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 when questioning popular lawmaking, 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[1] is generally understood to embody certain principles of procedural fairness.[2] 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.[3] 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.[4] 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,[5] 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.[6] Further, in many states there

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[1] U.S. CONST. amend. XIV, § 1.

[2] *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 81 (1972) ("Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property . . . ."); *see also* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1279–95 (1975) (listing traits of fair procedures). *But see* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) ("The Supreme Court's recurrent efforts to shape due process law to promote policy ends have also taken a toll on doctrinal integrity." (footnote omitted)).

[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-

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[7] *See infra* notes 104–06 and accompanying text (discussing specific states' restrictions on acts by the legislature amending or repealing laws passed through direct democracy).

[8] The vast majority of states with direct democracy implemented the reform between 1898 and 1918. *See* DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES 25 tbl.1 (2004) (listing the dates of state adoption of the initiative). Mississippi was the most recent to adopt the reform, having done so in 1992. *Id.*

[9] *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1641 (2010) (noting that the statewide initiative process is used in twenty-four states); *see also* STEVEN L. PIOTT, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA 1–15 (2003) (noting the initiative system's progressive roots); JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY: POPULISM REVIVED 69 (1986) (same); Bertrall L. Ross II, *The Costs and Elusive Gains of Creating Complementarities Between Party and Popular Democracy: A Response to Ethan J. Leib & Christopher S. Elmendorf*, 3 CALIF. L. REV. CIRCUIT 146, 155 (2012) (same). Perhaps because of its populist roots, direct democracy is popular among most voters. *See* Todd Donovan & Jeffrey A. Karp, *Popular Support for Direct Democracy*, 12 PARTY POL. 671, 680 (2006) (finding, in a study of six countries, that direct democracy is most popular with younger voters); *cf.* Joshua J. Dyck & Mark Baldassare, *Process Preferences and Voting in Direct Democratic Elections*, 73 PUB. OPINION Q. 551, 559 (2009) (finding that one's support for direct democracy is correlated with "yes" votes on an initiative). This support extends across racial demographics. *See* JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 118 (2004) (presenting data showing support for direct democracy among each racial demographic in the United States).

[10] *See, e.g.*, League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297 (9th Cir. 1997) (invalidating much of California's Proposition 187, which purported to eliminate benefits from unlawfully present immigrants in the state); William N. Eskridge Jr., *The California Proposition 8 Case: What Is a Constitution For?*, 98 CALIF. L. REV. 1235, 1236–38 (2010) (describing a proposition that eliminated then-existing marriage rights for same-sex couples).

[11] U.S. CONST. amend. XIV, § 1.

cluded that the Due Process Clause protects substantive fundamental rights, placing them beyond the reach of the state.[12] 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?[13]

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.[14] 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.[15] And with notable symmetry, representative government has

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[12] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (relying on the substantive guarantee of liberty in the Due Process Clause to justify privacy protections for consensual adult same-sex sexual conduct); Planned Parenthood v. Casey, 505 U.S. 833, 846–51 (1992) (finding that a woman's decision to terminate a pregnancy is protected by the substantive component of the Fourteenth Amendment). A number of scholars have criticized this line of jurisprudence. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (referring to substantive due process as a "contradiction in terms—sort of like 'green pastel redness'"); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 221–39 (2d ed. 1997) (arguing that the original meaning of "due process" did not include "judicial power to override legislation on substantive or policy grounds"); Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1531–32 (2008) (same). *See generally* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 133, 351 (1990) (arguing that the progression of political judging has accelerated in recent decades and criticizing constitutional law theorists for urging judges to take such actions outside of the limits of their authority).

[13] *See, e.g.*, Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–72 (1972), *overruled in part on other grounds by* Paul v. Davis, 424 U.S. 693 (1976) (recognizing the broad yet bounded nature of the terms "liberty" and "property" in procedural due process inquiries). *See generally* Henry Paul Monaghan, *Of "Liberty" and "Property*," 62 CORNELL L. REV. 405 (1977) (tracing the expanding definitions of "liberty" and "property"); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (describing the evolving notion of property and the corresponding changes in law).

[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); s*ee 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]

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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 nonjusti-

ment 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) ("[D]irect 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 accomodates 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.[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.[27] Indeed, Sanford Levinson has famously argued that there are many normatively problematic antidemocratic practices built into the Constitution.[28] And sensitivity is required before deepening or expanding such practices. Nor do I take the position that *all* uses of direct democracy are

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Initiative, Referendum, and the Constitution's Guarantee Clause, 80 TEX. L. REV. 807, 814 (2002) ("[T]here is a clear historical answer to the question of whether legislative plebiscites violate the Guarantee Clause. That answer is 'no.'"). The idea that direct democracy is most consonant with the will of the people has been called into serious question. *See, e.g.*, Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 462 (2003) (arguing that direct democracy privileges "majority faction" at the expense of "amendments and compromise" that can make legislation more tolerable for a wider swath of the public).

[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).

[27] *See* Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 622–35 (1998) (concluding that the initiative process is not substantially inferior to the imperfect legislative process); *see also* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 8–9 (2011) (asserting that corruption exists in U.S. government in the form of bad governance and a lack of trust); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 714 (1984) ("[I]nterest-group theory of legislation provides powerful evidence of the persistence and extent of legislative abuse."); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 223 (1986) (asserting that special interest groups tend to dominate the political process). *But see* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 915–27 (1987) ("Although beleaguered, the public interest remains a significant factor in politics."). Due process analysis centers on whether the process one seeks will result in fairer decisions than the alternative and on the costs and benefits of that procedure, not on whether the requested procedure is flawless. *See* William N. Eskridge, Jr. & Philip P. Frickey, The Making of *The Legal Process*, 107 HARV. L. REV. 2031, 2037 (1994) (describing the importance of cost-benefit analysis to understanding legal procedures); Charles H. Koch Jr., *A Community of Interest in the Due Process Calculus*, 37 HOUS. L. REV. 635, 640–42 (2000) (describing the test articulated in *Mathews v. Eldrige* for determining whether procedural design is adequate).

[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.[29] 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."[30] 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.[31] As an empirical matter, it has been documented in political science literature that minorities fare worse in plebiscites than before legislatures.[32]

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[29] *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).

[30] Wilkinson v. Austin, 545 U.S. 209, 211 (2005) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

[31] *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) ("[T]he 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 LEGIS. 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).

[32] *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.[33] 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,[34] as have courts.[35] But far less

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the process employed may not have allowed for a full and fair expression of popular voice." Clark, *supra* note 16, at 453. "From this perspective, . . . an outcome extremely harmful to a minority but only modestly beneficial to the majority . . . is not itself the problem. Rather, it is evidence of the problem." *Id.*

[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 OHIO 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").

[35] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 459, 487 (1982) (overturning a state initiative dismantling a school busing program for desegregation as unconstitutional under the Equal Protection Clause); Hunter v. Erickson, 393 U.S. 385, 389 (1969) (finding a violation of the Equal Protection Clause where a city amended its city charter to prevent the city council from dealing with racial discrimination issues in housing matters); Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466, 470 (6th Cir. 2012) (holding that a state proposal on race-conscious admissions policies violates the Equal Protection Clause), *cert. granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013); *cf*. Perry v. Brown, 671 F.3d 1052, 1084 (9th Cir. 2012) (overturning a voter initiative that took away the right of same-sex couples to marry on the

frequently have commentators or courts alluded to the deficiencies of nonrepresentative lawmaking using due process jurisprudence.[36] 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.[37] 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.[38] What did the words of the Due

grounds that it reflected a mere desire to harm an unpopular group), *vacated and remanded by* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); Evans v. Romer, 854 P.2d 1270, 1282 (Colo. 1993) (finding that a voter-initiated amendment infringed upon the rights of "independently identifiable class[es]" to "participate equally in the political process"), *aff'd on other grounds*, Romer v. Evans, 517 U.S. 620, 634–35 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." (alteration in original) (emphasis omitted) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted)); Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGEORGE L. REV. 473, 486–88 (2002) (stating that in *Romer*, the Court missed an opportunity to recognize the case's implications for the diminution of equal political participation).

