Republican Form of Government Clause.”), with Amar, supra note 25, at 759 (“Until its proponents offer more evidence than scraps from Number 10 and its sequel Number 14, we are entitled to say . . . that the Anti-Direct Democracy reading of the Republican Government Clause of Article IV is ‘not proven.’” (footnote omitted)).
argues that the principles articulated in the antebellum state cases governing popular lawmaking should play a larger role in that discourse. Further, this Article argues for the first time that if direct democracy violates the nonjusticiable Republican Form Clause, then certain uses of direct democracy violate procedural due process. This is of potential practical importance because unlike the Republican Form Clause, the Due Process Clause is justiciable. Finally, I argue that even if the initiative process does not violate the Republican Form Clause, there are still serious questions as to the constitutionality of initiatives that eliminate liberty or property interests under the Due Process Clause. It remains the case that representative government has been historically understood to provide deliberative filters that lead to increased protection of the liberty and property interests of minorities.

Part V identifies modern uses of direct democracy that implicate this vision of procedural due process. I focus on three issue areas: removal of marriage rights, disparate taxation of groups such as corporations or high-income earners, and deprivation of vested public benefits from specific groups. These examples demonstrate why procedural due process can helpfully supplement, but not replace, meaningful equal protection scrutiny of discriminatory voter initiatives.

I

THE UNFINISHED “DUE PROCESS REVOLUTION”

Hailing principles of fairness, the Supreme Court ushered significant shifts into due process jurisprudence in the 1970s. The Court stopped short, however, of requiring procedural scrutiny of legislation that deprived individuals or groups of liberty or property interests. Our system of representative government, federal courts have reasoned, is imbued with legislative process. This Part examines that jurisprudence, and explains why this logic collapses in the context of the initiative process. Thus, whatever the proper scope of procedural scrutiny of the normal legislative process, additional scrutiny is warranted when initiatives purport to deprive individuals or groups of constitutionally cognizable interests.

A. The Due Process Revolution

During the 1960s and 1970s, scholars successfully advocated for at least two significant innovations to procedural due process jurispru-

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dence in civil cases. The first innovation, generally associated with Charles Reich, pushed courts to expand the definition of what constituted property. Reich contended that alongside real estate, chattels, and investment assets stood government-created entitlements around which people organized their lives. The Supreme Court cited and endorsed this expanded view of property in the 1970 case *Goldberg v. Kelly*. The Court held that state-created entitlements to welfare constituted property. The state therefore could not deprive a recipient of these entitlements absent a pretermination hearing. The extant jurisprudence continues to recognize that states may create constitutionally cognizable liberty or property interests that warrant some level of due process.

The second innovation centered on what type of hearing a person is due when the state deprives her of liberty or property. The most influential scholarly voice on this topic was Henry J. Friendly, who...
served as one of the nation’s leading jurists.73 In his 1975 lecture-
turned-article, Some Kind of a Hearing,74 he advocated for a sliding
scale of procedural protections depending on the severity of the gov-
ernment deprivation.75 Before outlining eleven traits of procedurally
fair hearings,76 he noted that the legal necessity of a hearing depends
in part on: (1) “the cost of providing an evidentiary hearing,” (2) “the
likelihood or the value of more accurate determinations,” and (3) the
significance of the deprivation itself.77

These observations also left a significant imprint on procedural
due process jurisprudence. In Mathews v. Eldridge, the Court cited
Judge Friendly’s article and issued an opinion that largely tracked his
analysis.78 Under Mathews, procedural due process demands that
courts consider the cost of providing additional procedural protec-
tions, the weight of the deprivation, and whether additional proce-
dures could make a meaningful difference in the outcome.79 This
balancing test remains the law today.80

B. Principles of the Due Process Revolution

As the Court expanded the reach of the Due Process Clause, it
reasoned that “‘[d]ue process,’ unlike some legal rules, is not a tech-
nical conception with a fixed content unrelated to time, place, and

73 See Brad Snyder, The Judicial Genealogy (and Mythology) of John Roberts:
Clerkships from Gray to Brandeis to Friendly to Roberts, 71 OHIO ST. L.J. 1149, 1151
74 Friendly, supra note 2, at 1279–95 (discussing the constitutional elements of a fair
hearing).
75 Id. at 1278–79 (“As we go down the second list from the more severe actions to the
less, the needle would point to fewer and fewer requirements on the list of required
safeguards.”).
76 These eleven traits include an unbiased tribunal, notice of the proposed action and
the grounds for it, an opportunity to present reasons why the proposed actions should not
be taken, the right to call witnesses, the right to know the evidence against oneself, the
right to have a decision based only on the evidence presented, the right to counsel, the
making of a record, a written statement of reasons, public attendance, and judicial review.
Id. at 1279–95; see also Sonia K. Katyal & Jason M. Schultz, The Unending Search for the
Optimal Infringement Filter, 112 COLUM. L. REV. SIDE BAR 83, 102 (2012) (highlighting the
eleven elements of a fair hearing discussed in Judge Friendly’s seminal article).
77 Friendly, supra note 2, at 1275–76; see also Henry J. Friendly, Indiscretion About
Discretion, 31 EMORY L.J. 747, 756 (1982) (“[T]he answer to the constitutional inquiry
‘what process is due?’ depends upon the costs and benefits of procedural safeguards in
different instances . . . .”).
79 Id. at 341, 348.
80 Turner v. Rogers, 131 S. Ct. 2507, 2517–18 (2011) (“[T]hese factors include (1) the
nature of the private interest that will be affected, (2) the comparative risk of an erroneous
deprivation . . . with and without additional or substitute procedural safeguards, and (3) the
nature and magnitude of any countervailing interest . . . .” (citing Mathews, 424 U.S. at 335)
(internal quotation marks omitted)).
circumstances." Instead, the Court emphasized that “due process is flexible and calls for such procedural protections as the particular situation demands.” In lauding the importance of flexibility, several Justices simultaneously noted that certain norms of “basic fairness” helped guide determinations about what processes are “due” and under which circumstances. Dignity, equality, and deliberative decisionmaking were among the norms of fairness the Court cited during the Due Process Revolution. By appealing to norms of fairness, courts could help reduce the likelihood of arbitrary deprivations of property or liberty.

The Court relied on these three norms of fairness, for example, when it concluded that state-created entitlements were constitutionally protected property under the Fourteenth Amendment. In Goldberg v. Kelly, the Court explained that among the important interests at stake were “the dignity and well-being” of the plaintiffs. Relatedly, the norm of equality animated the Court’s reasoning, for state-created entitlements could “help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”

Moreover, the Court noted how deliberative forums aid fair decisionmaking, especially settings in which individuals orally advance ideas and arguments. “[O]ral presentations . . . permit the recipient to mold his argument to the issues the decision maker appears to regard as important.” Thus, the Court concluded, “a [welfare] recipient must be allowed to state his position orally” before the state removes his or her benefits.

C. The Lawmaking Exemption

In Bi-Metallic Investment Co. v. State Board of Equalization, the Court held that legislation of general applicability does not require compliance with many of the hallmarks of procedural due process, such as notice and an opportunity to be heard. Instead, the Court

83 Mackey v. Montrym, 443 U.S. 1, 21 (1979) (Stewart, J., dissenting) (noting that “the concept of basic fairness . . . underlies the constitutional due process guarantee”); Mathews, 424 U.S. at 348 (“The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.”).
85 Id. at 265.
86 Id. at 269.
87 Id.
88 239 U.S. 441, 445 (1915).
concluded that such procedural protections are only required when a smaller class of individuals is impacted in an “exceptionally” different way than others.\footnote{Id. at 446; see also Londoner v. City and Cnty. of Denver, 210 U.S. 373, 385–86 (1908) (concluding that for a specific, individual tax assessment, “due process of law requires that at some stage of the proceedings . . . the taxpayer shall have an opportunity to be heard”).} It is simply impracticable, in a complex society, to award a hearing to every citizen each time the government issues a law or rule that impacts property.\footnote{Bi-Metallic, 239 U.S. at 441.}

In 1976, the peak of the Due Process Revolution, a case reached the Court that tested the vitality of Bi-Metallic. At issue in City of Eastlake v. Forest City Enterprises, Inc. was an ordinance that permitted a town’s residents to rezone specific parcels of property through a referendum.\footnote{City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 670 (1976); see also id. at 680 (Powell, J., dissenting) (‘[H]ere the only issue concerned the status of a single small parcel owned by a single ‘person.’ This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair.”). Two older cases prohibited ordinances that permitted one third of adjacent landowners to block development of a property. Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122–23 (1928) (describing the ordinance as “repugnant to the due process clause”); Eubank v. City of Richmond, 226 U.S. 137, 144 (1912) (calling the ordinance “an unreasonable exercise of the police power”). The Court distinguished those cases, noting that they involved “the delegation of legislative power, originally given by the people to a legislative body, and in turn delegated by the legislature to a narrow segment of the community, not to the people at large.” Eastlake, 426 U.S. at 677; cf. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (permitting delegation of power to a body where an “intelligible principle” accompanies the directive); Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (same).}

The United States Supreme Court rejected this argument. It reasoned that a referendum is not a delegation of power because all power originates from the people themselves.\footnote{Id. at 462 U.S. at 672.} In this sense, the Court did not reason that all legislation is exempt from due process scrutiny. Nor did the Court take the position that all exercises of direct democracy comport with procedural due process.\footnote{Id.} In the con-
text of a referendum, a deliberative legislative body first reviews the legislation before voting to pass the issue to the voters. The decision does not speak to the procedural issues at stake when a government takes away protected interests in the absence of such a deliberative forum. What of an argument that depends not on the fact that “the people” are making decisions, but instead on the process by which the people made said decisions?

In any event, the Supreme Court and lower courts have subsequently reaffirmed the legal doctrine that generally exempts legislation from procedural due process scrutiny. The Court held in State Board for Community Colleges v. Knight that “[t]he Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.”95 The First Circuit similarly explained in Garcia-Rubiera v. Fortuño that “[w]here property is affected by generally-applicable legislative action, property owners are not entitled to notice above and beyond the notice provided by the enactment and publication of the statute.”96

Alongside pragmatics, a reason given for this prohibition is that the legislative process provides citizens with adequate protections. The D.C. Circuit has reasoned that “the legislative process provides all the process that is constitutionally due before Congress may enact a provision.”97 A number of other appellate courts have also adopted this reasoning.98 As four Justices wrote in Missouri v. Jenkins, “[t]axation by a legislature” does not implicate due process because “citizens who are taxed are given notice and a hearing through their representatives.”99

This is not to say the Court never engages in procedural scrutiny of legislation. But when it does, the Court does not rely on procedural due process. Dan T. Coenen has provided a useful taxonomy of the cases in which the Supreme Court has invoked procedure-conscious

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

96 665 F.3d 261, 272 (1st Cir. 2011).
98 Rea v. Matteucci, 121 F.3d 483, 485 (9th Cir. 1997) (“When a state alters a state-conferring property right through a legislative process, the legislative determination provides all the process that is due.” (citations omitted) (internal quotation marks omitted)); McMurtry v. Holladay, 11 F.3d 499, 504 (5th Cir. 1993) (“[W]hen a legislature extinguishes a property interest via legislation that affects a general class of people, the legislative process provides all the process that is due.”).
“semisubstantive constitutional rules.”\textsuperscript{100} Courts have sometimes provided “how” rules, which are rules permitting Congress to pass legislation if it “corrects judicially identified shortcomings in the lawmaking process.”\textsuperscript{101} At other times, the Court has provided “constitutional ‘who’ rules, which steer policy choices from one nonjudicial decision maker to another.”\textsuperscript{102}

Yet none of these semisubstantive rules invoke the Due Process Clause.\textsuperscript{103} And as a result, they represent a crude manner by which to achieve the principle of fairness that animates procedural due process.\textsuperscript{104} Applying the Due Process Clause, the Supreme Court has concluded that such fairness is thwarted when, among other things, deprivations of liberty occur arbitrarily,\textsuperscript{105} as a means of oppression,\textsuperscript{106} or in a manner that undermines individuals’ dignity.\textsuperscript{107} Categorically exempting legislation from this jurisprudence represents a missed opportunity not only to affirm dignity and equality, but also to apply those values to a class of procedures through which the government exercises profound power.

\textsuperscript{100} See Coenen, \textit{Pros and Cons, supra} note 31, at 2842–53 (discussing the different forms of semisubstantive review used by the Supreme Court).

\textsuperscript{101} \textit{Id.} at 2843; see, e.g., Gregory v. Ashcroft, 501 U.S. 452, 464 (1991) (declining to apply a federal law to state judges absent a clear statement from Congress).


\textsuperscript{103} Coenen, \textit{Pros and Cons, supra} note 31, at 2839.

\textsuperscript{104} As discussed in Part V, the invocation of a categorical “who” rule which prevents the people themselves from ever using the initiative process when liberty or property interests are at stake would not be as attentive to the specific factual circumstances of a case in the manner procedural due process permits. See \textit{infra} note 395 and accompanying text.

\textsuperscript{105} Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection of the individual against arbitrary action of government.” (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889))); Hurtado v. California, 110 U.S. 516, 527 (1884) (contending that Fourteenth Amendment due process was “intended to secure the individual from the arbitrary exercise of the powers of government”).

\textsuperscript{106} Den \textit{ex dem.} Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 277 (1855) (noting that the Fifth Amendment’s Due Process Clause helps ensure that government power is not “used for purposes of oppression”); see also Edward S. Corwin, \textit{The Doctrine of Due Process of Law Before the Civil War}, 24 HARV. L. REV. 366, 367 (1911) (discussing how modern due process protects individuals from the “unreasonable, unnecessary, and arbitrary” exercise of state power (citing Lochner v. New York, 198 U.S. 45 (1905))).

\textsuperscript{107} Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) (“From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”); cf. Fuentes v. Shevin, 407 U.S. 67, 81 (1972) (“[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person’s right to enjoy what is his, free of governmental interference.”); Rochin v. California, 342 U.S. 165, 174 (1952) (barring conduct “offensive to human dignity” under substantive due process).
D. Direct Democracy and the Lawmaking Exemption

As noted, courts have given two reasons for the rule that “the normal legislative process satisfies the due process clause for making class-wide decisions.” The first is that our legislative processes would grind to a halt if the government needed to provide notice or hearings to every individual impacted by legislation. The second is that, in any event, people do receive process when legislation is passed. Our system of representative government is itself designed to protect against the arbitrary invasion of rights.

It is not apparent that those rationales apply when states enact laws without the “normal legislative process.” Government would not grind to a halt if laws were passed through the representative government rather than the initiative process. Twenty-six states survive without it, and 99.7% of state laws are passed by state legislatures. Further, the initiative process evades the procedural protections of representative government. Under the initiative process, in twenty-four states, people may place proposals on the ballot and turn those proposals into law without the involvement of legislatures. In North Dakota, for example, a proposal may be placed on the ballot if supporters gather signatures from 2% of voters. This absence of legislative involvement undermines the notion that individuals receive a deliberative, transparent hearing.

Moreover, laws passed in this manner often take on a superior status to laws passed through representative means. In California, initiatives are neither amendable nor repealable by the legislature. In

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108 Marusic Liquors, Inc. v. Daley, 55 F.3d 258, 263 (7th Cir. 1995); see also Atkins v. Parker, 472 U.S. 115, 143 (1985) (Brennan, J., dissenting) (“Congress may reduce the entitlement level or alter the formula through the normal legislative process, and that process pretermits any claim that Congress’ action constitutes unconstitutional deprivation of property.”).

109 See supra notes 89–90 and accompanying text (stating that due process only requires a hearing when rights of a distinct smaller class are impacted “exceptionally,” but not every time the government issues a law or rule that affects property).