[36] For example, in *Jones v. Bates*, 127 F.3d 839, 860 (9th Cir. 1997), *rev'd on other grounds*, 131 F.3d 843 (9th Cir. 1997) (en banc), the panel overturned an initiative on the grounds that it provided insufficient notice about its effects. While the court reversed that decision *en banc*, it left undisturbed Judge Reinhardt's observations about the benefits of the legislative process. More commonly, however, questions of procedural due process have not played a meaningful role in examining the legality of statutes that deprive individuals of liberty or property. *See* Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 641–44 (6th Cir. 2001) (concluding that allowing a voter referendum to determine whether to deprive a person of a property interest consisted of a violation of *substantive* due process), *rev'd on other grounds*, 538 U.S. 188 (2003). The Supreme Court did not address the closely related question of whether the referendum violated procedural due process. *See* Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by* Engquist v. Oregon Department of Agriculture, 44 GA. L. REV. 161, 178 (2009) (observing that the Supreme Court in *Buckeye* declined to decide whether the case implicated state-created property interests).

[37] *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 86 (1997) ("Despite claims of republican revivalists that the Constitution aims to create a deliberative democracy[,] . . . the quality of governmental deliberation—or indeed its absence—is generally held irrelevant under most constitutional provisions, including the Due Process, Equal Protection, and Takings Clauses."). Fallon cites, as examples of this revivalist scholarship, Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1505–07 (1988), and Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 68–75 (1985).

[38] *See* JACK M. BALKIN, LIVING ORIGINALISM 3–34 (2011) (presenting the interpretive approaches of "fidelity to text and principle" and "framework originalism"); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–303 (2007) (elaborating on this method); Jack M. Balkin, *Fidelity to Text and Principle*, *in* THE CONSTITUTION IN 2020 11, 11 (Jack M. Balkin & Reva B. Siegel eds., 2009) (defining the method of "fidelity to text and principle"); *cf.* Fred O. Smith, Jr., *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM

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 lawmaking, 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

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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.[40] 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.[41] 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.[42] 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."[43] 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."[44]

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.[45] The experiments with

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[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.").

[41] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13, 38 (Amy Gutmann ed., 1997).

[42] *See* Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 41, at 145 (noting that the Eighth Amendment imposes an "abstract principle" forbidding cruel and unusual punishment).

[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.

BALKIN, LIVING ORIGINALISM, *supra* note 38, at 3.

[44] BALKIN, LIVING ORIGINALISM, *supra* note 38, at 7.

[45] *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 coauthored 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

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[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).

[49] *See* Richard L. Hasen, *Fixing Washington*, 126 HARV. L. REV. 550, 572 (2012) (reviewing LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS POLITICS—AND A PLAN TO STOP IT (2011) and JACK A. ABRAMOFF, CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST (2011)) ("A 2011 Gallup poll found that sixty-four percent of voters had low or very low trust in members of Congress, the lowest percentage ever recorded by Gallup for a profession and below trust ratings for lobbyists, telemarketers, and car salespeople."); Michael Cooper & Megan Thee-Brenan, *Congress Seen as Top Culprit in Debt Debate*, N.Y. TIMES, Aug. 5, 2011, at A1 ("A record 82 percent of Americans now disapprove of the way Congress is handling its job . . . .").

[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.[51] He and a co-author actually find evidence that deliberation among ideologically diverse groups does not similarly exacerbate polarization.[52] 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.[53] Legislation is generally exempt from these requirements of procedural fairness under the Due Process Clause.[54] 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*."[55] 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,[56] and less prone to deliberation.[57] They

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).

[55] Missouri v. Jenkins, 495 U.S. 33, 66 (1990) (Kennedy, J., concurring) (emphasis added).

[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

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inability of citizen lawmakers to deliberate about, or to amend, proposed ballot measures."); *see also* Fallon, *supra* note 2, at 332–37 (describing courts' mixed record of ensuring judicial review); Friendly, *supra* note 2, at 1294–95 (declaring judicial review a constitutional requirement of a fair hearing).

[57] *See* THE FEDERALIST NO. 10, at 50 (James Madison) (Clinton Rossiter ed., 1961) (stating 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"); Eule, *supra* note 5, at 1527 ("[T]he deliberative process offers time for reflection, exposure to competing needs, and occasions for transforming preferences.").

[58] *See generally supra* note 32 (identifying empirical sources demonstrating that minorities do not fare as well in direct democracy).

[59] *See* Bd. of Cnty. Comm'rs v. Carter, 2 Kan. 109, 123–29 (1863) (finding impermissible a statutory provision that retroactively favors particular individuals and injures other parties); Adams v. Palmer, 51 Me. 480, 490–91 (1863) (interpreting Maine's due process clause as prohibiting retroactive application of legislation that would otherwise interfere with vested property rights).

[60] *See Bd. of Cnty. Comm'rs*, 2 Kan. at 123–29 (striking down a statutory provision in which the board of county commissioners went outside the scope of its authority and improperly issued bonds); *see also* Sherman v. Buick, 32 Cal. 241, 249–50 (1867) (holding that the legislature cannot transfer private property for private use, but rather may only interfere with property rights within the confines of constitutional due process protections); Norris v. Doniphan, 61 Ky. (4 Met.) 346, 357–61 (1863) (discussing the legality of the confiscation of enemy property under American due process protections); Denny v. Mattoon, 84 Mass. (2 Allen) 361, 382 (1861) (declaring that legislation alone may not deprive an individual of his property, but rather such deprivation must be done through appropriate tribunals with adequate constitutional protections).

[61] *See* Budd v. State, 22 Tenn. (3 Hum.) 482, 491 (1842) (discussing a state due process clause intended "in general, to protect minorities from the wrongful action of majorities"); Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 557 (1831) (finding that a state due process clause "intended to secure to weak and unpopular minorities and individuals equal rights with the majority").

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

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[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 democractic government as a means of securing the "lawful right and liberty" of man).

[63] *See* WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 166–209 (1972) (describing the ways legislators appealed to republicanism when enacting Reconstruction legislation and amendments).

[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[66]

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

[66] Due process literature often refers to the major shifts in due process jurisprudence during the 1970s as a "revolution," frequently citing its genesis as *Goldberg v. Kelly*, 397 U.S. 254 (1970). *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE

dence in civil cases.[67] The first innovation, generally associated with Charles Reich, pushed courts to expand the definition of what constituted property.[68] Reich contended that alongside real estate, chattels, and investment assets stood government-created entitlements around which people organized their lives.[69] The Supreme Court cited and endorsed this expanded view of property in the 1970 case *Goldberg v. Kelly*.[70] 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.[71] The extant jurisprudence continues to recognize that states may create constitutionally cognizable liberty or property interests that warrant some level of due process.[72]

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

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STATE 8–10 (1985) (examining the influx of due process litigation in the 1970s); Jason Parkin, *Adaptable Due Process*, 160 U. PA. L. REV. 1309, 1316 (2012) ("For the millions of individuals who have received public benefits since the 1970s, the fair hearing system established in the wake of *Goldberg* and *Mathews* represents the real-world legacy of the Supreme Court's due process revolution.").

67 Importantly, this era also ushered in innovations to due process in the area of criminal justice. *See* FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW 26–66 (1970) (describing the ways in which the Warren Court expanded the rights of criminal defendants through the Due Process Clause).

68 *See* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965) (discussing the public policy question of entitlement); Reich, *supra* note 13, at 733 (discussing the emergence of government-created wealth).

69 *See* Reich, *supra* note 68, at 1255 ("It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.").

70 *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) ("It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.").

71 *See id.* at 264 ("[O]nly a pre-termination evidentiary hearing provides the recipient with procedural due process.").

72 *See, e.g.*, Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 750–51 (2005) (examining whether "an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated"); Wilkinson v. Austin, 545 U.S. 209, 213 (2005) (examining state procedures for the classification of prisoners for placement at "supermax" facilities, in terms of compliance with due process requirements); Gilbert v. Homar, 520 U.S. 924, 926 (1997) (addressing whether it is a violation of the Due Process Clause to "fail[ ] to provide notice and a hearing before suspending a tenured public employee without pay"); Goss v. Lopez, 419 U.S. 565, 567 (1975) (discussing due process issues for the temporary suspension of high school students "without a hearing either prior to suspension or within a reasonable time thereafter").

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 government 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 protections, the weight of the deprivation, and whether additional procedures 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 technical conception with a fixed content unrelated to time, place, and

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[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 (2010) (describing Friendly's influence).

[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. SIDEBAR 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 . . . .").

[78] 424 U.S. 319, 343, 348 (1976) (citing Friendly, *supra* note 2).

[79] *Id.* at 341, 348.

[80] Turner v. Rogers, 131 S. Ct. 2507, 2517–18 (2011) ("[T]hose 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."[81] Instead, the Court emphasized that "due process is flexible and calls for such procedural protections as the particular situation demands."[82] 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.[83] 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.[84] 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."[85]

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."[86] Thus, the Court concluded, "a [welfare] recipient must be allowed to state his position orally"[87] before the state removes his or her benefits.

C. The Lawmaking Exemption

In *Bi-Metallic Investment Co. v. State Board of Equalization*,[88] 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

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[81] Cafeteria & Rest. Workers v. McElroy, 367 U.S. 886, 895 (1961).

[82] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[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.").

[84] *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[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.[89] 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.[90]

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.[91] The Ohio Supreme Court had rejected the ordinance, finding that because the provision "lack[ed] standards to guide the decision of the voters," it "permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner."[92]

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.[93] 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.[94] In the con-

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[89] *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").

[90] *Bi-Metallic*, 239 U.S. at 441.

[91] 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).

[92] *Eastlake*, 462 U.S. at 672.

[93] *Id.*

[94] Imagine, for example, a measure that required one "yes" or "no" vote on multiple issues, or an ordinance with unclear wording. *See* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 689–90 (2010) (discussing the single-subject rule present in many state constitutions designed to eliminate logrolling in the initiative process); *see also* Markus v. Bd. of Elections, 259 N.E.2d 501, 504–05 (Ohio 1970) (holding that a ballot statement was defective because it did not adequately present the question or issue to be decided). Vague initiatives in particular raise questions of fair notice, an axiomatic due process concern.

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-Rubíera 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

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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 opporunity to present their objections.").

95 State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283–84 (1984).

96 665 F.3d 261, 272 (1st Cir. 2011).

97 Am. Bus. Ass'n v. Rogoff, 649 F.3d 734, 743 (D.C. Cir. 2011).

98 Rea v. Matteucci, 121 F.3d 483, 485 (9th Cir. 1997) ("When a state alters a state-conferred property right through a legislative process, the legislative determination provides all the process that is due." (citations omitted) (internal quotation marks omitted)); McMurtray 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.").

99 495 U.S. 33, 66 (1990) (Kennedy, J., concurring in part and concurring in judgment).

"semisubstantive constitutional rules."[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."[101] At other times, the Court has provided "constitutional 'who' rules, which steer policy choices from one nonjudicial decision maker to another."[102]

Yet none of these semisubstantive rules invoke the Due Process Clause.[103] And as a result, they represent a crude manner by which to achieve the principle of fairness that animates procedural due process.[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,[105] as a means of oppression,[106] or in a manner that undermines individuals' dignity.[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.

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[100] *See* Coenen, *Pros and Cons*, *supra* note 31, at 2842–53 (discussing the different forms of semisubstantive review used by the Supreme Court).

[101] *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).

[102] Coenen, *Pros and Cons*, *supra* note 31, at 2851. An example is *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), invalidating a ban on aliens from certain kinds of employment because the Civil Service Commission promulgated the proscription rather than Congress. Coenen also describes what he calls constitutional "why" rules and "when" rules. Coenen, *Pros and Cons*, *supra* note 31, at 2848–49.

[103] Coenen, *Pros and Cons*, *supra* note 31, at 2839.

[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 infra* note 395 and accompanying text.

[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").

[106] Den *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, *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))).

[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."[108] 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.[109] 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.[110]

It is not apparent that those rationales apply when states enact laws *without* the "normal legislative process."[111] 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,[112] and 99.7% of state laws are passed by state legislatures.[113] 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.[114] 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.[115] 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.

[111] S.F. Forty-Niners v. Nishioka, 89 Cal. Rptr. 2d 388, 397 (Ct. App. 1999) ("Because the initiative process bypasses the normal legislative process, safeguards are necessary to prevent abuses and provide for an informed electorate."); Wyo. Nat'l Abortion Rights Action League v. Karpan, 881 P.2d 281, 289 (Wyo. 1994) ("There is a difference, however, between the initiative process and the normal legislative process."); *cf.* Gutierrez v. Ada, 528 U.S. 250, 256 (2000) ("Referendums are exceptions to the normal legislative process, and passage of a referendum is not itself essential to the functioning of government."). *But see Marusic Liquors*, 55 F.3d at 263 ("[T]he referendum satisfies the due process clause.").

[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]

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116 *Id.*

117 *Id.*

118 *Id.*

119 *See* Friendly, *supra* note 2, at 1279–95.

120 *See* Eule, *supra* note 5, at 1561 (highlighting how minimal public debate and private voting in the context of plebiscites challenge judicial review of discrimination claims); Bell, *supra* note 34, at 14–15 (discussing how the privacy of the voting booth "enables . . . voters' racial beliefs and fears to be recorded and tabulated in their pure form"); Schacter, *supra* note 16, at 126–47 (arguing that intent-based interpretative techniques are problematic in the context of direct legislation); *see also* Friendly, *supra* note 2, at 1294–95 (calling judicial review a hallmark of fair decisionmaking); *cf.* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 333–35 (1993) (describing courts' mixed record of ensuring judicial review).