110 Infra Part II.B.


112 MATSUSAKA, supra note 9, at 147 app. 1, tbl. A1.1.

113 Natelson, supra note 25, at 808.

114 MATSUSAKA, supra note 9, at 147 app. 1, tbl. A1.1.

115 Id.
Arizona, the legislature is prohibited from amending an initiative unless the amendment furthers the purpose of that initiative; and even then, amendment requires three-fourths of the state house and state senate.\(^{116}\) Arkansas, Michigan, North Dakota, and Washington similarly require either two-thirds or three-fourths of their state legislatures to amend laws passed through this form of direct democracy.\(^ {117}\) And these are the rules with respect to statutory initiatives—not constitutional amendment initiatives, where the rules for legislative change are generally even more onerous.\(^ {118}\)

This circumvention and constraint of legislatures severely undermines the notion that in the context of lawmaking, representative government provides the process that is constitutionally mandated. There are procedural protections that exist in legislatures that are less prevalent in plebiscites. Among the traits that Judge Friendly identified as hallmarks of fair process were judicial review, the making of a record, and unbiased tribunals.\(^ {119}\) Representative government comes closer to reflecting those traits than does direct democracy. Accordingly, when an individual or minority’s constitutional interests are at stake, representative government provides greater access to the types of procedural mechanisms that promote dignity, equality, and deliberative decisionmaking.

1. **Judicial Review and Record-Making**

Judicial review and statutory interpretation are more difficult in the context of direct democracy because of the sacrosanct principles of free speech and privacy at the voting booth.\(^ {120}\) Consequently, there is necessarily less transparency in plebiscites than in legislatures.\(^ {121}\)
As with traditional legislation, judges must sometimes evaluate the constitutionality of ballot initiatives. “[V]oters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation.”122 Judges may therefore hold the state accountable for unconstitutional initiatives and legislative enactments. Unlike traditional legislation, however, the lack of a legislative history in the plebiscite context complicates a number of constitutional inquiries courts make.

Courts often review legislative history to determine whether the procedural record is consistent with substantive constitutional provisions.123 When the Supreme Court overturned aspects of the Violence Against Women Act, for example, the Court looked to the congresional record to determine whether it demonstrated that states had failed to adequately address violence against women.124 “Congress’ findings,” the Court concluded, “indicate that the problem [addressed] does not exist in all States, or even most States.”125

Constitutional tests of congressional power are not the only moments in which the courts look to legislative history. Courts are often called upon to evaluate legislative intent, especially when determining whether legislation comports with the First or Fourteenth Amendment.126 A court may strike down legislation if it finds that the
law was enacted with the purpose of promoting religion,\footnote{See, e.g., Stone v. Graham, 449 U.S. 39, 41–43 (1980) (per curiam) (holding that a Kentucky statute requiring the posting of the Ten Commandments in school classrooms had a “pre-eminent” religious purpose and thus violated the Establishment Clause (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971))).} expressing naked animus,\footnote{See, e.g., Romer v. Evans, 517 U.S. 620, 632 (1996) (holding unconstitutional a Colorado constitutional amendment nullifying and prohibiting antidiscrimination legislation on the basis of sexual orientation because “its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests”); see also U.S. Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).} or subjugating certain groups.\footnote{See Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (striking down a state law prohibiting the education of children in a foreign language, noting that “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue”); see also Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (describing racial classifications in antimiscegenation laws as “measures designed to maintain White Supremacy” and holding that the law unconstitutionally “restrict[ed] the rights of citizens on account of race”); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (concluding that the racially discriminatory enforcement of a statute was inexplicable on any grounds “except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified”).}

For example, in 2011, Judge Myron Thompson cited the legislative record when enjoining enforcement of an Alabama law that “essentially prohibit[ed] individuals who cannot prove their citizenship status from staying in their manufactured homes.” The court cited a legislative record that reflected stereotypes about those of Mexican heritage. One legislator complained during the legislative debate, for example, that he “saw . . . about 30 [Mexicans] get out of a car one day . . . [he] thought it was a circus.” “In this statement,” Judge Thompson noted, “there is a stereotype commonly associated with Mexicans.”

This approach of looking to the legislative record is not new. In United States Department of Agriculture v. Moreno,\footnote{413 U.S. 528 (1973).} the United States Supreme Court looked to statements in the legislative record to show Congresspersons’ animus toward “hippies.”\footnote{Id. at 543 (“The legislative history of the Act indicates that the ‘unrelated’ person provision of the Act was to prevent ‘essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps—so-called ‘hippies’ or ‘hippy communes’—from participating in the food stamp program.” (quoting 116 CONG. REC. 42003 (1970))).} Similarly in 1982, a federal judicial panel reviewed the legality of a Georgia redistricting...
plan under the Fourteenth Amendment and the Voting Rights Act. To divine legislative intent, the court found the words of the then-Chairman of the state’s reapportionment committee useful. Chairman Joe Mack Wilson had flatly explained to his colleagues during the reapportionment process that he did not “want to draw nigger districts.” Wilson’s words served as unusually candid evidence of racially motivated intent. “Representative Joe Mack Wilson is a racist,” the court concluded in its findings of fact.

There is a resounding absence of such a record when voters directly enact measures. Complicating matters further, a number of courts have concluded that attempting to discover the intentions of voters who pass measures is not only unmanageable, but impermissible. Voters have a constitutional right to vote how they please in secrecy. The Fifth Circuit has reasoned that “an inquiry into the motives of voters may very well constitute an unwarranted and unconstitutional undermining of one of the most fundamental rights of the citizens under our constitutional form of government.” The Sixth Circuit has similarly concluded that “[s]ince a court cannot ask voters how they voted or why they voted that way, a court has no way of ascertaining what motivated the electorate.”

In recent decades, scholars have explored reasons beyond judicial review that make it important to create a transparent record before taking away a person’s rights. These include dignity and confidence in the legitimacy of the system that resulted in such a deprivation.

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136 Id. at 501, 516–17.
137 Id. at 501.
138 Id. at 500. Generally, the legislative record does not reveal unconstitutional motivations as nakedly as Wilson’s words did. These records serve as a helpful guide to courts nonetheless.
139 See Eule, supra note 5, at 1555–56 (highlighting the absence of public deliberation in substitutive plebiscites); see also Schacter, supra note 16, at 119–20 (discussing the absence of a legislative record in the context of direct legislation and its impact on judicial interpretation).
140 See, e.g., D’Aurizio v. Borough of Palisades Park, 899 F. Supp. 1352, 1359 n.5 (D.N.J. 1995) (“Whether voter secrecy is ‘nonconstitutional’ raises a serious question.”); Kirksey v. City of Jackson, 506 F. Supp. 491, 498–99 (S.D. Miss. 1981) (discussing the propriety of judicial inquiry into the motivation of the electorate and concluding that such an inquiry would be improper), aff’d, 663 F.2d 659 (5th Cir. 1982), decision clarified on denial of reh’g, 669 F.2d 316 (5th Cir. 1982).
141 Kirksey, 663 F.2d at 662 (internal quotation marks omitted).
142 Arthur v. City of Toledo, 782 F.2d 565, 574 (6th Cir. 1986); see also Eule, supra note 5, at 1561 (citing Arthur with emphasis on protection of the secret ballot).
143 See Jerry L. Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U. L. Rev. 885, 901 (1981) (arguing that procedural systems in administrative law should guarantee equality of process in order to promote the dignity of affected individuals); Martin H. Redish & Lawrence C. Marshall, Adjudicatory Independence and the
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When a person’s rights are taken, he or she often looks to the procedural mechanisms that preceded the deprivation for legitimacy. In the judicial context, the openness of these proceedings is among these markers of legitimacy. As Judith Resnik observed, transparent proceedings remind the public that all people are “equally entitled to the forms of procedure offered to others, so as to mark their dignity and to accord them the respect and fairness due to all persons.” Open legislative proceedings respect these values of dignity and legitimacy in a way that secret ballots do not.

2. Unbiased Tribunal

The chambers of representative government come closer to reflecting unbiased tribunals than voting booths. To be sure, legislators are not impartial. As James Madison noted, the House of Representatives is the “branch of the federal government . . . dependent on the people” and “should have an immediate dependence on, and an intimate sympathy with, the people.” He later added that legislators generally “deriv[e] their advancement from their influence with the people” and would oppose “innovations in the government subversive of the authority of the people.”

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Values of Procedural Due Process, 95 YALE L.J. 455, 484 (1986) ("[E]ven an inequality in procedure that does not relate to the outcome of the case could be deemed an affront to dignitary values.").


145 See Judith Resnik, Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s), 5 LAW & ETHICS HUM. RTS. 2, 6 (2011) (discussing the legitimacy of the open court both historically (in Roman law) and currently, as compared with “closed military courts”).

146 Id.


Nonetheless, legislators take oaths to protect the public good and act in a manner consistent with the Constitution.\textsuperscript{149} Voters do not. Legislators are generally not permitted to vote on legislation in which they have a pecuniary interest. Voters are. As Judge Linde explained, “[e]lected lawmakers neither have nor claim authority to legislate for their own or their families’ private interests. There is a difference between deciding to reduce taxes on one’s constituents and deciding to reduce taxes on oneself.”\textsuperscript{150}

3. Deliberation

In \textit{Jones v. Bates}, Judge Stephen Reinhardt succinctly identified the lack of deliberative filters attendant to the initiative process.\textsuperscript{151} Before an initiative is enacted, there are no committee hearings; no analysts to provide dispassionate data about the proposal; no debates with most decisionmakers present; and no dual representative bodies that separately consider the bill.\textsuperscript{152} In addition, “no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power . . . ; and it is far more difficult for the people to ‘reconvene’ to amend or clarify the law if a court interprets it contrary to the voters’ intent.”\textsuperscript{153}

For these reasons, deliberative democracy holds a traditionally cherished place in the history of the Republic. The Founders believed that the deliberative filters enumerated above would help ensure reason prevailed above both passions and the types of special interests James Madison called factions.\textsuperscript{154} Modern observers of the legislative

\textsuperscript{149} U.S. \textsc{Const.} art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .”); \textit{see also} Hans A. Linde, \textit{State Courts and Republican Government}, 41 Santa Clara L. Rev. 951, 952 (2001) (referencing these oaths).


\textsuperscript{151} \textit{Jones v. Bates}, 127 F.3d 839, 861 (9th Cir.) (overturning an initiative on the grounds that it provided insufficient notice about its effects), \textit{rev’d on other grounds, en banc}, 131 F.3d 843 (9th Cir. 1997). The court reversed the decision, \textit{en banc}, but left Judge Reinhardt’s observations about the benefits of the legislative process undisturbed.

\textsuperscript{152} \textit{Id.} at 860.

\textsuperscript{153} \textit{Id.; see also} Linde, \textit{supra} note 150, at 1739 (“More systematic critics point to the absence of the deliberative process that was intended to be the hallmark of American lawmaking, predicated on knowledgeable examination, committee study, consultation, debate, compromise, and passage by more than one institution.”).

\textsuperscript{154} \textit{The Federalist} No. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961) (explaining that the principle of representation serves “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations”); \textit{see also} Eule, \textit{supra} note 5, at 1527 (“[T]he deliberative process offers time for reflection, exposure to
process may rightly question whether deliberative filters have served their noble function. This does not mean, however, that deliberation has lost all importance.

Perhaps one of the most important functions of deliberation, even in our broken representative system, is that it frequently results in an amended final version of a bill. This arises from an adversarial process between those who favor and those who oppose a bill, allowing them to foresee, and reduce, the negative impacts of legislation. In a representative democracy, amendments can result in legislation that reflects considered judgment and compromises that may well embody the will of the people in a way that a mere yes-or-no ballot simply cannot. On the other hand, in popular lawmaking, voters “can adopt no amendments, however obvious may be their necessity,” Judge Willard of the New York Court of Appeals identified this concern roughly a decade before the Fourteenth Amendment’s ratification.

In other instances, amendments may result in a bill that can command a majority of legislators, while simultaneously protecting the dignity, liberty, or property interests of a class. For example, when the New York legislature voted to permit same-sex marriage, representatives were able to amend the law to protect the freedom of religious groups, making clear that the law would not force them to endorse or bless any marriage. In contrast, a simple vote of “yes” or “no” would have provided no opportunity for religious protection.

Empirical evidence also suggests a practical importance between the legislative process and the initiative process—especially when a minority’s rights are at stake. Political scientists have shown, for example, that the rights of gays and lesbians generally fare worse in plebiscites than legislatures. Most aptly, voters have sometimes used the initiative process to take away gains won in the legislative

155 See, e.g., Akhil Reed Amar, Note, Choosing Representatives by Lottery Voting, 93 Yale L.J. 1283, 1304 (1984) (claiming that legislative government may be deliberative but may skew the legislature against discrete minorities).


157 Barto v. Himrod, 8 N.Y. 483, 495 (1853) (Willard, J).

158 See, e.g., Geraldine Baum, N.Y. Legalizes Gay Marriage; Rights Groups Hope the Move Will Revive a National Push that Seemed to be Stalled, L.A. Times, June 25, 2011, at AA.1 (noting “exemptions for religious organizations that do not want to acknowledge or extend benefits to gays who marry”).

159 E.g., Haider-Markel et al., supra note 32 (finding that direct democracies more often resulted in the preclusion or elimination of gay marriage rights than in legislatures).
process and courts. These examples include voter decisions to remove rights from groups in the areas of housing, employment, education, and marriage.

II

LAWMAKING

A. Beyond the Substantive Due Process Debate

Because the Fourteenth Amendment became law in 1868, and because no state adopted the initiative process until thirty years later, there are limits to what historical sources can teach about the Due Process Clause’s application to direct democracy. There are, however, two relevant topics that history can illuminate. The first, examined in this Part, is whether a categorical exemption of legislation from procedural scrutiny is historically supportable. The second, examined in Part III, is whether due process embodies principles that exalt representative government above other forms.

Recent years have ushered in significant scholarly discussion about the historical use of due process to invalidate legislation. These discussions have generally focused on whether an originalist understanding of the due process clause would support a controversial doctrine called “substantive due process.” The doctrine, which supports cases like Roe v. Wade, holds that some substantive rights are so fundamental that no amount of process could justify their elimination.

160 See, e.g., Todd Donovan, Direct Democracy and Campaigns Against Minorities, 97 MINN. L. REV. 1730, 1741 n.64 (2013) (describing examples).

161 See, e.g., Raymond E. Wolfinger & Fred I. Greenstein, The Repeal of Fair Housing in California: An Analysis of Referendum Voting, 62 AM. POL. SCI. REV. 753 (1968) (discussing voters’ decision to overturn California’s Rumford Act, which banned racial discrimination by realtors and apartment owners).

162 See, e.g., Barbara S. Gamble, Putting Civil Rights to a Popular Vote, 41 AM. J. POL. SCI. 245, 258 (1997) (identifying repealed antidiscrimination employment ordinances against gay men and lesbians).

163 E.g., Donovan, supra note 160 (identifying a number of education initiatives: California’s Proposition 209, Arizona’s Proposition 107, Washington’s Initiative 200, Michigan’s Proposition 2, and Nebraska’s Initiative 424.)

164 See, e.g., Maine Citizen’s Guide to the Referendum Election, MAINE.GOV (Nov. 3, 2009), http://www.maine.gov/sos/cec/elec/2009/intent09.htm (asking referendum voters whether they “want to reject the new law that lets same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages”).


167 Roe v. Wade, 410 U.S. 113 (1973) (recognizing a substantive due process right to abortion).
In 2009, Frederick Mark Gedicks offered a historical defense of substantive due process under the Fifth Amendment, and a more equivocal defense under the Fourteenth Amendment. A year later, Ryan C. Williams marshaled evidence that some version of substantive due process is supportable under the Fourteenth Amendment’s Due Process Clause, but not that of the Fifth Amendment. Then in 2012, Nathan Chapman and Michael McConnell argued that while there is strong historical support for invalidating legislation on due process grounds, the version of substantive due process that gained jurisprudential prominence in the twentieth century is unsupportable.

While this recent scholarship reaches three divergent views about the historical sustainability of substantive due process, there is one point of agreement: There is an originalist basis for overturning legislation on due process grounds under the Fourteenth Amendment. Even Chapman and McConnell, skeptics of substantive due process, argue that “by the time of adoption of the Fifth Amendment, due process was widely understood to apply to legislative acts.” Under their view, “[l]egislative acts violated due process not because they were unreasonable or in violation of higher law, but because they exercised judicial power or abrogated common law procedural protections.” Separation of powers, they argue, served as a defining feature of due process.