121 *See* Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243, 1276–77 (2011) ("[Within legislatures,] tradeoffs are considered within a legislative process that is transparent and thus enables legislators to make enforceable deals (logrolls). This is not possible in initiative lawmaking where votes cannot be discerned and in which policies cannot be assessed against one another through, say, a structured appropriations process."); Schacter, *supra* note 16, at 152 ("Steadfastly insisting that voters made a determi-

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 congressional 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

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nate, transparent policy choice or deploying the hollow fiction that voters have done so are not the only options open to a court confronted with the kinds of interpretive questions illustrated in the study."). *But see* Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687, 706–07 (2010) (observing that the rule that only a single subject may appear on a ballot helps increase political transparency, especially if it is reformed); *cf*. Eule, *supra* note 5, at 1562 ("Two approaches are possible. We may relax the burden of proving discriminatory purpose and be more imaginative about the sources we canvass—for example, ballot pamphlets, exit polls, campaign advertising—or we may abandon the purpose requirement altogether in certain plebiscitary settings.").

122 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

123 *See* Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1354 (2002) (observing that the Rehnquist Court signaled to lower courts that inquiry into whether substantive constitutional provisions are violated should focus "on the particular legislative history and context of enactment of the challenged law").

124 *See, e.g.*, United States v. Morrison, 529 U.S. 598, 662–63 (2000) (rejecting provisions of the Violence Against Women Act as an improper use of Congress's power to enforce the Fourteenth Amendment).

125 *Id.* at 626.

126 *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (deciding that in applying intermediate scrutiny to a classification based on gender, the State's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"); Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) (explaining that in the Establishment Clause context, the "State's articulation of a secular purpose . . . [must] be sincere and not a sham").

law was enacted with the purpose of promoting religion,[127] expressing naked animus,[128] or subjugating certain groups.[129]

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."[130] 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."[131] "In this statement," Judge Thompson noted, "there is a stereotype commonly associated with Mexicans."[132]

This approach of looking to the legislative record is not new. In *United States Department of Agriculture v. Moreno*,[133] the United States Supreme Court looked to statements in the legislative record to show Congresspersons' animus toward "hippies."[134] Similarly in 1982, a federal judicial panel reviewed the legality of a Georgia redistricting

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127 *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))).

128 *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.").

129 *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").

130 Cent. Ala. Fair Hous. Ctr. v. Magee, 835 F. Supp. 2d 1165, 1169 (M.D. Ala. 2011).

131 *Id.* at 1193.

132 *Id.*

133 413 U.S. 528 (1973).

134 *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)).

plan under the Fourteenth Amendment and the Voting Rights Act.[135] To divine legislative intent, the court found the words of the then-Chairman of the state's reapportionment committee useful.[136] Chairman Joe Mack Wilson had flatly explained to his colleagues during the reapportionment process that he did not "want to draw nigger districts."[137] 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.[138]

There is a resounding absence of such a record when voters directly enact measures.[139] 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.[140] 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."[141] 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."[142]

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.[143]

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135 *See* Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982).

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. 1981), *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*

When a person's rights are taken, he or she often looks to the procedural mechanisms that preceded the deprivation for legitimacy.[144] In the judicial context, the openness of these proceedings is among these markers of legitimacy.[145] 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."[146] 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."[147] 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."[148]

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.").

144 *See* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 142 (2011) (noting the psychological role of procedural due process and procedural justice); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 120 (2000) (finding that people determine the legitimacy of authority through the fairness of the decisionmaking process); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439 (1992) (enumerating "participation, dignity, and trust" as factors—in addition to neutrality—influencing a person's perception of procedural fairness). *But compare* Anne Richardson Oakes & Haydn Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 611–12 (2011) (critiquing Professor Tyler for underemphasizing an ultimate outcome's role in the perception of procedural fairness), *with* Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM J. POL. SCI. 629, 640–41 (1989) (noting the influence possessing a fair disposition has on perceiving fairness).

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.*

147 THE FEDERALIST NO. 52, at 123 (James Madison) (Clinton Rossiter ed., 1961).

148 THE FEDERALIST NO. 57, at 142 (James Madison) (Clinton Rossiter ed., 1961).

Nonetheless, legislators take oaths to protect the public good and act in a manner consistent with the Constitution.[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."[150]

3. Deliberation

In *Jones v. Bates*, Judge Stephen Reinhardt succinctly identified the lack of deliberative filters attendant to the initiative process.[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.[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."[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.[154] Modern observers of the legislative

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[149] U.S. 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 . . . ."); *see also* Hans A. Linde, *State Courts and Republican Government*, 41 SANTA CLARA L. REV. 951, 952 (2001) (referencing these oaths).

[150] Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1743 (1998).

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

[152] *Id.* at 860.

[153] *Id.*; *see also* Linde, *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.").

[154] 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"); *see also* Eule, *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.[155] 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.[156] On the other hand, in popular lawmaking, voters "can adopt no amendments, however obvious may be their necessity."[157] 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.[158] 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.[159] Most aptly, voters have sometimes used the initiative process to take away gains won in the legislative

competing needs, and occasions for transforming preferences. Public debate among those of equal status and eloquence thus ultimately leads to realization of the common good.").

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).

156 *See* Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401–03 (2003) (discussing how the Framers of the Constitution created a government to promote varying perspectives).

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.[160] These examples include voter decisions to remove rights from groups in the areas of housing,[161] employment,[162] education,[163] and marriage.[164]

II
LAWMAKING

A. Beyond the Substantive Due Process Debate

Because the Fourteenth Amendment became law in 1868,[165] and because no state adopted the initiative process until thirty years later,[166] 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.[167]

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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").

165 Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1725 (2012).

166 Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1, 4 (2011) (noting that South Dakota became the first state to adopt direct democracy in 1898); Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 695 (2011) (same).

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.[168] 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.[169] 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.[170]

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."[171] 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."[172] Separation of powers, they argue, served as a defining feature of due process.[173]

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-

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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.").

169 Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 460–77 (2010) (outlining case law on the Fifth and Fourteenth Amendments).

170 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1672 (2012) (criticizing the use of originalism to support modern due process).

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.[174] 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.[175] 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.[176]

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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).

[176] The relationship between dignity and procedural fairness has been explored in recent decades by a number of authors. *See, e.g.*, Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981) (addressing dignity in the administrative context); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976) (emphasizing the process values of dignity); Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 917 (noting the role of dignity in the context of the Sixth Amendment's Confrontation Clause); *cf*. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 807 (2008) (stating courts' role as leveler for litigants, treating "judges, juries, lawyers, and staff" equally); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 440–41 (1992) (same).

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.

1. Real Estate

In *Lindsay v. Commissioners*, a South Carolina appellate court considered whether it violated due process to seize land without compensation.[177] Judge Waties issued an influential opinion challenging the notion that all acts of the legislature comported with procedural due process.[178] 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.[179] 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."[180]

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.[181] 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?[182]

He additionally asked, "[C]an any thing prove more fully, the arbitrary character of the act, than this?"[183]

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.").

179 *Id.* at 57; S.C. CONST. of 1790, art. IX, § 2, *reprinted in* 6 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3258, 3264 (1909).

180 Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 981 (1990).

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,[184] 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."[185] 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."[186]

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*,[187] 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,"[188] 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 disseised 'but by lawful judgment of his peers, or by due process of law.'"[189]

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."[190] This pain could only be inflicted if the property was taken for public use, and the seizure was accompanied by fair compensation.[191] "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."[192]

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."[193] "[T]his is an exertion of power which the legislature indulges with caution, and which nothing but the legislature can perform."[194]

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.[195] These cases often focused more on the inviolability of private property than concerns about separation of powers. The case of *Taylor v. Porter*,[196] 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."[197] 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.[198]

2. *Employment*

Another emblematic example of a state court overturning legislation on due process grounds is *Hoke v. Henderson*.[199] 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."[200] 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."[201] Thus, absent a law abolishing the office itself, the legislature could not "lessen the tenure of the incumbent, or transfer it to another."[202]

This reasoning speaks to something more than a Montesquieu-like concern with checks and balances.[203] 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,[204] 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."[205] "[H]e 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 . . . ."[206]

3. Voting

Nineteenth-century courts also expressed concern about the unwarranted deprivation of liberty. A particularly compelling example is *State v. Staten*.[207] 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.

203 *Cf.* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1951 (2011) (citing Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 226 (2007)) ("[F]unctionalists view their job as primarily to ensure that Congress has respected a broad background purpose to establish and maintain a rough balance or creative tension among the branches."); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433 (1987) ("Functionalism is closely allied with the vision of checks and balances among the branches of government."); Mark Tushnet, *The Sentencing Commission and Constitutional Theory: Bowls and Plateaus in Separation of Powers Theory*, 66 S. CAL. L. REV. 581, 583 (1992) ("When the Court uses a functional approach . . . the discussion tends to center on balance-of-powers considerations.").

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."[208] 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."[209]

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,[210] 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.[211] 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."[212]

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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208 State v. Staten, 46 Tenn. (1 Cold.) 233, 245 (1869) (citing THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 355).

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,[213] 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[214] and punished individuals without a hearing.[215]

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 . . . ."[216] 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.[217] 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.[218]

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*,[219] wherein the Tennessee Supreme Court explained that an "act . . . does

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213 7 Port. 293 (Ala. 1838) (Collier, C.J.).

214 *See* Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 351 (1987) ("The Supreme Court of Alabama . . . expanded the definition of 'property' when it determined . . . *In re Dorsey*.").

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").

218 Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819).

219 34 Tenn. (2 Sneed) 104 (1854).

not apply to and effect [sic] all persons or officers who are or may be in the same situation and circumstances, and is, therefore, partial and limited in its operation, and consequently not the 'law of the land' in the sense of our Constitution."[220]

The language of equality was sometimes even more direct. In *Budd v. State*,[221] 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."[222] 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."[223] 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.[224]

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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.[225] Most famously, in *Dr. Bonham's Case*,[226] 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.[227] "[O]ne cannot be Judge and Attorney for any of the parties," Coke wrote.[228] 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."[229]

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[230] and representative democracy was not his chief frame. "[I]f a King

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Constitutionalism, and the Fifth Amendment, 58 EMORY L.J. 585, 594 (2008); John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT. 337, 337 (1997); Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1113 (2011); Williams, *supra* note 169, at 428.

225 *See* Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 454 n.61 (2011) (noting that Coke believed due process rights antedate the Magna Carta); Gedicks, *supra* note 224, at 594 ("Although [the] Magna Carta fell into disuse in succeeding centuries, Sir Edward Coke revived it as the centerpiece of a 'higher law' constitutionalism . . . .").

226 (1610) 77 Eng. Rep. 638 (C.P.) 652; 8 Co. Rep. 107 a.

227 *See id.* at 118 (stating that censors cannot act as "judges, ministers, and parties"); *cf.* Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 393 (2012) (noting the venerable nature of the case but arguing that its core principle is often overstated). The case is famous in large part because of the following dicta:

> [T]he Common Law doth controll [sic] Acts of Parliament, and somtimes [sic] shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll [sic] it, and adjudge such Act to be void; and, therefore . . . [s]ome Statutes are made against Common Law and right, which those who made them, would not put them in execution . . . .

1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 275–76 (Steve Sheppard ed., 2003). Some scholars have invoked that language to argue that Coke supported a version of substantive due process. *See, e.g.*, Gedicks, *supra* note 224, at 594 (stating that Coke considered natural law and common law to be one and the same).

228 *Id.*

229 Magna Carta § 39 (1215 & 1225), *reprinted in* A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 45 (1998).

230 None of this is to suggest that Coke never showed independence, despite writing for the King's Bench. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 51 n.211 (2001) (identifying examples of Coke's time as Chief Justice of the King's Bench when he demonstrated judicial independence). This independence ultimately led to his dismissal. *Id.* Still, scholars have argued that it was only after Coke was dismissed from the judiciary that he "became an advocate of parliamentary authority." *Id.* at 52 n.211.

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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231 Calvin's Case, (1608) 77 Eng. Rep. 377 (K.B.) 398.

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) ("[I]f 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.").

234 CONG. GLOBE, 39TH CONG., 1ST SESS. 1034 (1866) (statement of Rep. Bingham).

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."[236] Representative Morton later argued that the Fourteenth Amendment altered the meaning of words in the original Constitution.[237] 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.[238] 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*.[239]

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.[240]

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

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[236] CONG. GLOBE, 38 CONG., 1ST SESS. 2989 (1864) (statement of Rep. Arnold). *But see* Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1164 (1992) ("[T]he Fourteenth Amendment . . . did not reflect a radical transformation . . . .").

[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); MD. 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 communities" 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

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241 PA. CONST. of 1776, § 17.

242 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787, at 164 (1969).

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 measure 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 legislation 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 voter 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

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[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.

[247] THE FEDERALIST NO. 10, at 126 (James Madison) (Michael Genovese ed., 2009); *cf*. JEREMY WALDRON, LAW AND DISAGREEMENT 69–75 (1999) (describing the strengths of deliberation).

[248] Larry D. Kramer, *"The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 730 (2006).

[249] Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 WM. & MARY Q. 925, 948 (2002).

[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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[251] 4 THE PAPERS OF ALEXANDER HAMILTON 35 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[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 TEX. 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."[256] This is a paradox certainly worth exploring, especially in light of the deeply rooted history of the town meeting.[257] 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."[258] 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."[259]

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.[260] Both views and votes historically were transparent, not anonymous.[261]

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ance); Morris v. Congdon, 893 A.2d 413, 413 (Conn. 2006) (same); Russell v. Zoning Bd. of Appeals of Brookline, 209 N.E.2d 337, 339 (Mass. 1965) (same); Winchester Taxpayers' Ass'n v. Bd. of Selectmen, Town of Winchester, 383 A.2d 1125, 1125 (N.H. 1978) (same). However, some jurisdictions outside of New England authorize the practice. *See, e.g.*, MONT. CODE ANN. §§ 7-3-601 to 7-3-613 (2013) (authorizing town halls within the jurisdiction); Gregg v. Town of Bourbonnais, 64 N.E.2d 106, 111 (Ill. App. Ct. 1945) (same); State *ex rel.* Newman v. Columbus Twp. Bd., 735 N.W.2d 399, 403 (Neb. Ct. App. 2007) (same). *But see* Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 534 n.5 (2004) (noting that very few, if any, towns in Montana have engaged in the practice).

256 Shaun Bowler, *When Is It OK to Limit Direct Democracy?*, 97 MINN. L. REV. 1780, 1796 n.79 (2013).

257 *See* JOSEPH F. ZIMMERMAN, THE NEW ENGLAND TOWN MEETING: DEMOCRACY IN ACTION 18–19 (1999) (describing the begininngs of the New England town meeting).

258 Wheelock v. City of Lowell, 81 N.E. 977, 979 (Mass. 1907).

259 JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 41 (1980) (quoting 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 534 (1995)).

260 *See* Sherman J. Clark, *Ennobling Direct Democracy*, 78 U. COLO. L. REV. 1341, 1365 (2007) ("The New England town meeting so often seen as precedent for—or at least an honored ancestor of—modern direct democracy did not provide for anonymous voting. People knew each other, and knew each other's votes. Perhaps it is time to consider a return to that tradition.").