The decades leading up to the Fourteenth Amendment offer evidence of what “due process” meant by the time of the amendment’s ratification. This is in part because a number of colonial and state constitutions contained due process guarantees or similar “law-of-the-

168 Frederick Mark Gedicks, An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment, 58 EMORY L.J. 585, 594 (2009) (“[O]ne widely shared understanding of the Due Process Clause of the Fifth Amendment in the late eighteenth century encompassed judicial recognition and enforcement of unenumerated substantive rights as a limit on congressional power.”); id. at 593 (“An originalist defense of Fifth Amendment substantive due process, therefore, would create a presumption that this doctrine is likewise encompassed by the original meaning of the Fourteenth Amendment Due Process Clause, thereby dramatically altering the interpretive landscape surrounding the latter clause.”).


171 Id. at 1677.

172 Id.

173 See id. at 1679 (“The meaning of ‘due process of law’ and the related term ‘law of the land’ evolved over a several-hundred-year period, driven, we argue, by the increasing institutional separation of lawmaking from law enforcing and law interpreting.”).
land” provisions. Many eighteenth- and nineteenth-century American opinions invoked these guarantees to overturn statutes that offended due process.

Alongside the separation of powers concerns identified by Chapman and McConnell, other animating principles sustain these opinions, including some of the principles courts sought to vindicate during the Due Process Revolution: protection of private rights from arbitrary interference and equality.

B. Protection of Private Rights

As early as 1796, state supreme courts invoked due process to strike down legislation that unduly interfered with vested liberty or property interests. The procedural features of the judiciary, courts reasoned, reduced the likelihood that individuals would have vested liberty or property arbitrarily revoked—deprivations based on random, invalid, or inaccurate considerations. Indeed, courts sometimes explicitly highlighted the comparative procedural advantages of the judiciary in protecting private rights. These advantages included impartial juries and judges, both of which aid accurate decisionmaking and demonstrate respect for the dignity of the aggrieved party.

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174 Id. at 1705 (“By 1780, all but two states (Connecticut and Rhode Island) had adopted a written constitution, and most of them included a bill of rights; all but two of these (New Jersey and Georgia) adopted law-of-the-land provisions.” (internal citations omitted)); see also Den ex. dem. Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 276 (1855) (noting that the “law-of-the-land” language of the Magna Carta and the “due process of law” provision in the United States Constitution are synonymous); Hurtado v. California, 110 U.S. 516, 521 (1884) (same); Brandon L. Garrett, Habeas Corpus and Due Process, 98 CORNELL L. REV. 47, 60 (2012) (noting the historical link between “law-of-the-land” provisions and “due process”); Timothy Sandefur, In Defense of Substantive Due Process, or the Promise of Lawful Rule, 35 HARV. J. L. & PUB. POL’Y 283, 287–88 (2012) (same).

175 E.g., Lindsay v. Comm’rs, 2 S.C.L. (2 Bay) 38, 40 (Ct. App. 1796) (challenging deprivation of freeholds through legislation).

Courts applied these procedural protections to many subject areas, emphasizing the ways procedural protections guard property and liberty interests such as real estate, employment, and voting.

I. Real Estate

In Lindsay v. Commissioners, a South Carolina appellate court considered whether it violated due process to seize land without compensation. Judge Waties issued an influential opinion challenging the notion that all acts of the legislature comported with procedural due process. He concluded that the taking of private property without process ran afoul of the due process provision contained in article IX of the state constitution. And while the court was evenly divided on the legality of the government’s seizure, Robert Riggs has astutely observed that “no member of the court suggested that the legislature was not subject to the law of the land as a constitutional limit on its actions.”

Judge Waties’s opinion focused on the direct harm the plaintiff would suffer if his property were seized arbitrarily, without the procedural protections available at the common law. He analogized the seizure to a private party taking another private party’s land. Under those circumstances, if the aggrieved person sued, what would be the nature of the action? It could not be founded on contract, for there was none. It must then be on a tort; it must be an action of trespass, in which the jury would give a reparation in damages. Is not this acknowledging that the act of the legislature [in authorizing uncompensated takings] is a tortious act? He additionally asked, “[C]an any thing prove more fully, the arbitrary character of the act, than this?”

Nine years later, the North Carolina Supreme Court invoked due process to overturn legislation that purported to interfere with vested property interests. In Trustees of the University of North Carolina v.

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177 2 S.C.L. (2 Bay) at 40.
178 See id. at 59 (“If the [law of the land] meant any law which the legislature might pass, then the legislature would be authorized by the constitution, to destroy the right, which the constitution had expressly declared, should for ever be inviolably preserved. This is too absurd a construction to be the true one.”).
181 See Lindsay, 2 S.C.L. at 61 (fearing that without judicial review, people become dependent on the legislature’s will).
182 Id.
183 Id.
Foy, that court reviewed legislation that repealed an earlier grant of land to the trustees of the University of North Carolina. “The property vested in the Trustees,” the court held, “must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body.” The court alluded to a purpose behind judicial supervision of such legislative acts. That is, these procedural protections were designed to keep vested property in a protected sphere beyond the “arbitrary will of the Legislature.”

Less than a decade later, the New York Chancery Court was even more explicit about the role of due process in guarding against undignified and arbitrary deprivation of private property. In Gardner v. Village of Newburgh, the government used the power of eminent domain to seize a stream on defendant’s property without his consent and without compensation. Enjoining this intrusion on the “inviolability of private property,” the court reasoned that “[a] right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be dispossessed ‘but by lawful judgment of his peers, or by due process of law.’”

The court made clear its concern about the plaintiff’s private interests and his dignity. “[I]t must be painful to any one to be deprived,” the court empathized, “of the enjoyment of a stream which he has been accustomed always to see flowing by the door of his dwelling.” This pain could only be inflicted if the property was taken for public use, and the seizure was accompanied by fair compensation. “This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.”

These legislative prerequisites shield individuals from arbitrary deprivations. Fairness is achieved not “by absolutely stripping the subject of his property, in an arbitrary manner, but by giving him a full

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184 5 N.C. (1 Mur.) 58 (1805).
185 Id. at 89.
186 Id.
187 2 Johns. Ch. 162 (N.Y. Ch. 1816).
188 Id. at 167.
189 Id. at 166.
190 Id. at 165.
191 See id. at 166 (reaffirming the ability of the legislature to take property for public use).
192 Id.
indemnification and equivalent for the injury thereby sustained.”

“[T]his is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform.”

Over the next several decades, similar questions repeatedly arose in cases where plaintiffs alleged that the state seized property for a nonpublic purpose. Courts embraced the principle that a statute could not take property from one person and give it to another private person. These cases often focused more on the inviolability of private property than concerns about separation of powers. The case of Taylor v. Porter, for example, overturned a statute authorizing the use of private property to build private roads. The court reasoned that “[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.”

It then went on to state:

The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of “legislative power” includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established.

2. Employment

Another emblematic example of a state court overturning legislation on due process grounds is Hoke v. Henderson. In 1833, the North Carolina Supreme Court invalidated a law that dissolved the statutory employment rights of county clerks. Originally, North Carolina state law allowed clerks to hold their office “during their good behavior.” But in 1832, the legislature passed a law requiring county clerks to face election. The State Supreme Court invalidated the law, holding that it violated due process and separation of powers. The Court wrote that the clerk’s employment was a form of “private

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193 Id. at 167 (citing 1 William Blackstone, Commentaries *139).
194 Id. at 167.
195 See, e.g., In re John & Cherry-Streets, 19 Wend. 659, 676–77 (N.Y. Sup. Ct. 1839) (Cowen, J.) (“[T]he legislature should have no power to deprive one of his property, and transfer it to another by enacting a bargain between them, unless it be in the hands of the latter, a trust for public use.”).
196 4 Hill 140 (N.Y. Sup. Ct. 1843) (Bronson, J.); see also Ross v. Irving, 14 Ill. 171, 175 (1852) (“[T]he legislature has not the power to take one man’s property, either without or with compensation, and give it to another.”); Reed v. Wright, 2 Greene 15, 26 (Iowa 1849) (considering private property and personal liberty to be sacred).
197 4 Hill at 144 (quoting Wilkinson v. Leland, 27 U.S. 627 (1829)).
198 Id. at 145.
199 15 N.C. (4 Dev.) 1 (1833).
200 Id. at 10 (emphasis omitted).
property, as much as the land which he tills, or the horse he rides or the debt which is owing to him.”

Thus, absent a law abolishing the office itself, the legislature could not “lessen the tenure of the incumbent, or transfer it to another.”

This reasoning speaks to something more than a Montesquieu-like concern with checks and balances. The opinion expresses concern about which process would better protect rights through fair, accurate decisionmaking. The court noted that inherent in property rights is the ability to exclude others, and it suggested that courts are better equipped than legislatures to protect property from undue violation. For example, impartial juries and judges aid juridical decisionmaking. In the words of the court, when the government grants a title in real estate, it “cannot be taken from him by a law, without the action of his peers as a jury to pass on the facts, and of a court to determine the title.”

“The who is to decide controversies between the powerful and the poor, and especially between the government and an individual, should be independent, in the tenure of his office, of all control and influence, which might impair his impartiality . . . .”

3. Voting

Nineteenth-century courts also expressed concern about the unwarranted deprivation of liberty. A particularly compelling example is State v. Staten. Decided one year after the ratification of the Fourteenth Amendment, it provides evidence of what the term “due process” was understood to mean during that era. At issue was a

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201 Id. at 18–19.
202 Id. at 26.
204 Hoke v. Henderson, 15 N.C. (4 Dev.) 1, 17 (1833) (“For what is property; that is, what do we understand by the term? It means . . . whatever a person can possess and enjoy by right; and in reference to the person, he who has that right to the exclusion of others, is said to have the property.”).
205 Id. at 25.
206 Id. at 23.
207 46 Tenn. 233, 245 (1869).
state law that permitted the governor to annul voter registrations in counties where he suspected fraud. This law effectively repealed a prior law granting suffrage to most free male citizens.

The Tennessee Supreme Court declared the disenfranchisement unconstitutional in terms that one cannot cast solely in terms of separation of powers. The court emphasized the importance of protecting vested rights. “The whole community is also entitled . . . to demand the protection of the ancient principles which shield private rights against arbitrary interference.” The court continued, stating that “[d]ue process of law, undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.”

Two features of Staten render it a particularly compelling site of study. First, while some earlier opinions invalidated laws that targeted specific individuals or groups, the law at issue in Staten did not involve such targeting. Second, the court embraced an expansive conception of what constituted a vested right. The court implicitly concluded that individuals had a vested right in registering to vote. Thus, even individuals who had not registered to vote prior to the law’s passage had a vested right.

One possible explanation is that the court engaged in the type of balancing that is now formally a part of due process inquiries—weighing the government’s and plaintiffs’ competing interests. Indeed, there is language in the opinion suggesting that the gravity of the liberty interest at stake demanded the court’s intervention. “The right of suffrage is a privilege; it is a right; one that is regarded by our race of people as more valuable than any other right with which he is invested.” The court continued, “it is regarded as more valuable than property, for by it he guards and protects his life, liberty and property; when clothed with the right, he has a vested interest, of which he can not be deprived by any act of the Legislature.”

C. Equality

The principle of equality also anchors nineteenth-century due process jurisprudence. Of instructive value is the case of In re

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209 Id. at 244–45.

210 See, e.g., supra notes 199–202 (evaluating the constitutionality of a law transferring an office from one individual to another).

211 See supra notes 78–80 (outlining the Mathews factors that must be weighed).

212 Staten, 46 Tenn. (1 Cold.) at 280–81 (emphasis added).
Dorsey, in which the Alabama Supreme Court reviewed the constitutionality of a statute that required attorneys to take an oath that they had never participated in a duel and would not do so in the future. The court declared the law unconstitutional in that it interfered with the property interest in practicing law and punished individuals without a hearing.

Chief Justice Collier prefaced his opinion by explaining the importance of equality in the case, even citing the Alabama Constitution's equal protection clause. "[E]very one has the same right to aspire to office, or to pursue any avocation of business or pleasure, which any other can . . . . [I]f any citizen is disqualified from the pursuit of any avocation or business, which any other citizen can pursue, an immediate and direct inequality is produced . . . ." The implication is that by taking away a particular group’s vested right to practice their chosen profession without a hearing, the legislation undermined procedural fairness and equality alike.

The Alabama Supreme Court was not alone in linking due process with values of equality. By 1860, at least fifteen states had adopted the view that to accord with due process, laws must be "general" rather than single out individuals or groups for special favor or disparaging treatment. This interpretation of due process is sometimes attributed to Daniel Webster, who argued in an 1819 U.S. Supreme Court case:

By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.

Following Webster’s argument, Tennessee led the adoption of this “general law” interpretation of due process. This understanding governed, for example, cases such as Mayor of Alexandria v. Dearmon, wherein the Tennessee Supreme Court explained that an “act . . . does

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213 7 Port. 293 (Ala. 1838) (Collier, C.J.).
215 See 7 Port. at 368 (dismissing such illegal trials as little better than no trial at all).
216 Id. at 361.
217 See Williams, supra note 169, at 462 nn.245–47 (listing Tennessee Supreme Court decisions expanding the “general law interpretation”).
219 34 Tenn. (2 Sneed) 104 (1854).
The language of equality was sometimes even more direct. In *Budd v. State*, the same court described the purpose of the law of the land provision as, “in general, to protect minorities from the wrongful action of majorities.” Likewise, in *Wally’s Heirs v. Kennedy*, the court contended that the purpose of due process was “to secure to weak and unpopular minorities and individuals equal rights with the majority.” In that case, the court overturned a law that purported to dismiss cases filed on Indian reservations.

A categorical exemption of legislation from due process scrutiny is thus inconsistent with the dominant understanding of “due process” as it existed by 1868. State courts, interpreting due process provisions, invalidated legislation that destroyed or diminished vested private rights, especially those laws that singled out individuals or groups for disparate treatment. In doing so, courts cited principles that continue to have normative and jurisprudential force today, including the protection of private rights, dignity, and equality.

III

**Representative Government**

A question that remains is how, if at all, the principles of due process should impact the scrutiny of *legislative* process. What do germane historical sources teach about favoring one type of legislative process (such as representative government) over another (such as the initiative process)?

Such historical sources illuminate the relationship between representative government and due process. From the Founding through Reconstruction, a dominant view was that representative government helped ensure that the state did not deprive persons of liberty and property without a deliberative, dignity-oriented, egalitarian process. Representative process is due process.

Before engaging this evidence, it is worth noting that discussions about the historical scope of due process often begin not with Madison, but with Sir Edward Coke’s seventeenth-century writings.

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220 Id. at 123.
221 22 Tenn. (3 Hum.) 482 (1842).
222 Id. at 491.
223 10 Tenn. (2 Yer.) 554, 557 (1831).
224 E.g., Chapman & McConnell, supra note 170, at 1689; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law*
Coke is widely credited with reviving due process analysis and introducing the doctrine into the modern common law tradition. Most famously, in *Dr. Bonham’s Case*, Coke and his fellow judges held that a law violated the principle of impartiality to the extent that it permitted a college of physicians to both try and penalize unlicensed doctors. “[O]ne cannot be Judge and Attorney for any of the parties,” Coke wrote. He relied on the language of Chapter 29 of the Magna Carta, which states that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.”

Despite Coke’s influence in the area of adjudicative process, however, it is not readily apparent that we should give equal weight to his views on legislative process. Coke wrote for the King’s Bench and representative democracy was not his chief frame. “[I]f a King...
come to a Christian kingdom by conquest,” he once wrote, “he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain.”231 By contrast, many colonial Americans fled England to escape tyranny, including the subversion of procedural fairness in Parliament.232 The American Constitution was born after a “radical” break with the British crown.233

Accordingly, American laws, cases, legislative debates, and related sources from three periods provide guidance: (1) the period before the ratification of the American Constitution and Bill of Rights; (2) the period between ratification and the Civil War; and (3) the Reconstruction Era, which brought the ratification and initial implementation of the Fourteenth Amendment.

A. Before Ratification

The Fourteenth Amendment’s Due Process Clause was modeled after that of the Fifth Amendment. Indeed, the authors of the Fourteenth Amendment appealed to these amendments during legislative debates. Bingham said of one proposed version, “[e]very word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States.”234 Bingham expressed bewilderment that one could “admit the force of [due process] in the bill of rights,” but oppose adopting the same language in the Fourteenth Amendment.235

To be sure, at other moments, legislators expressed grander visions than simply reaffirming old ideas through the Reconstruction Amendments. They were building a new country. During a debate

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232 See Michael Bush, The Pilgrims’ Complaint: A Study of Popular Thought in the Early Tudor North 144 (2009) (“This evidence details the nature of the Pilgrims’ charge of tyranny, citing the government’s contempt for the society of orders and the rights and duties that held it together [and] its deliberate ignorance of certain procedures, thought vital to the proper functioning of parliament . . . .”).
233 See Gordon S. Wood, The Radicalism of the American Revolution 5 (1992) (“If we measure the radicalism by the amount of social change that actually took place—by transformations in the relationships that bound people to each other—then the American Revolution . . . was as radical and as revolutionary as any in history.”); see also Akhil Reed Amar, America’s Constitution: A Biography 5 (2005) (“New World republicans would keep Old World monarchs at a distance and thus make democracy work on a scale never before dreamed possible.”).
235 Id. at 1089 (“Gentlemen admit the force of the provisions in the bill of rights, . . . but they say ‘We are opposed to its enforcement by act of Congress under an amended Constitution, as proposed.’”).
about the Thirteenth Amendment. Representative Arnold stated that “[a] new nation is to be born from the agony through which the people are now passing. This new nation is to be wholly free. Liberty, equality before the law is to be the great corner stone.” Representative Morton later argued that the Fourteenth Amendment altered the meaning of words in the original Constitution. Still, Bingham’s words suggest that even if the Fifth Amendment did not create a ceiling for due process, it at least created a floor. For this reason, an investigation of the history preceding the Fifth Amendment’s Due Process Clause is warranted.

1. State Charters and Constitutions

In the century leading up to the U.S. Constitution’s original ratification, six colonial charters and all but two state constitutions contained “due process” or “law-of-the-land” provisions. At least four of these documents identified a link between representative process and the security of liberty or property.

The Rhode Island founding colonial charter stated that no person in this colony shall be taken or imprisoned or be disseized of his lands or liberties . . . but by the lawful judgement [sic] of his peers, or by some known law, and according to the letter of it, ratified and confirmed by . . . the general assembly lawfully met and orderly managed.

This language reflects a preference not only for representation, but also for the “orderly” process that accompanies representative government. This charter remained in effect during the time frame in which the American Constitution was written and ratified.

The Pennsylvania Constitution of 1776 similarly linked its law-of-the-land provision with representation. It declared that “[r]epresentation in proportion to the number of taxable inhabitants is


237 See CONG. GLOBE, 41ST CONG., 2ND SESS. 1254 (1870) (“[T]he meaning of it is changed as effectually as if the amendment had been put into the Constitution in the first place.”).

238 Supra note 173 and accompanying text; see also MASS. CONST. of 1780, art. XII, pt. I (state due process law); MO. CONST. of 1776, art. XXI (same); N.C. CONST. of 1776, art. XII (same); N.H. CONST. of 1784, art. I, § 15 (same); N.Y. CONST. of 1777, art. XIII (same); S.C. CONST. of 1778, art. XLI (same).

239 Acts and Orders Made at the General Court of Election (May 1–21, 1647), reprinted in 1 AMERICA’S FOUNDING CHARTERS: PRIMARY DOCUMENTS OF COLONIAL AND REVOLUTIONARY ERA GOVERNANCE 150 (Jon L. Wakelyn ed., 2006) (emphasis added).

240 Chapman & McConnell, supra note 155, at 1705.
the only principle which can at all times secure liberty and make the
voice of a majority of the people the law of the land.”241 In addition,
the constitutions of Delaware and Maryland both declared that “the
right of the people to participate in the legislature is the best security
of liberty and the foundation of all free government.”242

2. Leading Thinkers

This emphasis on representative government is in tension with the
concept of direct democracy. As Gordon Wood has observed, leaders
argued that direct democracy “can only take place in small communi-
ties” because it would not only be “inconvenient, but impracticable
for all to meet in One Assembly.”243 This sentiment reverberated in
the writings of Thomas Jefferson, who wrote that the purest republic is
democracy, “but [that is] impracticable beyond the limits of a
town.”244

This rejection, then, did not emerge solely from elitist concerns
about voter competence or intelligence.245 Rather, it reflected the
practical view that, at least at the statewide level, it is impossible for
all voters to gather in the same forum. Implicit in this practical view is
a normative perspective about the importance of process. It would not
have been impossible for individuals to go to the polls and directly

241 PA. CONST. of 1776, § 17.
243 Id.
244 15 THE WRITINGS OF THOMAS JEFFERSON 65 (Albert Ellery Bergh ed., 1907). Does
Jefferson’s apparent conflation of “democracy” and “republic” undermine the idea that the
two are distinct? Not necessarily. As described in Part IV, it is possible that every republic
is a (representative) democracy, but that not every democracy is a republic.
245 Some critics of direct democracy rely on theories of voter incompetence. See, e.g.,
DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE
UNITED STATES 198 (1984) (“[T]hose with less than graduate-school reading ability will be
unable to read and understand the voter’s handbook or the actual description of the mea-
sure printed on the ballot.”); Arthur Lupia, Shortcuts Versus Encyclopedias: Information
and Voting Behavior in California Insurance Reform Elections, 88 AM. POL. SCI. REV. 63,
63 (1994) (considering but rejecting voter ignorance as an argument against “direct legisla-
tion election”). But see Craig M. Burnett & Mathew D. McCubbins, When Common
Wisdom Is Neither Common nor Wisdom: Exploring Voters’ Limited Use of Endorsements
on Three Ballot Measures, 97 MINN. L. REV. 1557, 1562 (2012) (expressing concern about
the increasingly complicated policy issues voters “are woefully unprepared to consider”).
Others, however, focus more on the process of direct democracy. For example, money
floods the process, raising questions of whether the voters’ will prevails. See Elisabeth R.
Gerber, Legislative Response to the Threat of Popular Initiatives, 40 AM. J. POL. SCI. 99,
124 (1996) (concluding that interest group influence in the initiative process undermines
ever will). In addition, the process leaves voters looking to incomplete information to
make decisions. See ARTHUR LUPIA & MATTHEW D. MCCUBBINS, THE DEMOCRATIC
DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 184 (1998) (arguing that
voters rely more on cues from trusted sources than on actual data).
vote on measures. What was impossible, leaders said, was for everyone to gather together in one hall. What was impossible was mutual deliberation.246

Even British classical liberals of the era understood there to be something unique about the deliberative process. Edmund Burke, for example, suggested that representation could not be properly achieved if representatives never met, and simply casted their ballots from afar.

The drafter of the Fifth Amendment’s Due Process Clause offered a similar, albeit more majoritarian, perspective on the deliberative process that accompanies representative government. In his famous Federalist Paper 10, James Madison argued that a republican government could “refine and enlarge the public views, by passing them through the medium of a chosen body.”247 As Larry Kramer has noted, Madison believed that well-refined deliberative process best reflected the will of the people themselves.248

Colleen Sheehan has provided thoughtful analysis on why this is so:

Madison did not simply equate public opinion with the will of the majority. Public opinion [was] not the sum of ephemeral passions and narrow interests; it [was] not an aggregate of uninformed minds and wills. Rather, public opinion require[d] the refinement and transformation of the views, sentiments, and interests of the citizens into a public mind guided by the precepts of reason, resulting in “the reason . . . of the public” or “the reason of the society.”249

This Madisonian view of public opinion has significant consequences for how we might plausibly understand the constitutional injunction against depriving a person of life, liberty, or property without due process of law. If law is legitimated only by the public will,250 and if the public will can only be rendered intelligible through

246 One could argue that this administrative concern is less apt today in light of a changed technological landscape. Even assuming that technological advancements may someday result in a system of popular lawmaking that approximates the type of transparency and mutual participation present in town halls, the currently constituted initiative process does not.


250 See Smith, Awakening, supra note 38, at 1943 (noting that the Declaration of Independence, Constitution and Federalist Papers invoke the idea that “legitimate government power emanates from the consent of the governed”).
refined, deliberative process, isn’t it illegitimate to deprive a person of liberty or life without such process?

Alexander Hamilton also offered perspective on the relationship between due process and legislative process, though scholars have reached diametrically opposed views about what he intended to convey. During a 1787 speech before the New York assembly, Hamilton offered:

Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta [sic], interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised [sic] or deprived of any right, but by due process of law, or the judgment of his peers. The words “due process” have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.251

Some have taken this language—especially the last sentence—to mean that courts cannot subject legislation to “due process” scrutiny.252 Others have taken the opposite view, arguing that Hamilton actually meant that not even legislation is immune from due process scrutiny.253 Ryan Williams has argued that there is insufficient evidence to support either view.254 In any event, the relationship between representative government and “due process of law” is less apparent in Hamilton’s work than in Madison’s.

3. Decisionmaking in Town Meetings

Under town-meeting governance, a municipality’s eligible voters gather and enact legislation.255 But as one scholar has observed, “the

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252 See, e.g., Frank H. Easterbrook, Substance and Due Process, 1982 SUP. CT. REV. 85, 98–99 n.35 (“[A]lthough legislatures may well commit wrongs . . . the ‘due process’ language describes [only] the business of courts.”).
253 See, e.g., Douglas Laycock, Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable, 60 T EX. L. REV. 875, 891 (1982) (interpreting the provision to mean that “legislatures cannot enact statutes depriving persons of rights, because only courts can deprive persons of rights”).
254 See Williams, supra note 169, at 443 (“It is not possible to determine conclusively, based solely on the surviving record of this one speech, which, if any, of the competing interpretations that have been attributed to these remarks accurately reflects Hamilton’s actual views.”).
255 The practice is particularly common in New England. See Cronin v. Town of Tewksbury, 517 N.E.2d 476, 476 (Mass. 1988) (evaluating uses of town meeting govern-
Town Hall Meeting system . . . does not seem to attract the same degree of criticism as the initiative process." This is a paradox certainly worth exploring, especially in light of the deeply rooted history of the town meeting. In the words of one Massachusetts court, “[i]t is hard to overestimate the historic significance and patriotic influence of the public meetings held in all the towns of Massachusetts before and during the Revolution.” Thomas Jefferson was among those who issued high praise to town meetings, calling such meetings “the wisest invention ever devised by the wit of man for the perfect exercise of self-government, and for its preservation.”

Yet there are profound procedural differences between town meetings and the initiative process. Consider the procedural inadequacies of the initiative process identified in Part I. These included a lack of a transparent record, which could complicate judicial review, undermine dignity, and raise the specter of impassioned or self-interested lawmaking. Another concern was the inability of individuals to gather in an orderly forum where ideas could be tested, refined, and amended.

Importantly, these concerns are less acute in a town hall, where all citizens of a town may gather in a single forum and discuss ideas. Both views and votes historically were transparent, not anonymous.
And deliberation in a single forum was possible. As Phil Frickey observed, “[t]hese meetings were tightly run, to allow all entitled to speak an opportunity to do so. The meetings were designed to promote consensus.”262 He added, “They have nothing whatever to do with modern-day direct democracy in large states with millions of citizens . . . who never meet in the same room, much less actually talk to each other, but nonetheless scratch and claw at each other over contentious ballot measures.”263

These town meetings are nonetheless critical to a discussion about the initiative process. If one is relying on original principles, one must not denigrate direct democracy on the grounds that legislators are more competent than the voters themselves. Rather, the focus of any sound constitutional critique must be on procedure and related principles of procedural fairness. Procedural principles unite representative government and the venerable town meeting, and procedural principles render the initiative process constitutionally suspect.

B. Antebellum Years

During congressional debates on the Fourteenth Amendment, a representative asked John Bingham the meaning of the proposed Due Process Clause. Bingham replied that “the courts have settled that long ago, and the gentleman can go and read their decisions.”264 An important question then is what, if anything, courts said about legislative due process.

In the two decades prior to the Fourteenth Amendment’s ratification, state courts across the country issued opinions that directly addressed the constitutionality of popular democratic lawmaking. The initiative process—lawmaking with no involvement from representative channels—was not yet a feature of American life during that period.265 Still, states did experiment with more modest forms of popular lawmaking. Legislatures sometimes passed laws, for example, that depended on approval at the ballot box from voters.266 And litigants

meetings that are falsely held up as models for modern plebiscites”); cf. John Doe No. 1 v. Reed, 130 S. Ct. 2811, 2832–33 (2010) (Scalia, J., concurring) (“Our Nation’s longstanding traditions of legislating . . . in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect.”).

263 Id.
264 CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866).
265 See supra note 8 and accompanying text (noting that very few states enacted direct legislative measures before 1898).
266 See infra notes 268–78 and accompanying text (giving examples of such laws).
called on state courts to consider the constitutionality of these measures.\textsuperscript{267}

State courts generally rejected legislative experiments that required statewide approval. Courts in New York,\textsuperscript{268} Texas,\textsuperscript{269} and Michigan\textsuperscript{270} held that it violated their state constitutions to give statewide lawmaking powers to voters.\textsuperscript{271} The courts of Iowa\textsuperscript{272} and Vermont\textsuperscript{273} articulated a similar view, albeit in dicta. Courts in Pennsylvania,\textsuperscript{274} Indiana,\textsuperscript{275} and Delaware\textsuperscript{276} went even further,

\textsuperscript{267} Id. (outlining several such cases).

\textsuperscript{268} See Thorne v. Cramer, 15 Barb. 112, 118 (N.Y. 1851) (“[T]he electors had no power to act in the matter; . . . even if every voter in the state had given his vote for this law, and was still in its favor, it would, nevertheless, be the plain and sworn duty of every court . . . to pronounce the act unconstitutional and void.”).

\textsuperscript{269} See State v. Swisher, 17 Tex. 441, 448 (1856) (“But, besides the fact that the Constitution does not provide for such reference to the voters, to give validity to the Acts of the Legislature, we regard it as repugnant to the principles of the Representative Government formed by our Constitution.”).

\textsuperscript{270} See People v. Collins, 3 Mich. 343, 344 (1854) (“In the proposition that the power of enacting general laws cannot be delegated by the legislative body even to the people, all the Judges concurred.”). In Collins, the law in question stated that upon voter approval the law would go into effect in December 1853 and that without approval the law would go into effect in March 1870. As discussed earlier, supra note 19, even those on the court who found the law unconstitutional stressed that the legislation would become law regardless of the outcome of the popular vote. Judge Martin, for example, wrote, “[i]f, therefore, it is found that any power necessary to its perfect enactment is to be exercised by the people, I concede, also, that the law is unconstitutional, for both the letter and the spirit of the Constitution, by necessary implication, deny this power to the people.” 3 Mich. at 405 (Martin, J.).

\textsuperscript{271} Id. at 352.

\textsuperscript{272} See Santo v. State, 2 Iowa 164, 205 (1855) (Concluding that a law was unconstitutional because it did not submit the question of whether a proposal should become law to the voters: “What effect then, had the vote of the people? None at all, in a legal sense or manner.”).

\textsuperscript{273} See State v. Parkes, 3 Liv. Law Mag. 13 (1854). The law at issue made the date of the legislation’s enactment contingent upon a vote. While this was ruled permissible, the court stated that “if the mode of proceeding under consideration is equivalent to giving legislative power to the people at large, it is, no doubt, in conflict with the constitution.” Id. at 14.

\textsuperscript{274} See Parker v. Commonwealth, 6 Pa. 507, 507 (1847) (“Under the constitution of Pennsylvania, legislative power must be exercised by th[e] legislature created by that constitution. Hence, the act of 1846, giving the citizens of certain counties the power to decide by a vote whether the sale of . . . liquors shall be continued . . . is unconstitutional and void.”).