261 *See id.* ("People . . . knew each other's votes."); *see also* Linde, *supra* note 150, at 1744 (noting that because "votes on ballot measures are cast in isolation, in carefully guarded privacy, and without obligation to hear anyone else or explain one's vote to anyone," they are "a carefully constructed antithesis to the public process of making collective public decisions in the public interest and in antithesis, also, to the New England town

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.").

[262] Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 432 (1998).

[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.[267]

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

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267 *Id.* (outlining several such cases).

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.").

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.").

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.).

271 *Id.* at 352.

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.").

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.

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.").

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).

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 *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 *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

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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); *Parker*, 6 Pa. at 507 ("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.").

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 . . . ?"[282]

The New York Court of Appeals reached the same conclusion two years later in *Barto v. Himrod*.[283] 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."[284]

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.[285]

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.[286]

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 . . . ."[287]

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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[282] 15 Barb. 112, 117–18 (N.Y. Gen. Term 1851).

[283] 8 N.Y. 483 (1853).

[284] *Id.* at 494 (Willard, J., concurring).

[285] Parker v. Commonwealth, 6 Pa. 507, 512–13 (1847).

[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.[288] Then upon passage, there are often significant restrictions on the legislature's ability to amend the legislation.[289]

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.[290]

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.[291] The short letter documented the results of a recent popular vote held in the city, an

[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."[292] Washington's city council authorized the vote because bills had "been introduced in Congress having in view the extension of the elective franchise, in this city, so as to confer its privileges upon the negro population."[293] Of the 6626 (white, male) voters who participated in the election, 6591 voted against permitting black men to vote.[294]

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."[295] The motion carried. In the House, the dialogue about the vote was less muted.[296] "Every vote against [the black man] at this pretended election was an argument in his favor," Representative Scofield argued.[297] 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.[298]

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*."[299] Unfiltered popular sentiment,

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[292] *Id.*

[293] WILLIAM TINDALL, STANDARD HISTORY OF THE CITY OF WASHINGTON FROM A STUDY OF THE ORIGINAL SOURCES 313–14 (1914).

[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.

[304] KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. 126 (2010).

[305] *See* WIECEK, *supra* note 63, at 187 (discussing the Wade-Davis bill and accompanying Manifesto); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012) (discussing James Ashley's perspective on the guarantee of a republican form of government). *See generally* Daniel S. Korobkin, *Republicanism on the Outside: A New Reading of the Reconstruction Congress*, 41 SUFFOLK U. L. REV. 487 (2008) (promoting a republican reading of the Reconstruction and the Fourteenth Amendment); Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government During Reconstruction*, 15 J. S. HIST. 192 (1949) (on contemporaneous understandings of the guarantee).

Sumner introduced resolutions to form provisional governments in the rebelling states, which he argued would "establish . . . republican forms of government under the Constitution."[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."[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.[308] Their assessments depended in part on the then-contested view that slavery was incompatible with republicanism.[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."[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.[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."[312] And ineluctably, in debates about the scope of that amendment, leaders cited their goal of achieving republican governments

306 CONG. GLOBE, 37TH CONG., 2D SESS. 737 (1862); *see also* David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1211 (2006) (discussing Senator Sumner's resolutions).

307 Abraham Lincoln, *Proclamation (Dec. 8, 1863)*, *in* 6 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).

308 Currie, *supra* note 306, at 1217 (citing 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. 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 somesuch expedient as this . . . .").

309 *See* CONG. GLOBE, 39TH CONG., 1ST SESS. 183 (1866) (statement of Rep. Kelley).

310 CONG. GLOBE, 39TH CONG., 1ST SESS. 3976 (1866).

311 CONG. GLOBE, 40TH CONG., 2D SESS. 958 (1868).

312 CONG. GLOBE, 39TH CONG., 1ST SESS. 5 (1865) (statement of Speaker Colfax).

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.[322] 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."[323] 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.[324] "[R]epublic" derives

Federal System: Rethinking Incorporation and Reverse Incorporation in Patterson *and* Gitlow, *in* Benchmarks: Great Controversies in the Supreme Court 71, 79 (Terry Eastland ed., 1995); Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 Colum. L. Rev. 1501, 1506 (2012) (describing the Fourteenth Amendment's effect on interpretation of the Thirteenth Amendment); *see also* Richard A. Primus, Bolling *Alone*, 104 Colum. L. Rev. 975, 977 n.7, 989 (2004) (reviewing the debate and providing a historical account of reverse incorporation). Reverse incorporation has been criticized by some scholars. *See, e.g.*, Ely, *supra* note 12, at 32 (1980) (calling reverse incorporation "gibberish both syntactically and historically"). Others have defended reverse incorporation. *E.g.*, Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 766–71 (1999); *cf.* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. Cal. L. Rev. 323 (2011) (noting that states often use federal constitutional doctrines in resolving state constitutional disputes and arguing that the United States Supreme Court should occasionally look to state constitutional law in resolving its disputes).

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."[325] James Madison put forward a vision of republicanism that comported 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."[326] Similarly, an eighteenth-century dictionary defined "Republican" as "[p]lacing the government in the people."[327] The more difficult question is whether "republican form" also refers to a system of representative government.[328]

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

> [t]he 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.[329]

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 . . . ."[330]

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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Guarantee Clause Regulation of State Constitutions, 62 STAN. L. REV. 1711, 1718 (2010) ("In short, republican governments rule (1) by the majority (and not a monarch), (2) through elected representatives, (3) in separate, coequal branches.").

325 8 THE OXFORD ENGLISH DICTIONARY 673 (2d ed. 1989).

326 THE FEDERALIST NO. 39, at 80 (James Madison) (Michael A. Genovese ed., 2009) (emphasis added).

327 Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 527 (1962) (quoting Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (London, John Jarvis 1786)).

328 Two helpful articles in compiling primary sources for this portion of this project are Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994), and Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25–26 (1988). In an earlier piece, I similarly defended the idea that representative government is a component of republicanism. Smith, *Awakening*, *supra* note 38.

329 THE FEDERALIST NO. 37, at 170 (James Madison) (Terence Ball ed., 2003).

330 THE FEDERALIST NO. 10, at 44 (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

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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.[339] While one scholar has contended that "[t]he Guarantee Clause *probably* does not require a state to have any representative legislature at all,"[340] 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*.[341] Similarly, Article IV, Section 4—the home of the Republican Form Clause—allows Congress to protect states from insurrection if a state *legislature* requests.[342]

Relatedly, each state had a legislature at the Founding.[343] This fact is telling because Madison contended that the states were republican as they entered the union.[344] 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.*"[345] 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.[346] Shay's Rebellion was a fresh memory.[347] Consider the words of Governor Edmund Randolph, who initially introduced the Republican Form Clause at the Constitutional Convention.[348] "[T]he

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339 Smith, *Awakening*, *supra* note 38, at 1954–57.

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* WIECEK, *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."[349]

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.[350] Orderly deliberative bodies—elected to represent the public—help ameliorate against this type of instability.[351]

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."[352] Judge Thomas Cooley's nineteenth-century treatise similarly defined "republican form" as "a government by representatives chosen by the people."[353]

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.[354] 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 lawmaking before the court violated

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instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State").

[349] RALPH KETCHAM, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 36 (2003) (Madison).

[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).

[351] *Cf.* THE FEDERALIST NO. 10, at 57–58 (James Madison) (Clinton Rossiter ed., 1961).