\textsuperscript{275} See Meshmeier v. State, 11 Ind. 482 (1858) (standing for the proposition that a law was void to the extent that its enactment depended on popular votes among municipalities).

\textsuperscript{276} See Rice v. Foster, 4 Del. (4 Harr.) 479, 486 (1847) (“As the act . . . is repugnant to the principles, spirit, and true intent and meaning of the constitution of this State, and tends to subvert our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void.”).
holding that it was unconstitutional to make certain state laws’ operation contingent on local plebiscites.\(^{277}\)

During that period, only a California court suggested, in dicta, that legislative enactment could depend on statewide popular approval.\(^{278}\) These decisions were based on state constitutions, including constitutions that have subsequently changed to permit popular lawmaking. Thus, if one looks to them for precedent, they are of little use. There is nonetheless language in the opinions that provides historical evidence of what leading members of the bar thought about the compatibility of due process and popular lawmaking. Courts noted that the processes of representative government allowed for deliberation and required officers to take oaths to the United States Constitution. These mechanisms helped protect against the types of threats courts cited in more traditional due process cases: arbitrary deprivations of private rights and unequal treatment of groups.

In \textit{People v. Collins}, for example, Justice Douglass expressed concern that absent judicial intervention, “[w]e may be subjected to the dominion of the popular majority of the hour—a majority whose opinion must be formed without legislative discussion or deliberation.”\(^{279}\) He feared that the absence of deliberative lawmaking could result in arbitrary deprivations of rights. “[W]here are the checks which the Constitution intended to provide against hasty and inconsiderate legislation? Where are the securities against arbitrary and irresponsible power?”\(^{280}\) Presiding Justice Green noted that this concern is compounded by the fact that legislators, unlike voters, take oaths to uphold the Constitution.\(^{281}\)

The General Term of New York espoused a similar set of values in \textit{Thorne v. Cramer}. “If the two houses can divest themselves of their office of lawmakers, and devolve it upon the body of the people,” the court’s justices asked, “what security have we against the passage of laws, perhaps well meant, but liable to be glaringly wrong, because

\(^{277}\) Id. ("As the act . . . is repugnant to the principles, spirit, and true intent and meaning of the constitution of this State, and tends to subvert our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void."); Meshmeier v. State, 11 Ind. 482 (1858) (standing for the proposition that a law was void to the extent that its enactment depended on popular votes among municipalities); \textit{Parker}, 6 Pa. at 507 ("Under the constitution of Pennsylvania, legislative power must be exercised by the[e] legislature created by that constitution. Hence, the act of 1846, giving the citizens of certain counties the power to decide by a vote whether the sale of . . . liquors shall be continued . . . is unconstitutional and void.").

\(^{278}\) See Hobart v. Supervisors of Butte Cnty., 17 Cal. 24, 34 (1860) (approving legislation that was rendered contingent on a countywide popular vote).

\(^{279}\) 3 Mich. 343, 417 (1854) (Douglass, J.).

\(^{280}\) Id.

\(^{281}\) Id. at 348–49 (Green, P.J.).
inconsiderately adopted? And what check is left upon hasty and ill-advised zeal . . . ?”

The New York Court of Appeals reached the same conclusion two years later in *Barto v. Himrod*. Judge Willard reasoned that in representative government, deliberation leads to necessary amendments, something not available in popular democracy. “[Voters] must take the system proposed or nothing; they can adopt no amendments, however obvious may be their necessity.”

The Pennsylvania State Supreme Court’s concern was that the lack of deliberation would lead to the oppression of minorities:

>[T]he difficulty, if not impossibility, of deliberation and consultation, and above all, the imminent danger that, in the absence of a sense of responsibility, the surest guaranty [sic] of social justice, the rights of the minority would be disregarded by a majority seeking only the gratification of its own desires, or the advancement of its peculiar opinions.

A key problem with popular lawmaking, then, is procedural. Deliberation in a single forum is impracticable, and thus there is no crucible to test bad ideas and elevate sound ones. And this could lead to the oppression of minorities. Perhaps for this reason, another Pennsylvania case imposed the rule that popular lawmaking was not available for legislation addressing property, political, and social rights.

Pennsylvania was not alone in expressing concern that an absence of deliberation could trample over minorities’ rights. The Delaware Court of Errors and Appeals articulated this view in *Rice v. Foster*. That court added that the tyranny over minorities could not only undermine minorities’ security, but also the state itself. “A triumphant majority oppresses the minority; each contending faction, when it obtains the supremacy, tramples on the rights of the weaker: the great aim and objects of civil government are prostrated amidst tumult, violence and anarchy . . . .”

These cases collectively demonstrate that in the decades immediately preceding Reconstruction, there was a general consensus in American courts that popular lawmaking undermined values associated with due process. Because this form of lawmaking lacked deliber-

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283 8 N.Y. 483 (1853).
284 Id. at 494 (Willard, J., concurring).
286 Commonwealth v. Judges of the Quarter Sessions, 8 Pa. 391, 395 (1848) (calling it “settled” that “the General Assembly of the commonwealth cannot delegate to the people a power to enact laws by the exercise of the ballot, affecting the property and binding the political and social rights of the citizens”).
287 Rice v. Foster, 4 Del. 479, 486 (1847).
ative filters and oaths, it had the potential to arbitrarily place “social rights,” property, and personal security at risk. This risk was especially great with respect to the rights and interests of minorities. If one accepts that original principles matter in constitutional interpretation, the near-unanimity of these cases constitutes strong evidence that some uses of popular lawmaking undermine due process. This is particularly true when one considers that, compared to the initiative process, the popular lawmaking at issue in the antebellum cases provided far more opportunity for representative lawmaking. The measures on the ballot in cases like Collins, Thorne, and Rice first received legislative approval. And after passage, there was nothing to stop the legislature from later amending or repealing the law. If the antebellum experiments with popular lawmaking raised alarm in American courts, one can reasonably extrapolate that these concerns are more acute in the context of initiatives. No involvement from representative channels is necessary to place legislation on the ballot. Then upon passage, there are often significant restrictions on the legislature’s ability to amend the legislation.

C. Reconstruction Era

In comparison to the antebellum courts, there is less evidence of what the congressional leaders of the Reconstruction Era thought of popular lawmaking. However, some evidence is apparent. First, we can draw tentative inferences from the manner in which Congresspersons treated a popular vote held in Washington, D.C. Second, Senators and Representatives often referenced their goal of achieving republicanism through their Reconstruction Era reforms. This historical context of the Fourteenth Amendment undermines the constitutional legitimacy of direct democracy, at least to the extent representative government is a tenet of republicanism.

1. The Washington Suffrage Referendum

On the morning of Monday, January 8, 1866, shortly after the chaplain’s daily prayer, Senator Lafayette Foster introduced a communication from the Mayor of Washington, D.C. The short letter documented the results of a recent popular vote held in the city, an

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288 See supra notes 112–14 and accompanying text (discussing states that allow voters to place proposals on the ballot without legislative involvement).
289 See supra notes 115–18 and accompanying text (discussing states that restrict legislative changes to voter initiatives).
290 The very contestable question of whether representative government is a tenet of republicanism is explored in greater depth in Part IV.
291 CONG. GLOBE, 39TH CONG., 1ST SESS. 133 (1866).
election which “ascertain[ed] the opinion of the people of Washington on the question of negro suffrage.” Of the 6626 (white, male) voters who participated in the election, 6591 voted against permitting black men to vote.

The announcement of this vote barely caused a ripple in the Senate. One Senator suggested that the announcement be referred to the Committee on the District of Columbia. Senator Justin Morrill, however, moved instead that the announcement “lie on the table.” The motion carried. In the House, the dialogue about the vote was less muted. “Every vote against [the black man] at this pretended election was an argument in his favor,” Representative Scofield argued. By “pretended election,” Scofield presumably could have meant an election in which a race of people was excluded from the franchise. However, because he represented a district in the state of Pennsylvania, which did not permit blacks to vote at the time, this may not be the best reading.

Still, another plausible reading is that a popular election that denied individual rights was of questionable normative legitimacy. Scofield compared Washington’s vote to a group of Pennsylvanians’ angry opposition to a criminal defendant’s motion for a less partial venue. That group said the trial should be held in their county “because they knew he was guilty.” Unfiltered popular sentiment,

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292 Id.
294 CONG. GLOBE, 39TH CONG., 1ST SESS. 133 (1866).
295 Id.
296 Id. at 175.
297 Id. at 180.
298 See id. at 245 (discussing Senator Davis’s enumeration of the states in which Blacks could and could not vote). It is also possible that a concept that Akhil Reed Amar calls the “denominator problem” helped inform Senator Scofield’s position. A particular problem is posed for republican notions of majoritarianism when entire classes of people, such as slaves, are denied the franchise, particularly in jurisdictions where they compose a majority or substantial proportion of the population. Amar, supra note 25, at 769. Amar cites Federalist No. 43, where Madison asks, “May it not happen, in fine, that the minority of citizens may become a majority of persons, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the state has not admitted to the rights of suffrage?” Id.
299 CONG. GLOBE, 39TH CONG., 1ST SESSION 180 (1866). Indeed, he noted, if White men in Washington “were generally consenting to this enlargement of the franchise its necessity would be less apparent.” Id.
he was suggesting, did not always interact well with the individual rights of unpopular groups.

This understanding is consistent with Representative Hiram Price’s words the same day. Price favored suffrage for the district despite Washington’s vote. Yet he praised another popular election in his home state of Iowa. He stated on the floor to another member, “[I]n the State of Iowa, within the last few months, the question has been submitted to the people, whether or not they would strike the word ‘white’ from their constitution, and . . . they have decided, by a majority of over sixteen thousand, that they would.”300 By rejecting Washington’s vote and espousing Iowa’s, Price’s actions suggest that he also perceived a difference between using popular lawmaking to deny rights and using popular lawmaking to bestow rights.

Others, such as Representative William Kelley, invoked republicanism to bolster arguments supporting the extension of the franchise to Blacks, notwithstanding the results of the popular election.301 He argued that Madison and other founders “were skillful architects, and understood the laws and principles of the business they undertook . . . . They made it the duty of the United States Government to guaranty to each State a republican form of Government . . . .”302 He added that “the rule of a majority not qualified by the power of the minority to resist is a despotism.”303 Most members of the House apparently agreed. That body passed a bill granting Black men the right to vote in Washington, though the Senate never acted.304

2. Enactment of Republicanism

Representative Kelley’s invocation of republicanism was far from unique during that era.305 As early as February 1862, Senator Charles

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300 Id. at 177.
301 See, e.g., id. at 180 (“I turn now to Federalist, No. 39, to a paper also from the pen of James Madison, examining ‘the conformity of the plan of Government to republican principles’ . . . .”).
302 Id. at 182.
303 Id. at 183.
Sumner introduced resolutions to form provisional governments in the rebelling states, which he argued would “establish . . . republican forms of government under the Constitution.”\textsuperscript{306} President Lincoln similarly relied on the Republican Form Clause as support for some of his Reconstruction efforts. In December 1863, Lincoln offered readmission to states that, among other things, “reestablish[ed] a State government which shall be republican.”\textsuperscript{307} Likewise, when Congress passed the Wade-Davis Bill, which put forth alternative conditions for readmission, supporters as well as opponents looked to the Republican Form Clause for support.\textsuperscript{308} Their assessments depended in part on the then-contested view that slavery was incompatible with republicanism.\textsuperscript{309}

After the war, as states applied for readmission, the debate about the meaning of republicanism gained new force. Some believed states could not be considered republican if they denied the franchise on account of race. “Wherever a man and his posterity are forever disfranchised [sic] from all participation in the government,” Representative George Boutwell argued, “that government is not republican in form.”\textsuperscript{310} Or in the words of Senator George Williams of Oregon, denying “political power” to “one half, or a majority, or even one third of the free male citizens” was irreconcilable with republicanism.\textsuperscript{311}

It was against this backdrop that Congress proposed the Fourteenth Amendment to the states. The day before Representative Bingham introduced the Fourteenth Amendment, the Speaker of the House stated in his opening address that Congress’s “first and highest obligation is to guaranty to every State a republican form of government.”\textsuperscript{312} And ineluctably, in debates about the scope of that amendment, leaders cited their goal of achieving republican governments

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\item[307] Abraham Lincoln, \textit{Proclamation (Dec. 8, 1863)}, in 6 \textit{A Compilation of the Messages and Papers of the Presidents 1789–1897}, at 214 (James D. Richardson ed., 1897); see also Currie, supra note 306, at 1215 (discussing Lincoln’s plan).
\item[308] Currie, supra note 306, at 1217 (citing \textit{Cong. Globe App.}, 38th Cong., 1st Sess. 82–83 (1864) (speech of Rep. Davis)); Lerche, supra note 305, at 195. Senator Ira Harris of New York previously offered a more stringent congressional plan for readmission, which was rejected. He too relied on the Republican Form Clause for support. \textit{Cong. Globe}, 37th Cong., 2d Sess. 3141 (1862) (“[I]n order to enforce this provision of the Constitution guaranteeing to them and the other States . . . a republican form of government, you are compelled to resort to some such expedient as this . . . .”).
\item[311] \textit{Cong. Globe}, 40th Cong., 2d Sess. 958 (1868).
\end{enumerate}
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amongst the states. Representative Frederick Woodbridge, for example, argued that the Fourteenth Amendment guarantees “inalienable rights of liberty and property, and . . . that protection to his property which is extended to the other citizens of the State.”313 Would not this “insure and secure forever to every citizen of the United States the privileges and blessings of a republican form of government? There is nothing more, there is nothing less, in this proposition.”314 He added that the amendment “does not destroy the sovereignty of a State, if such a thing exists.”315

Even after the Fourteenth Amendment gained congressional approval, speeches continued to trace that amendment’s relationship to republicanism. For example, in 1867, Representative Bingham advanced a provision that, among other things, required states to adopt the Fourteenth Amendment as a condition of readmission. Advocating for the provision, he argued that if one were “to write from this hour till the going down of the sun he could do no more toward giving those people an opportunity to adopt a republican form of government.”316

Two years after the Fourteenth Amendment was ratified, Representative Morton put forth one of the more intriguing arguments about the relationship between the Fourteenth Amendment’s Due Process Clause and republicanism.317 At issue was a Reconstruction bill impacting Mississippi. Morton argued that the Fourteenth Amendment adopted a more progressive vision of republicanism than that of the Founders. “[T]o have a republican form of government now there must . . . be protection to all, there must be not taking of life, liberty, or property without due process of law.”318 This requirement—along with others in the Thirteenth and Fourteenth Amendments—“now enter[s] into the definition” of republicanism.319

Morton’s view was not universally accepted. Senator Allen Thurman of Ohio, for example, believed that the definition of republicanism remained static.320 And scholarly debate rages about the legitimacy of “reverse incorporation”—the idea that a later amendment can influence interpretation of an earlier amendment.321 Even if one

313 CONG. GLOBE, 39TH CONG., 1ST SESS. 1088 (1866).
314 Id.
315 Id.
316 CONG. GLOBE, 39TH CONG., 2D SESS. 1212 (1867).
317 CONG. GLOBE, 41ST CONG., 2D SESS. 1254 (1870).
318 Id.
319 Id.
320 Id. at 1218.
321 See Bolling v. Sharpe, 347 U.S. 497 (1954) (finding equal protection values in the Fifth Amendment Due Process Clause); Akhil Reed Amar, Constitutional Rights in a
rejects reverse incorporation, however, Morton’s argument nonetheless evinces that Congress viewed republicanism as a key guiding principle when enacting the Fourteenth Amendment. If that is true, republicanism should serve as a guiding principle of the Fourteenth Amendment’s interpretation. Part IV explores the compatibility of republicanism and direct democracy.

IV

REPUBLICANISM AND DUE PROCESS

As observed in Part III, congressional leaders frequently cited their goal of achieving republicanism through enacting Reconstruction measures, including the Fourteenth Amendment. These pronouncements sometimes explicitly referenced Article IV, Section 4, which states that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” This invites two related questions: First, does direct democracy run afoul of republicanism? Second, if so, what does this mean for procedural due process?