[352] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 293 (Boston, Hillard, Gray & Co. 1833).

[353] T.A. Sherwood, *The Initiative and Referendum Under the United States Constitution*, 56 CENT. L.J. 247, 249 (1903) (quoting THOMAS MCINTYRE COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 194 (1880)).

[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."[355] 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."[356]

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."[357]

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."[358]

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."[359] 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

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[360] *See* THE FEDERALIST NO. 10, at 43–44 (James Madision) (Terrence Bell ed., 2003).

[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.[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.[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 *Bond v. United States*,[366] where the Court assessed whether a federal criminal defendant had standing to raise a defense under the Tenth Amendment.[367] The defendant alleged that federal prosecutors exceeded Congressional power when they prosecuted her for violating a treaty.[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.[369] "Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power

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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, *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).

365 *See* Suja A. Thomas, *Nonincorporation: The Bill of Rights after* McDonald v. Chicago, 88 NOTRE DAME L. REV. 159, 162–64 (2012) (providing helpful history of incorporation). As a doctrine, incorporation has experienced criticism. *E.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY 155–89 (2d ed. 1997); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 748 (1965) (criticizing the term "incorporation" and stating "[t]he sense of the word 'incorporate' implies simultaneity," an inaccurate description).

366 131 S. Ct. 2355 (2011).

367 *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. *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."); New York v. United States, 505 U.S. 144, 156 (1992) ("[W]hat is not conferred [by the Tenth Amendent], is withheld, and belongs to the state authorities." (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833))).

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

369 *See Bond*, 131 S. Ct. at 2355, 2364–65 (2011); *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-

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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)).

377 Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (establishing the political question doctrine).

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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Court would not reach the merits of a challenge to the Voting Rights Act of 1965 because the Guarantee Clause is nonjusticiable); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608, 612 (1937) (same); Mountain Timber Co. v. Washington, 243 U.S. 219, 234 (1917) (same); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565, 569 (1916) (same); Marshall v. Dye, 231 U.S. 250, 256–57 (1913) (same); Kiernan v. Portland, 223 U.S. 151, 163–64 (1912) (same). *But see* New York v. United States, 505 U.S. 144, 185 (1992) ("Even if we assume that petitioners' claim is justiciable, neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government."); Baker v. Carr, 369 U.S. 186, 242 n.2 (1962) (Douglas, J., concurring) ("The statement[ ] . . . that this guaranty is enforceable only by Congress or the Chief Executive is not maintainable."); Kies v. Lowrey, 199 U.S. 233, 239 (1905) (finding that the creation of a school district by a state legislature does not violate the Republican Form Clause); Forsyth v. Hammond, 166 U.S. 506, 519 (1897) (holding that state court adjudication of municipal boundaries did not violate the Republican Form Clause); Plessy v. Ferguson, 163 U.S. 537, 563–64 (1896) (Harlan, J., dissenting) (arguing that racial segregation is "inconsistent with the guarantee given by the Constitution to each State of a republican form of government"); *In re* Duncan, 139 U.S. 449, 461–62 (1891) (finding that statutes were validly enacted by a republican government); Minor v. Happersett, 88 U.S. 162, 175–76 (1874) (holding that the Republican Form Clause did not provide women with the right to vote); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25 (1988) (identifying this dual strand of jurisprudence and, more generally, advocating for the Republican Form Clause to play a role in protecting state autonomy).

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.[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."[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."[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."[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.[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 *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.[388]

If one reads *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

383 *Id.* at 151.
384 *Id.* at 150.
385 *Id.*
386 *Id.*
387 *Id.* at 141.
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.[389] 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.[390] 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.[391] 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.[392]

These court decisions harmonize with the legislative history of the Fourteenth Amendment's Due Process Clause, which frequently adduced a commitment to republicanism.[393] 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.[394]

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.[395] 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,[396] 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*.[397]

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*.[398] 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

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[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 occassioned 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.[399] Finally, both approaches focus on *deprivations* of interests to which a group was previously entitled as a matter of common law or state law.[400]

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.[401] More famously, California voters eliminated same-sex marriage in Proposition 8, an amendment to the state's constitution.[402] 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

[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").

[401] Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 184 n.7 (2012); *see also* Kevin Miller, *Urban, Rural Divide Defines Differing Views on Marriage*, BANGOR DAILY NEWS, Nov. 5, 2009, at 1, *available at* http://bangordailynews.com/2009/11/04/politics/urban-rural-divide-defines-differing-views-on-marriage/ (describing the elimination of same-sex marriage rights in Maine).

[402] *See* William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution For?*, 98 CALIF. L. REV. 1235, 1236 n.2 (2010) ("Maine's legislature adopted a same-sex marriage law in 2009, but the voters overrode the legislature through a popular referendum in November 2009."). It is important to note that in Maine, voters approved the reinstatement of same-sex marriage rights in November 2012. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, at P14, *available at* http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html. And a district court opinion overturned the constitutionality of Proposition 8 on substantive grounds—an opinion that stands after the United States Supreme Court ruled that those who appealed the decision lacked standing. Hollingsworth v. Perry, 133 S. Ct. 2652, 2660, 2668 (2013). Nonetheless, studying the procedural due process issues at stake can reveal how statewide initiatives render minorities' rights vulnerable.

their preexisting right to register to vote,[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.[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.[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"[406] under the state constitution. Likewise, in Maine, the state's representative channels enacted legislation permitting same-sex couples to marry.[407]

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

> [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.'[410]

This nexus between marriage and liberty is longstanding. During the legislative debates of Reconstruction, a critic of civil rights legisla-

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403 State v. Staten, 46 Tenn. 233, 245 (1869) (citing THOMAS MCINTYRE COOLEY, COOLEY CONSTITUTIONAL LIMITATIONS 355 (1868)).

404 *See generally* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (property); Wilkinson v. Austin, 545 U.S. 209 (2005) (liberty).

405 *See, e.g.*, Lockyer v. City and Cnty. of San Francisco, 95 P.3d 459, 472 (Cal. 2004) ("When the substantive and procedural requirements established by the state marriage statutes are satisfied, the county clerk and the county recorder each has the respective mandatory duty to issue a marriage license . . . .").

406 *In re* Marriage Cases, 43 Cal. 4th 757, 843 (2008).

407 *See* Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws 150, *available at* http://www.mainelegislature.org/legis/bills/bills_124th/billpdfs/SP038401.pdf (repealed Nov. 3, 2009 by a people's veto referendum).

408 *See infra* note 414 and accompanying text (listing these consequences).

409 Kimberly D. Richman, *By Any Other Name: The Social and Legal Stakes of Same-Sex Marriage*, 45 U.S.F. L. REV. 357, 360 (2010).

410 Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

tion registered his fear that "[m]arriage is a civil contract, and to marry according to one's choice is a civil right."[411]

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.[412] 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.[413]

1. 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-

411 CONG. GLOBE, 39TH CONG., 1ST SESS. 318 (1866) (statement of Senator Thomas A. Hendricks). An originalist perspective of the right to marry would make a compelling area of study.

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.[414]

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.[415] 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.[416]

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."[417]

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.[418] 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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414 Van Dyck v. Van Dyck, 425 S.E.2d 853, 855 (Ga. 1993) (Sears-Collins, J., concurring).

415 United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

416 *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.").

417 Mathews v. Eldridge, 424 U.S. 319, 348 (1975).

418 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.