A. Meaning of Republican Form

At the Founding, the word “republican” referred to popular sovereignty and the principle of majority rule. “[R]epublic” derives from the Latin word “republica,” which means “a state governed by the people.” The word “republican” was used to describe a form of government in which the people hold sovereignty and exercise it through their representatives. The guarantee clause in Article IV, Section 4, of the United States Constitution states that “the United States shall guarantee to every State in this Union a Republican Form of Government.”

322 See supra Part III.C.2 (describing the uses of republicanism).
323 U.S. Const. art. IV, § 4.
324 See Charlton C. Copeland, Ex parte Young: Sovereignty, Immunity, and the Constitutional Structure of American Federalism, 40 U. Tol. L. Rev. 843, 865 (2009) (“[T]he Guarantee Clause also stands for the position that recognizing states as political communities is inextricably connected to their being controlled by a sovereign People.”); Daniel S. Korobkin, supra note 305, at 491 (“One conventional view of republicanism is simply government by the people, or popular sovereignty.”); William T. Mayton, Direct Democracy, Federalism and the Guarantee Clause, 2 Green Bag 269, 271 (1999) (stating that the Guarantee Clause prohibits “choices and experiments” that fall outside “the zone of popular sovereignty”); see also Jacob M. Heller, Note, Death by a Thousand Cuts: The
from the Latin phrase “res publica.” *Res* meaning “affair,” and *publicus* meaning “public.” Madison put forward a vision of republicanism that comport with this etymological understanding. Madison argued that the word “republic” describes “a government which derives all its powers . . . from the great body of the people.” Similarly, an eighteenth-century dictionary defined “Republican” as “[p]lacing the government in the people.” The more difficult question is whether “republican form” also refers to a system of representative government.

Evidence from the Founding and the antebellum period suggests that majoritarian deliberative bodies—such as those found in representative government—were an indispensable component of a republican form of government. In Federalist No. 37, Madison explained that

> the genius of Republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those entrusted with it should be kept . . . by a short duration of their appointments; and, that, even during this short period, the trust should be placed not in a few, but in a number of hands.

This description is far more consonant with representative government than with direct democracy. While this passage references the importance of entrusting power in “a number of hands,” Madison made clear elsewhere that this language referred to elected officials. “[T]he Representatives must be raised to a certain number, in order to guard against the cabals of a few . . . .”

Madison drew the sharpest contrast between republicanism and democracy in the oft-cited Federalist No. 10. This work distinguished between what he considered to be a “pure Democracy” and a

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329 The Federalist No. 37, at 170 (James Madison) (Terence Ball ed., 2003).
“Republic,”331 “A Republic, by which I mean a Government in which the scheme of representation takes place . . . promises the cure for which we are seeking.”332 He continued:

The two great points of difference between a Democracy and a Republic are, first, the delegation of the Government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.333

One could plausibly argue that Madison was speaking only for himself. As Akhil Reed Amar has noted, Madison used the qualifying language “by which I mean.”334 However, at other points, Madison references the distinction between the two without this qualifier. In Federalist No. 14, Madison states that “in a democracy, the people meet and exercise the government in person; in a republic, they assemble and administer it by their representatives and agents.”335 In any event, Madison’s views are of particular importance because he was heavily involved in shaping the Republican Form Clause during the Constitutional Convention.336

It is also true that, as Amar highlights, sometimes individuals referred to America’s system of government as a “democracy,” or otherwise conflated republicanism and democracy.337 One potential explanation for this is that while every republic is democratic, not every democracy is republican. On this view, a democracy is a majoritarian government based on popular rule. As such, a republican form of government is democratic because it expresses the will of the people through representative government. But there are other, “purer” democracies that are not republican because they do not include any representative processes. This explanation best helps to explain how Madison at least once labeled the American system of government a “democracy,”338 despite the unequivocal language of Federalists 10 and 14.

As I have argued elsewhere, the constitutional language surrounding “republican form” further suggests that deliberative bodies

331 Id.
332 Id. (emphasis added).
333 Id. (emphasis added).
334 Id.; Amar, supra note 25, at 757.
335 THE FEDERALIST NO. 14, at 60 (James Madison) (Terence Ball ed., 2003).
336 See 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 47–48 (1911) (proposing the language “that the Constitutional authority of the States shall be guarantied to them respectively agst. domestic as well as foreign violence”).
337 See Amar, supra note 25, at 758 (noting that James Wilson conflated the two terms).
338 See FARRAND, supra note 336, at 135 (containing an instance of Madison using the term).
are a component of republicanism. While one scholar has contended that “[t]he Guarantee Clause probably does not require a state to have any representative legislature at all,” the words of other provisions in Article IV suggest otherwise. Article IV implicitly contemplates that each state would have a legislature. For example, Article IV, Section 3 enjoins states from forming one state within the boundaries of another absent approval from Congress and both states’ legislatures. Similarly, Article IV, Section 4—the home of the Republican Form Clause—allows Congress to protect states from insurrection if a state legislature requests.

Relatedly, each state had a legislature at the Founding. This fact is telling because Madison contended that the states were republican as they entered the union. Madison further argued that other states had a “right to insist, that the forms of government under which the compact was entered into, should be substantially maintained.” Thus, meaningful departures from the forms of representative government found in states at the Founding raise serious questions about whether the new forms remain republican. Certain uses of the initiative process likely constitute such a departure.

The motivations behind the Republican Form Clause further undermine the notion that “republican form” did not include a guarantee of deliberative lawmaking bodies. The Founders sought to protect state stability to guard not only against despotism, but also anarchy. Shay’s Rebellion was a fresh memory. Consider the words of Governor Edmund Randolph, who initially introduced the Republican Form Clause at the Constitutional Convention.

340 Natelson, supra note 25, at 815.
341 U.S. CONST. art. IV, § 3.
342 U.S. CONST. art. IV, § 4.
343 Smith, Awakening, supra note 38, at 1956–57 (“[E]very state had a legislature and a system of representative government at the time the Constitution was drafted and ratified.”).
344 See The Federalist No. 43, at 241 (James Madison) (Clinton Rossiter ed., 1961) (noting that the American system was “founded on republican principle, and composed of republican members”).
345 Id. (emphasis added).
346 Smith, Awakening, supra note 38, at 1957; see Declaration of Independence, para. 2 (U.S. 1776) (showing the Founders’ fear of despotism). Larry Kramer has identified evidence that some Anti-Federalists were also concerned that Federalists had monarchial aims. See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 130 (2002).
347 See Wieck, supra note 63, at 48 (describing how Shay’s Rebellion escalated the fear of anarchy).
348 See Farrand, supra note 336, at 22 (introducing a resolution at the Constitutional Convention “that a Republican Government & the territory of each State, except in the
republican principle,” Edmund Randolph argued, would help reduce “the prospect of anarchy from the laxity of government everywhere.”

If in fact the Republican Form Clause was intended to guard against anarchy, it is unlikely that guaranteeing majoritarian rule, and nothing more, would further that goal. One could imagine creative but chaotic governments that pass laws based only on a snapshot of individuals’ views at any given moment; it is well documented that these views vacillate frequently. Orderly deliberative bodies—elected to represent the public—help ameliorate against this type of instability.

This view of republican form reverberated in the decades leading up to Reconstruction. Justice Joseph Story, in his highly influential nineteenth-century Commentaries, defined a republican government as one in which “all its powers were derived directly or indirectly from the people, and were administered by functionaries holding their offices during pleasure, or for a limited period, or during good behavior.” Judge Thomas Cooley’s nineteenth-century treatise similarly defined “republican form” as “a government by representatives chosen by the people.”

The more illuminating evidence from the nineteenth century, however, is found in the state court opinions rejecting or otherwise doubting popular lawmaking under existing state constitutions. As noted in Part III, in the two decades before the Fourteenth Amendment’s ratification, state courts almost unanimously rejected experiments with popular lawmaking. These opinions often reasoned that American states were republican in form, and therefore governed by majoritarian deliberative bodies.

In People v. Collins, for example, Presiding Justice Green concluded that because the popular lawmakers before the court violated instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State”).

350 See JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 53, 61 (1992) (describing the inconsistent responses individuals give to pollsters depending on how much time they have to think about their answers, a disparity he attributes to voter ambivalence).
352 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 293 (Boston, Hillard, Gray & Co. 1833).
354 Supra notes 264–89 and accompanying text.
“the foundation of a republican form of government in this country,” it represented “a gross and glaring infraction of the Constitution.” Justice Martin agreed with this assessment, asserting that “the genius of republican institutions” exalts “virtues of a representative government” over the comparative “dangers of a pure democracy.”

These assessments did not stand alone. The Delaware Court of Errors and Appeals ruled that because a law permitting popular lawmaking “tends to subvert our representative republican form of government, it is the unanimous opinion of this Court, that the said act is null and void.”

Further, despite tolerance for some types of popular lawmaking, even the California Supreme Court understood that republicanism imposed limits on direct democracy. “The general principle is unquestionably true, that our system is not a pure democracy, but a representative republican government; one of whose departments, the Legislature, has the exclusive faculty of enacting laws.”

All of these facts taken together suggest that majoritarian deliberative bodies were viewed as an important component of republican government. And representative government provides the most common example of such a body. It is unlikely that the initiative process also embodies these republican principles. Just as the initiative process’s absence of a deliberative forum raises constitutional concerns under the Due Process Clause itself, this absence also raises concerns under the Republican Form Clause.

For two reasons, I will stop short of arguing unequivocally that direct democracy could never conform to the Republican Form Clause. First, the existence of town meetings, which lasted during the Framing and the centuries that followed, suggests that there are at least some majoritarian deliberative bodies—other than legislatures—that can conform to constitutional norms. However, it is important to note that these town meetings have long occurred at the local, rather than the state, level. Second, as Akhil Reed Amar has persuasively identified, a central component of republicanism is self-government or “popular sovereignty.” And in a nation of profound technological innovation, it could be folly to argue that there will never be any circumstances in which self-governing statewide deliberative bodies could enact laws in a way that facilitates transparency, reasoned discussion, judicial review, and related principles of fairness. Yet, as cur-

355 People v. Collins, 3 Mich. 343, 393 (1854) (Green, P.J.).
356 Id. at 403 (Martin, J.).
357 Rice v. Foster, 4 Del. 479, 499 (1847).
358 Hobart v. Supervisors of Butte Cnty., 17 Cal. 24, 30 (1860).
359 Amar, supra note 25, at 749.
rently constituted, there are serious constitutional questions as to whether the statewide initiative process meets that bar.

B. Role of Republicanism in Due Process Analysis

There are, in my view, two reasons why it matters for due process analysis that at the Framing, and in the decades leading up to the ratification of the Fourteenth Amendment, there was evidence of a constitutionally significant preference for deliberative lawmaking.

The first is the historical symmetry between the principles animating the meaning of due process and the principles that buttressed arguments in favor of representative government. Due process was understood to prevent the state from depriving people of liberty or property in an arbitrary manner, or by means that undermined individual dignity. Similarly, when state courts questioned popular lawmaking in the decades leading up to the passage of the Fourteenth Amendment, these courts offered assessments, albeit in dicta, as to how this type of lawmaking lacked procedural features such as deliberation, increasing the likelihood that private interests and social rights of minorities would be undermined. These concerns echoed James Madison’s warnings in the Federalist No. 10 that a representative scheme of government protected the interests of minorities from the unmitigated passions of the majority. 360 This raises serious questions about whether or when a state may constitutionally deprive individuals of liberty or property through means that lack these types of deliberative features. 361

Second, there is a more technical doctrinal reason why it matters whether direct democracy transgresses the Republican Form Clause. The Fourteenth Amendment prohibits “any state” from “depriv[ing] any person of life, liberty, or property, without due process of law.” 362 This must mean, at a minimum, that a state shall not deprive a person of life, liberty, or property on the basis of a law that is inconsistent with the nation’s primary and ultimate law, the United States Constitution. 363 In a sense, this rule is deeply embedded in constitutional

361 Robert Natelson has implied that nineteenth-century sources, “distant from the Founding Era,” should not inform interpretations of “republican form.” Natelson, supra note 25, at 813–14. They have much greater value, however, if the goal is to understand what the term generally meant to the proponents of Reconstruction.
362 U.S. CONST. amend. XIV.
363 See Williams, supra note 169, at 420–21 (describing this positivist view of due process); cf. John Harrison, Substantive Due Process and the Constitutional Text, 83 VA. L. REV. 493, 497 (1997) (“In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law.”).
adjudication. For example, state criminal defendants have rights to confrontation, counsel, and jury trials not simply because those words appear in the Bill of Rights, but because the Fourteenth Amendment’s Due Process Clause commands that states honor these procedural rights before depriving the accused of liberty.\textsuperscript{364}

This conception of due process is not limited to the constitutional provisions in the Bill of Rights that have been incorporated into the Due Process Clause.\textsuperscript{365} It extends, or should extend, to laws passed in derogation of structural provisions of the Constitution as well. This question arose indirectly a few years ago in \textit{Bond v. United States},\textsuperscript{366} where the Court assessed whether a federal criminal defendant had standing to raise a defense under the Tenth Amendment.\textsuperscript{367} The defendant alleged that federal prosecutors exceeded Congressional power when they prosecuted her for violating a treaty.\textsuperscript{368}

The Court unanimously ruled that Bond had standing. Seven justices relied on principles generally associated with due process, such as the importance of guarding against arbitrary deprivations of liberty.\textsuperscript{369} “Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power

\textsuperscript{364} McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–35 (2010) (“The Court [in the modern era] also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights.” (footnote omitted)); cf. Nicholas Quinn Rosenkranz, \textit{The Objects of the Constitution}, 63 STAN. L. REV. 1005 (2011) (suggesting that some provisions of the Bill of Rights may have different objectives from those of the Fourteenth Amendment and thus, at a minimum, result in different applications against states and against the federal government).


\textsuperscript{366} See id. at 2365–67; see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). This amendment has been understood to protect a zone of state sovereignty. \textit{See Printz v. United States}, 521 U.S. 898, 928 (1997) (“It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.”); \textit{New York v. United States}, 505 U.S. 144, 156 (1992) (“[W]hat is not conferred [by the Tenth Amendment], is withheld, and belongs to the state authorities.” (quoting 3 Joseph Story, \textit{Commentaries on the Constitution of the United States} 752 (1833))).

\textsuperscript{367} The case is back before the Supreme Court, following Bond’s guilty plea and ultimate conviction. \textit{See United States v. Bond}, 681 F.3d 149, 166 (3d Cir. 2012), cert. \textit{granted}, 133 S. Ct. 978 (2013) (No. 12-158).

\textsuperscript{368} See \textit{Bond}, 131 S. Ct. at 2355, 2364–65 (2011); \textit{see supra} Parts I–II (identifying these historical tenets of due process).
cannot direct or control their actions,” Justice Kennedy wrote for the Court.370 “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power,” he added.371

Justice Ginsburg’s concurrence more directly identified the role that due process played in the case. She echoed Justice Hugo Black’s view, expressed roughly forty years earlier in North Carolina v. Pearce, that “[d]ue process . . . is a guarantee that a man should be tried and convicted only in accordance with valid laws of the land.”372 The federal government sought to deprive Bond of liberty on the basis of a potentially invalid law, she reasoned.373 Indeed, even before Bond, Richard Fallon noted that the Due Process Clause had served as the most natural doctrinal home for the idea that a person may not experience a deprivation of liberty under constitutionally invalid laws.374 Justice Ginsburg’s vision also echoes the words and reasoning of Marbury v. Madison,375 which held that “a law repugnant to the Constitution is void.”376

C. Justiciability

In 1849, the Supreme Court ruled in Luther v. Borden that litigants could not invoke the Republican Form Clause as a source of enforceable rights.377 It was the role of Congress, not courts, to enforce that clause.378 The Court has subsequently affirmed the idea that the clause is nonjusticiable,379 including in challenges to the initia-

370 See Bond, 131 S. Ct. at 2364.
371 Id.
372 Id. at 2367 (Ginsburg, J., concurring) (citing North Carolina v. Pearce, 395 U.S. 711, 739 (1969) (Black, J., concurring in part and dissenting in part)).
373 Id. at 2367–68 (Ginsburg, J., concurring).
374 Richard H. Fallon, Jr., As-Applied and Facial Challenges and Third-Party Standing, 113 HARV. L. REV. 1321, 1331–33 (2000) (“[I]t is hard to identify direct judicial affirmations of the valid rule requirement, though a doctrinal home could easily be found in the Due Process Clause: due process forbids sanctions unless a defendant had fair notice of a valid rule of law.”).
375 5 U.S. (1 Cranch) 137 (1803); see also Fallon, supra note 374, at 1332 (“The notion that an ‘invalid law’ is not law at all underlies Marbury v. Madison.”).
376 Marbury, 5 U.S. at 180; see also People v. Collins, 3 Mich. 343, 405 (1854) (Martin, J.) (“What is law? It is the declared will of the legislature. It presupposes the exercise of judgment and reason; and if a general law, must be complete, positive and absolute in itself (deriving its authority from the Legislature), and not dependent . . . upon any other tribunal, body or persons.” (internal citations omitted)).
378 Id.
379 See Bonfield, supra note 327, at 556 (“Since 1912 . . . the Supreme Court has consistently refused to entertain on the merits any suit seeking to enforce the guarantee clause.”); see also City of Rome v. United States, 446 U.S. 156, 182 n.17 (1980) (indicating that the
tive process in the early 1900s.\(^{380}\) This jurisprudence has faced criticism from scholars including John Hart Ely and Judge Richard Posner.\(^{381}\) But even if one rejects the view that the Republican Form Clause is justiciable, it does not follow that the state may deprive a person of life, liberty, or property through a law enacted in derogation of that clause. The Due Process Clause is justiciable.

The case of *Pacific States Telephone & Telegraph Co. v. Oregon*\(^ {382}\) offers strong evidence as to why a procedural due process argument should not be entirely foreclosed as nonjusticiable. In that case, the United States Supreme Court dismissed a case that relied on the Republican Form Clause to challenge a state’s initiative process. Citing the political nature of the inquiry, the Court dismissed the case

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\(^{380}\) See, e.g., *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (finding that the question whether citizen lawmaking violated the Republican Form Clause constituted a nonjusticiable political question). In addition to the Republican Form Clause claim, the petitioners challenged the initiative on equal protection grounds under the Fourteenth Amendment, and on the grounds that the initiative violated fundamental rights, relying on Article VI of the United States Constitution. *Id.* at 137–38.

\(^{381}\) John Hart Ely called Guarantee Clause jurisprudence an “unfortunate doctrine” that extended a proper holding in *Luther*, 48 U.S. (7 How.) 1, to contexts in which political question considerations were less relevant. *Ely, supra* note 12, at 118 n.; *see also* Risser v. Thompson, 930 F.2d 549, 552 (7th Cir. 1991) (stating that “this result has been powerfully criticized,” but that “it is too well entrenched to be overturned at our level of the judiciary”) (citing *Ely, supra* note 12, at 118 n.).

\(^{382}\) 223 U.S. 118 (1912).
for want of jurisdiction.\textsuperscript{383} The case did not reject the possibility, however, that an argument premised on procedural due process would meet a different fate.

Distinguishing the case before it from other hypothetical cases, the Court explained that no litigant in that case “assert[ed] that it was denied an opportunity to be heard as to the amount for which it was taxed.”\textsuperscript{384} It noted that “[i]f such questions had been raised, they would have been justiciable, and therefore would have required the calling into operation of judicial power.”\textsuperscript{385} By contrast, it perceived a claim premised on the view that a state lacked republican form not as an attack on the “tax as a tax, but on the state as a state.”\textsuperscript{386} Indeed, one concern that case identified is that if the claim that Oregon was no longer republican survived, it would necessarily invalidate every law the state had passed—initiatives and otherwise—once the initiative process had been enacted.\textsuperscript{387}

By contrast, the doctrinal moves I contend are possible do not require invalidating all of a state’s laws—only initiatives that deprive a person of liberty or property. I acknowledge, though, that this contention is somewhat unsatisfying to the extent the argument depends on the unconstitutionality of all initiatives under the Republican Form Clause. Even if, as a practical matter, only laws that deprive individuals of liberty or property could be invalidated, one could plausibly read \textit{Pacific States} as supporting the proposition that it is beyond the judicial role for a court ever to reason that the initiative process has resulted in a state transmuting from a republican form to some other kind of government.\textsuperscript{388}

If one reads \textit{Pacific States} in that manner, this does not eliminate the potential role for due process analysis when initiatives eliminate liberty or property interests. As noted at the outset of this Part, regardless of whether initiatives technically violate the Republican Form Clause, it is important to explore whether due process jurisprudence can better harmonize the historical connections between due process and republicanism. Because representative government was traditionally viewed as a means of providing procedural protections to electoral minorities’ private rights, there is a strong argument that it

\textsuperscript{383} Id. at 151.
\textsuperscript{384} Id. at 150.
\textsuperscript{385} Id.
\textsuperscript{386} Id.
\textsuperscript{387} Id. at 141.
\textsuperscript{388} See id. (reasoning that the defendant’s argument was nonjusticiable in part because it rested on the premise that “the propositions each and all proceed alone upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon”).
undermines due process when the state deprives individuals of liberty or property without the procedures that attend representative government. This type of argument is the type that appears to have been approved of in *Pacific States* itself—an argument premised expressly on the absence of adequate procedural protections. This next Part explores what such an argument might look like as applied in contemporary contexts.

V

APPLICATION

A categorical exemption of legislation from procedural due process scrutiny is historically unsupportable. Courts overturned legislation on due process grounds in the decades between the Founding and Reconstruction, citing the importance of protecting vested private rights from arbitrary destruction, especially the rights of minorities. State courts invoked these same due process values when expressing doubts about legislative process that evaded representative democracy, reasoning that lawmaking without open, transparent deliberation renders vested rights vulnerable.

These court decisions harmonize with the legislative history of the Fourteenth Amendment’s Due Process Clause, which frequently adduced a commitment to republicanism. These decisions also harmonize with the history of the Republican Form Clause, which demonstrates that open deliberation is a pillar of republicanism in our constitutional tradition.

A final issue remains. In light of these historical observations, which uses of the initiative process violate procedural due process, and which ones do not? This Part engages that question.

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389 223 U.S. 118, 150 (1912) (identifying governmental failures as the source of defendant company’s injury).

390 See supra Part II (providing the historical context for such a categorical exemption of legislation from procedural due process scrutiny).

391 See, e.g., *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. 58 (1805) (overturning a law repealing a land grant to a university and holding that the state bill of rights precluded the legislature from taking property without judicial involvement).

392 See, e.g., *Rice v. Foster*, 4 Del. 479, 486 (1847); *Barto v. Himrod*, 8 N.Y. 483, 487–89 (1853) (“Popular rights and universal suffrage, the favorite theme of every demagogue, afford, without constitutional control or a restraining power, no security to the rights of individuals, or to the permanent peace and safety of society.”);  *State v. Swisher*, 17 Tex. 441, 448 (1856) (calling “repugnant to the principles of the Representative Government formed by our Constitution” a law that permitted county voters to decide by election whether to award liquor licenses).

393 See supra Part III.C.2 (outlining historical disagreements concerning the relationship between republicanism and the Fourteenth Amendment’s Due Process Clause).

394 See generally supra Part IV. (discussing the Republican Form Clause’s relationship with due process and justiciability).
There are at least two plausible doctrinal approaches that would show fidelity to this history. The first is a categorical approach, banning all statewide uses of the initiative process that take away any person or group’s liberty or property interest. This approach is most logical if one believes that the initiative process is inherently antirepublican. If the initiative process violates the Republican Form Clause, it follows that it is not constitutional to deprive groups of liberty or property interests on the basis of void, unconstitutional law. The second approach is to balance any deprivation with the cost and usefulness of additional procedural safeguards. The latter approach is how most procedural due process claims are engaged, and it probably best comports with the argument that certain initiatives violate due process because they run afoul of the principles of fairness—including dignity, equality, and deliberation—that provision embodies. What is more, because this argument does not depend on the premise that all initiatives are unconstitutional under the Republican Form Clause, this argument is less susceptible to the justiciability concerns articulated in Pacific States.

Despite their differences, these two approaches share several common traits. Both approaches focus on statewide initiatives, in light of the Constitution’s special commitment to a republican form of government in each state. Another common trait is that neither approach applies to laws that generally impact all individuals equally. In the decades leading up to the Fourteenth Amendment’s ratification, courts showed a particular concern with “partial” laws that

395 See supra Part IV.B (discussing how the conception of due process includes prohibitions against depriving a person of liberty under constitutionally invalid laws); cf. Bond v. United States, 131 S. Ct. 2355, at 2367 (2011) (Ginsburg, J., concurring) (stating that a defendant has a personal right not to be convicted under a constitutionally invalid law); Fallon, supra note 374, at 1331–33 (discussing the valid rule requirement—“the notion that everyone has a personal constitutional right not to be subjected to governmental sanctions except pursuant to a constitutionally valid rule of law”—and its natural doctrinal home in the Due Process Clause). This approach would resemble what Coenen calls a “who” rule—that is, a rule that only legislative bodies may make certain decisions. Coenen, Pros and Cons, supra note 31, at 2851.

396 See Mathews v. Eldridge, 424 U.S. 319 (1976) (establishing that the due process test must be applied before administrative benefits can be terminated).

397 See 223 U.S. 118, 140–43 (1912) (discussing how the arguments raised by the litigant would lead to “the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to the doctrine which underlies and would be necessarily involved in sustaining the propositions contended for”); see also Part IV.C (discussing Pacific States and relevant justiciability arguments).

398 U.S. CONST. art. IV, § 4.
targeted an individual or class. Finally, both approaches focus on deprivations of interests to which a group was previously entitled as a matter of common law or state law.

Three contexts can help illuminate how these doctrinal approaches might apply: deprivation of marital rights, deprivation of voting rights, and deprivation of a group’s income through tax reform. Below is an abbreviated discussion of these contexts. I chose marriage rights as the site of the most extended discussion. These descriptions are intended to illustrate how courts can deploy procedural due process to initiative lawmaking, rather than to provide conclusive answers about what the outcome of that deployment should be in these particular contexts.

A. Marriage Rights

In 2009, the voters of Maine eliminated same-sex marriage in that state, reversing a law that the state legislature enacted only six months earlier. More famously, California voters eliminated same-sex marriage in Proposition 8, an amendment to the state’s constitution. In both Maine and California, voters eliminated the preexisting liberty and property interests of gay citizens. Just as the Tennessee governor in *State v. Staten* removed the ability of certain citizens to exercise

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399 See, e.g., Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 104, 123 (1854) (striking down a law penalizing one county sheriff for failing to hold an election where the law did not apply to the seventy other similarly situated sheriffs in the state); Budd v. State, 22 Tenn. (3 Hum.) 483, 491 (1842) (declaring the importance of laws that “treat similarly all who were in like circumstances”).

400 See, e.g., Bd. of Cnty. Comm’rs v. Carter, 1 Kan. 109, 123–29 (1863) (ruling that a board of county commissioners could not legally exceed its statutory authority and exact bonds from the county); Adams v. Palmer, 51 Me. 480, 490–91 (1863) (holding that a statute “cannot divest the defendant of rights vested in her before its passage”).


their preexisting right to register to vote.\textsuperscript{403} California and Maine denied citizens their ability to register for marriage licenses.

The Supreme Court has ruled that states may create liberty and property interests through (1) non-discretionary benefits (2) for an individual or class with (3) a connection to liberty or property recognized at common law.\textsuperscript{404} Marriage appears to satisfy this test. County clerks do not exercise discretion to determine which legally eligible couples may marry and which ones may not.\textsuperscript{405} Furthermore, in both California and Maine, gay residents were the beneficiaries of state-created law. According to California’s Supreme Court, the equal protection clause designated gays and lesbians as a suspect class and required that laws “imposing differential treatment on the basis of sexual orientation . . . be viewed as constitutionally suspect”\textsuperscript{406} under the state constitution. Likewise, in Maine, the state’s representative channels enacted legislation permitting same-sex couples to marry.\textsuperscript{407}

These state-created benefits arguably had a nexus to property. There are substantial tax consequences tied to marriage,\textsuperscript{408} and, more generally, scholars have identified 1138 federal benefits contingent on marriage.\textsuperscript{409} Marriage also has a nexus to liberty. In the words of \textit{Board of Regents v. Roth},

\begin{quote}
[Liberty] `denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men.'\textsuperscript{410}
\end{quote}

This nexus between marriage and liberty is longstanding. During the legislative debates of Reconstruction, a critic of civil rights legisla-
tion registered his fear that “[m]arriage is a civil contract, and to marry according to one’s choice is a civil right.”

Further, Proposition 8 and similar laws did not deny the right to marry altogether. They eliminated the right for one group that, as discussed below, has particularly benefited more from the deliberative processes of legislatures (and courts) than from the initiative processes.

To be sure, there are substantial critiques of marriage, including Melissa Murray’s thoughtful illumination of ways that marriage sometimes historically has served as a nonliberating punitive institution. Still, barring an incorporation of this valuable work into jurisprudence, there remains a doctrinally cognizable nexus between marriage rights and liberty.

Under the categorical approach, that would end the inquiry. Any use of the initiative process that eliminated a cognizable liberty or property interest would violate due process. It would not matter how important the interest is, assuming it qualified as a liberty or property interest. Nor would it matter whether the person or persons who lost their liberty or property could have protected themselves better in the political process, a concern that the balancing approach necessarily incorporates. By contrast, as described in Part I, in due process cases, courts generally balance the following: (1) the private interests affected by the government action; (2) the cost of providing additional procedural protections; and (3) the value of additional process.

I. Private Interest

As former Chief Justice Leah Ward Sears-Collins of the Georgia Supreme Court observed roughly twenty years ago, a bundle of rights comes with marriage, including the ability to:

a) file joint income tax returns; b) create a marital life estate trust; c) claim estate tax marital deductions; d) claim family partnership tax income; e) recover damages based on injury to a partner; f) receive survivor’s benefits; g) enter hospitals, jails and other places restricted to “immediate family”; h) live in neighborhoods zoned “family only”; i) obtain “family” health insurance, dental insurance, bereavement leave and other employment benefits; j) collect unem-


412 See Melissa Murray, Marriage as Punishment, 112 Colum. L. Rev. 1, 46 (2012) (arguing that the disciplinary character of marriage continues to guide courts’ jurisprudence and that courts have understood marriage “to promote the norms of disciplined sexuality and fiscal responsibility”).

413 Supra notes 77–80 and accompanying text.
ployment benefits if they quit their job to move with their partner to a new location because he or she has obtained a new job; k) get residency status for a noncitizen partner to avoid deportation; l) automatically make medical decisions in the event a partner is injured or incapacitated; m) and automatically inherit a partner’s property in the event he or she dies without a will.\footnote{Van Dyck v. Van Dyck, 425 S.E.2d 853, 855 (Ga. 1993) (Sears-Collins, J., concurring).}

This list gained fuller meaning in June 2013, when the United States Supreme Court invalidated section 3 of the Defense of Marriage Act, a law that denied all federal marital benefits to married gay couples.\footnote{United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).} And while this list is itself copious, it tells only part of the story. In addition to these tangible benefits, with marriage comes more intangible acknowledgment from the state that the married persons are worthy of both the institution and of the ability to decide whom to marry.\footnote{See Loving v. Virginia, 388 U.S. 1, 12 (1967) (“Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”); Richman, supra note 409, at 367–69, 372–77 (2010) (collecting data showing that same-sex couples often rate legal benefits as comparatively less important than public validation in reasons they chose to marry); see also Jane Rigby, Why the Word “Marriage” Matters, WASH. POST, Feb. 13, 2001, at C6 (“Marriage matters, because marriage is how society decides whose relationships matter, and whose don’t.”).}

2. Cost to Government

“At some point,” the Court has explained, “the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.”\footnote{Mathews v. Eldridge, 424 U.S. 319, 348 (1975).}

Because the infrastructure of representative democracy is already in place in each state, there is little additional financial cost involved in requiring legislators, rather than voters, to make determinations about whether to eliminate significant liberty and property interests. The Constitution of the United States presupposes that each state has a legislature in place to make important decisions and no state has deviated entirely from this constitutional commitment.\footnote{First, Article IV’s words reflect an unqualified assumption that each state would have a legislature. Article IV, Section 3 commands that no state shall be formed within the boundaries of another state unless Congress and both states’ legislatures approve. U.S. CONST. art. IV, § 3. Second, the very section in which the Guarantee Clause is found permits Congress to protect states from invasion if a state legislature requests. CONST. art. IV, § 4.} Indeed, if anything, the initiative process imposes unique financial and administrative costs on the limited resources of the state. According to a 2003
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estimate released by the California Secretary of State’s office, a 2003 statewide special election cost taxpayers somewhere between fifty-three and sixty-six million dollars to administer.419 On the other hand, any analysis of the cost should note that not all initiatives occur during special elections—and it would therefore be important to account for the relative cost of adding an initiative to an existing ballot.

3. Value of Additional Process

Representative government is accompanied by deliberative process, oaths, transparency, and a form of recordmaking that aids judicial review.420 There is evidence that this additional process is meaningful and consequential with respect to gay and lesbian Americans. In 1997, Professor Barbara Gamble studied seventy-four civil rights initiatives, including those targeting gays and lesbians. She found that seventy-eight percent resulted in “a defeat of minority interests.”421 More recent empirical research has affirmed that gay rights fare better in legislatures than at the ballot box. “[G]ay and lesbian civil rights consistently lose out when the issue is decided in state ballot contests.”422 If it is not the additional procedural protections that attend representative government that account for these disparate results, it is unclear what else does.

To be sure, several elections in November 2012 undermined this conventional view; voters in Maine, Maryland, and Washington approved same-sex marriage.423 However, the acts on the Maryland and Washington ballots were both referenda, not initiatives. Thus, the legislatures approved same-sex marriage prior to the popular vote. And in Maine, the legislature approved same-sex marriage three years before the voters did so. What is more, voters in thirty-two states have rejected same-sex marriage, and thirty states have constitutional

420 See supra Part I.C (arguing that representative government comes closer to reflecting fair process than direct democracy).
422 Haider-Markel et al., supra note 32.
amendments that remove the issue from representative channels. This suggests that the additional procedural protections gays and lesbians receive in systems of representative government are valuable and consequential.

B. Voting Restrictions

In November 2011, voters in Mississippi passed an initiative that required photo identification to vote. As a practical matter, this meant that any registered voter in Mississippi could no longer vote without first obtaining the required identification. The act arguably deprived such registered voters of a liberty interest: the right to vote.

The initiative was not Mississippi’s first legislative effort to ban citizens without photographic identification from voting. Before the initiative’s passage, legislators had put forth a number of unsuccessful bills with the same goal. In fact, on multiple occasions, bills requiring photographic identification passed both chambers of the state legislature. But during those years, the two chambers never agreed on a single version of the bill.

Most recently, in 2009, the state house passed a law that restricted voting in some respects, but sought to make voting easier in other ways. The bill would have required photo identification to vote. Yet, as a result of amendments and compromises, the bill would have expanded the period prior to Election Day during which Mississippi voters could cast ballots. What is more, the bill would have restored the franchise for citizens previously convicted of felonies.


427 Id.

428 Id.

429 Id.

430 See Compromise Voter ID Bill Passes House, Faces Uncertain Future, DISPATCH (Feb. 12, 2009), http://www.cdispatch.com/news/article.asp?aid=255 (discussing the ratification of a bill that requires government identification to vote, but allows all residents to vote in the twenty days leading up to the Saturday before election day and allows registration up to three days before an election).

431 Phil West, Senate’s Voter ID Bill Not Dead Yet, COM. APPEAL, Mar. 7, 2009, at DSA1.

432 Id.

433 Id.
The passage of this compromise would have been significant. On
the one hand, impoverished and racial minorities are thought to be
less likely to have photographic identification than the affluent and
Whites. On the other hand, in recent years, early-voter periods
have proven popular with minority voters. And felon disenfran-
chisement laws disproportionately prevent racial minorities from
voting. However, the compromise bill stalled in the state senate.

When the compromise stalled, proponents of voter identifi-
cation laws gathered enough signatures to place a voter-ID initiative on the
ballot. Voters approved the measure in November 2011. There
were no simultaneous initiatives expanding early voting or otherwise
expanding the franchise.

Under current constitutional doctrine, voter identification laws
inherently do not burden fundamental rights. In 2008, for example,
the United States Supreme Court upheld Indiana’s voter-ID laws in
Crawford v. Marion County Election Board. The Court reasoned that,
“on the basis of the record that has been made in this litigation, we
cannot conclude that the statute imposes ‘excessively burdensome
requirements’ on any class of voters.” This ruling made it difficult
for voters in other states to file constitutional challenges to such
laws.

A question Crawford does not purport to answer is whether it
matters how a court goes about requiring individuals to possess pho-
tographic identification to vote. The statute at issue in Indiana was
passed by the Indiana legislature. Does it implicate different con-
cerns when voters enact such a law through the initiative process
rather than the normal legislative process?

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434 Tova Andrea Wang, Competing Values or False Choices: Coming to Consensus on the
Election Reform Debate in Washington State and Across the Country, 29 Seattle U. L.
Rev. 353, 362 n.46 (2005) (“A 1994 Department of Justice study found that blacks in
Louisiana were four to five times less likely than whites to have photo IDs.”).

435 Some Florida Counties Affected by Voting Rights Ruling, Fla. Today (June 26,
2013, 4:33 PM), http://www.floridatoday.com/article/20130625/NEWS01/130625012/
(noting that on early voting days “turnout among blacks is disproportionately high”).

436 David Owens, Voter ID Petition Headed to Jackson, Laurel Leader-Call, Feb.

437 Harrison, supra note 425.


439 Common Cause/Georgia v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) (“We con-
clude, based on the decision in Crawford v. Marion County Election Board, which upheld a
similar law in Indiana, that the burden imposed by the requirement of photo identification
is outweighed by the interests of Georgia in safeguarding the right to vote.” (citation
omitted)).

440 Crawford, 553 U.S. at 186 n.4.
As an initial matter, the right to vote is a liberty interest. And there is a colorable argument that voter identification laws deprive some of that right—at least temporarily. Any individual who lacks photographic identification loses that ability until he or she obtains such identification. While the Supreme Court found in Crawford that this burden is sometimes justified to protect the integrity of the ballot box, it does not necessarily follow that the burden is not a deprivation of liberty, at least to some degree.

Under a categorical application of procedural due process to the initiative, this would end the inquiry. If the state deprived persons of liberty on the basis of process that violated the Republican Form Clause, that deprivation would be unconstitutional. Thus, using the initiative process to implement voter identification laws would violate procedural due process even though identical laws passed through the normal legislative process may not.

The balancing approach is more complex. The first question would ask, how great is the interest in voting in person? The answer is not obvious, for as important as the right to vote is, the right to vote in person is less well-established. Voter identification laws have little impact on a person who votes via absentee ballot. The second factor to consider would be the cost to the state of providing additional process. Here, again, it is likely much less costly to pass laws through the normal legislative process than it is to place an initiative on the ballot and hold an election. As noted, this calculus would change in ways worthy of additional empirical investigation if the initiative were added to an election that would otherwise exist. Still, there would remain the cost of educating millions of people about a legislative proposal, rather than a smaller group of elected representatives. Finally, courts would inquire as to whether additional process actually would reduce the risk of an unfair deprivation of liberty in a meaningful way.

In applying this final factor, a state could argue that state legislatures across the country have implemented voter identification laws in states as varied as Texas, Indiana, and Georgia. On the other hand, the Mississippi example is striking because proponents of voter identification laws appealed to the initiative process after legislative efforts failed. What is more, the version of legislation that came closest to passing in the Mississippi legislature contained early voting and felon-enfranchisement provisions. Those provisions disproportionately would have benefited racial minorities and the poor—the very groups

441 Burson v. Freeman, 504 U.S. 191, 211 (1992) (calling the right to vote a “fundamental right”).

generally thought to be impacted the most by voter identification laws.\footnote{See \textsuperscript{ supra} note 435.}

\section*{C. Taxes}

In Federalist Paper No. 10, Madison argued that decisions about taxes were particularly prone to passion and faction, suggesting that those decisions are better left to representative channels: “The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice.”\footnote{\textsc{The Federalist No. 10}, at 56 (James Madison) (E.H. Scott ed., 1898).}

In the past few years, at least two states have placed measures on the ballot seeking to raise income taxes only on high-income residents. In November 2010, voters in Washington considered and rejected a measure that would have raised taxes selectively on those earning more than $200,000 a year.\footnote{Libby Tucker, \textit{I-1098 Defeat a Boon to Business}, \textsc{Columbian}, Nov. 4, 2010, at E1.} Two years later, a similar measure emerged and passed in California.\footnote{See Nanette Asimov, \textit{Despite Prop. 30 Win, Student Fees May Rise}, \textsc{S.F. Chronicle}, Nov. 8, 2012, at A10 (discussing the passage of Proposition 30, a tax to raise revenue for higher education).} Through Proposition 30, voters in California imposed new income taxes on individuals making over $250,000.\footnote{Josh Richman, \textit{Brown Stumps for Tax Hike}, \textsc{San Jose Mercury News}, Nov. 2, 2012, at 2B.} This proposition arguably deprived top income earners of a common law property interest: money.\footnote{See \textsc{Comm'r v. Shapiro}, 424 U.S. 614, 629 (1976) (“[T]he Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt postdeprivation hearing at which some showing of the probable validity of the deprivation must be made.”).}

The outcome of this argument would potentially depend on whether one applied a categorical or balancing approach to the legislation. Under the categorical approach, Proposition 30 and similar measures are impermissible because they deprive a group of a property interest through the initiative process.

By contrast, the balancing approach in \textsc{Mathews} is attentive to context, including the cost of providing additional process. And in the case of Proposition 30, one could plausibly contend that there would have been substantial costs associated with using the traditional legislative process. In California, the legislature is not permitted to raise taxes without a vote from two-thirds of the legislature.\footnote{\textsc{Cal. Const.} art. 13A, § 3(a).} Voters used...
the initiative process to impose this high procedural requirement, essentially restricting the normal legislative process. This arguably shifts the cost calculus, in part because using the “normal” legislative process in its traditional form would first require an initiative.

The case of Proposition 30, then, helps illuminate a key advantage of the Mathews v. Eldridge balancing test over a bright-line categorical rule. It allows courts to apply principles of procedural fairness to specific facts, just as in other due process cases.

D. Complementary Doctrines

This expanded role for procedural due process would supplement, rather than supplant, other doctrines designed to police the fairness of the initiative process. These doctrines include Equal Protection and Substantive Due Process.

1. Equal Protection

In Hunter v. Erickson, the Supreme Court ruled that the State may not “disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.” The Court overturned a city’s charter that prohibited the city from passing an anti-discrimination housing ordinance

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452 393 U.S. 385, 393 (1969).
without a popular vote.\textsuperscript{453} The Court further reasoned that because “the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are constitutionally suspect, and subject to the most rigid scrutiny.”\textsuperscript{454}

The Supreme Court reaffirmed this holding in \textit{Washington v. Seattle School District No. 1}.\textsuperscript{455} The Equal Protection Clause “guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute . . . that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner.”\textsuperscript{456}

“But the Fourteenth Amendment reaches a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.”\textsuperscript{457} The Court therefore invalidated a statewide initiative that prevented local school boards from considering racial desegregation when making school assignments.\textsuperscript{458}

In 2012, a divided Sixth Circuit relied on the holdings of \textit{Hunter} and \textit{Seattle} to invalidate a statewide initiative passed in Michigan.\textsuperscript{459} That initiative enacted a constitutional amendment preventing the consideration of race in college admissions.\textsuperscript{460} The court stated that “[i]t is . . . a guarantee that minority groups may meaningfully participate in the process of creating these laws and the majority may not manipulate the channels of change so as to place unique burdens on

\textsuperscript{453} Id. at 393.
\textsuperscript{454} Id. at 391 (citations omitted). This case and its progeny depend on “political process” theory. Jane Schacter has powerfully identified some of the limitations of political process theory. \textit{See} Jane S. Schacter, \textit{Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate}, 109 Mich. L. Rev. 1363 (2011) (arguing that deep conceptual problems with political process theory are apparent in the same-sex marriage debate); \textit{see also} Jane S. Schacter, \textit{Ely and the Idea of Democracy}, 57 Stan. L. Rev. 737 (2004) (arguing that democracy is a contested notion distinct from majoritarianism, the equation of democracy and majoritarianism rests upon strong assumptions about political accountability, and there are significant ambiguities regarding democracy). Despite her critique of the limits of procedural arguments to achieve a norm of democratic equality, I nonetheless see my project as compatible with hers. I seek not only to use procedure to achieve democratic equality, but rather to use democratic equality to inform our conceptions of procedural fairness.

\textsuperscript{455} 458 U.S. 457, 467 (1982).
\textsuperscript{456} Id.
\textsuperscript{457} Id. (citations omitted).
\textsuperscript{458} Id. at 470.
\textsuperscript{459} Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 474 (6th Cir. 2012).
issues of importance to them.” As in Hunter and Washington, then, the question was whether “an enactment that changes the governmental decision-making process for legislation with a racial focus . . . improperly manipulates the channels for [political] change.”

Introducing the doctrine of procedural due process would neither duplicate nor replace the political process inquiries under the Fourteenth Amendment. Hunter and Washington both involved legislation with a racial focus. As the marriage, public benefits, and tax examples all show, not all initiatives targeting minority groups have a racial focus.

Moreover, proponents of the Michigan initiative successfully filed for certiorari with the Supreme Court. It is not premature to begin thinking of doctrines beyond equal protection to ensure that the initiative process does not trample fairness, equality, and inviolable property interests.

2. Substantive Due Process

Procedural due process would not duplicate substantive due process analysis. The Court has ruled that due process protects certain fundamental rights, such as free speech and the right to bear arms. Accordingly, regardless of the legislative process, a law that banned handguns in the home or censored speech would violate substantive due process notwithstanding any procedural protections.

In addition, it may be time to explore critically whether partial rather than general laws violate substantive due process. After all, courts used due process to strike down partial laws in the decades before the Fourteenth Amendment. Such an inquiry is beyond the scope of this paper.

The important point for our purposes is that procedural due process can protect liberty and property interests, regardless of whether they rise to fundamental rights. For example, the Supreme Court has ruled that there is no fundamental right to education, but students nonetheless have a state-created property interest in education.

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461 Coal. to Defend Affirmative Action, 701 F.3d at 474.
462 Id. at 477.
465 Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 104, 123 (1854).
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There is no fundamental right to welfare benefits, but sometimes there are procedural protections put in place before the state may eliminate a person’s benefits. Expanding procedural due process to the initiative process would simply apply this distinction in a new context.

CONCLUSION

There is a difference between withdrawing constitutionally protected interests through the deliberative processes of representative government and allowing anonymous silent masses to withdraw those rights. There is also a difference between denying rights to those who have never had them and stripping those rights away from people who rely on them. Procedural due process provides a well-founded doctrinal home for those precepts.

As leading thinkers and courts recognized in the decades leading up to the Fourteenth Amendment’s ratification, procedural fairness is compromised when the state deprives groups or individuals of their rights without deliberative process. In the context of direct democracy, this absence of deliberation is compounded by the absence of a legislative record, leaving liberty and property vulnerable. At a time when popular lawmaking continues to proliferate at an accelerated pace, we must guard against the arbitrary or unfounded destruction of rights.

468 See Goodwin Liu, Rethinking Constitutional Welfare Rights, 61 STAN. L. REV. 203, 205 (2008) (arguing that welfare rights stem from shared societal understandings and that because these understandings are subject to democratic revision, courts cannot fix the existence or contents of a welfare right in perpetuity).

469 See Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (holding that, under the circumstances of the case, an adequate hearing was required before welfare benefits could be terminated in order to comport with due process of law).