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

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[419] *FAQs About Recalls*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/special-elections/2003-statewide/faqs-about-recalls.htm#12 (last visited Mar. 11, 2014).

[420] *See supra* Part I.C (arguing that representative government comes closer to reflecting fair process than direct democracy).

[421] Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 254 (1997); *cf.* POLITICS IN THE AMERICAN STATES 141 (Virginia Gray, Russell Hanson & Thad Kousser eds., 9th ed. 2008) (collecting sources documenting this phenomenon); Zoltan J. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Decisions*, 64 J. OF POL. 154 (2002) (describing how racial minorities fare worse in popular lawmaking than when representative process is used).

[422] Haider-Markel et al., *supra* note 32.

[423] Maura Dolan & Alana Semuels, *Gay Marriage Wins May Signal Shift*, L.A. TIMES, Nov. 8, 2012, at A1, *available at* http://articles.latimes.com/2012/nov/08/nation/la-na-gay-marriage-20121108.

amendments that remove the issue from representative channels.[424] 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.[425] 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.[426] Before the initiative's passage, legislators had put forth a number of unsuccessful bills with the same goal.[427] In fact, on multiple occasions, bills requiring photographic identification passed both chambers of the state legislature.[428] But during those years, the two chambers never agreed on a single version of the bill.[429]

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.[430] The bill would have required photo identification to vote.[431] 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.[432] What is more, the bill would have restored the franchise for citizens previously convicted of felonies.[433]

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424 Tim Jones, *Ill. Lawmakers Lead Midwest Toward Gay Marriage Law*, BLOOMBERG NEWS (Feb. 16, 2013), http://www.bloomberg.com/news/print/2013-02-14/illinois-senate-approves-measure-legalizing-gay-marriage.html.

425 Bobby Harrison, *Initiatives Could Still Face Hurdles*, N.E. MISS. DAILY J., Nov. 13, 2011.

426 Editorial, *Voter Registration Initiative Aims at 2010 1st District Race*, N.E. MISS. DAILY J., Aug. 4, 2009, *available at* http://djournal.com/opinion/opinion-voter-registration-initiative-aims-at-2010-1st-district-race (discussing a 2009 attempt to garner requisite signatures to include a voter identification initiative on the 2010 ballot and past legislative attempts to pass a voter identification laws).

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.[434] On the other hand, in recent years, early-voter periods have proven popular with minority voters.[435] And felon disenfranchisement laws disproportionately prevent racial minorities from voting. However, the compromise bill stalled in the state senate.

When the compromise stalled, proponents of voter identification laws gathered enough signatures to place a voter-ID initiative on the ballot.[436] Voters approved the measure in November 2011.[437] 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."[438] This ruling made it difficult for voters in other states to file constitutional challenges to such laws.[439]

A question *Crawford* does not purport to answer is whether it matters *how* a court goes about requiring individuals to possess photographic identification to vote. The statute at issue in Indiana was passed by the Indiana legislature.[440] Does it implicate different concerns 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. 11, 2010, at A1.

437 Harrison, *supra* note 425.

438 Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 202 (2008).

439 Common Cause/Georgia v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009) ("We conclude, 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.[441] 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.[442] 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").

442 TEX. ELEC. CODE § 63.001 et seq.; O.C.G.A. § 21-2-417; IND. CODE §§ 3-5-2-40.5, 3-10-1-7.2, 3-11-8-25.1 (2013).

generally thought to be impacted the most by voter identification laws.[443]

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."[444]

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.[445] Two years later, a similar measure emerged and passed in California.[446] Through Proposition 30, voters in California imposed new income taxes on individuals making over $250,000.[447] This proposition arguably deprived top income earners of a common law property interest: money.[448]

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 *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.[449] Voters used

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443 *See supra* note 435.

444 THE FEDERALIST NO. 10, at 56 (James Madison) (E.H. Scott ed., 1898).

445 Libby Tucker, *I-1098 Defeat a Boon to Business*, COLUMBIAN, Nov. 4, 2010, at E1.

446 *See* Nanette Asimov, *Despite Prop. 30 Win, Student Fees May Rise*, S.F. CHRON., Nov. 8, 2012, at A10 (discussing the passage of Proposition 30, a tax to raise revenue for higher education).

447 Josh Richman, *Brown Stumps for Tax Hike*, SAN JOSE MERCURY NEWS, Nov. 2, 2012, at 2B.

448 *See* 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.").

449 CAL. CONST. art. 13A, § 3(a).

the initiative process to impose this high procedural requirement, essentially restricting the normal legislative process.[450] 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.[451]

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."[452] The Court overturned a city's charter that prohibited the city from passing an anti-discrimination housing ordinance

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[450] *See* Lou Cannon, *California Legislature Faces Huge Task Deciding on Taxes*, WASH. POST, June 11, 1978, at A1 (discussing the passage of Proposition 13); *cf.* Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1292 (1995) (describing similar voter-initiated restrictions imposed in Arizona, Colorado, and Washington).

[451] Some critiques of the initiative process cite Proposition 187. Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 297 ("If you look at other initiatives passed, such as Proposition 187 in California, . . . you see a specific minority being targeted."). On November 8, 1994, California voters enacted Proposition 187, a measure that denied "public social services and publicly-funded health care to . . . alien[s] in the United States in violation of federal law." League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1250 (C.D. Cal. 1997). "Social services" included public education, among other public benefits such as entitlements. *Id.* at 1254. Proposition 187 was a *referendum*, however, not an initiative. Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 110 (2008); Patrick J. McDonnell, *Davis Won't Appeal Prop. 187 Ruling, Ending Court Battles*, L.A. TIMES, July 29, 1999, at A1. That is, the state legislature approved the measure before it became law and the act therefore did not escape the deliberative channels of representative government. The same is true of other referenda passed in recent years aimed at nullifying undocumented immigrants' benefits. Gerald P. Lopez, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1798 (2012) ("Arizona passed [an] ambitious slate of anti-undocumented immigrant legislative and ballot initiatives in the 2000s. Victorious ballot initiatives included Proposition 200, [which] prohibit[ed] undocumented immigrants from receiving state or local public benefits.").

[452] 393 U.S. 385, 393 (1969).

without a popular vote.[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."[454]

The Supreme Court reaffirmed this holding in *Washington v. Seattle School District No. 1*.[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."[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."[457] The Court therefore invalidated a statewide initiative that prevented local school boards from considering racial desegregation when making school assignments.[458]

In 2012, a divided Sixth Circuit relied on the holdings of *Hunter* and *Seattle* to invalidate a statewide initiative passed in Michigan.[459] That initiative enacted a constitutional amendment preventing the consideration of race in college admissions.[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

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453 *Id.* at 393.

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. *See* Jane S. Schacter, *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); *see also* Jane S. Schacter, *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.

455 458 U.S. 457, 467 (1982).

456 *Id.*

457 *Id.* (citations omitted).

458 *Id.* at 470.

459 Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 701 F.3d 466, 474 (6th Cir. 2012).

460 MICH. CONST. art. I, § 26.

issues of importance to them."[461] 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."[462]

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.[463] 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.[464] 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.[465] 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,[466] but students nonetheless have a state-created property interest in education.[467]

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461 *Coal. to Defend Affirmative Action*, 701 F.3d at 474.

462 *Id.* at 477.

463 Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

464 Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (speech); McDonald v. Chicago, 1130 S. Ct. 3020, 3050 (2010) (right to bear arms).

465 Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 104, 123 (1854).

466 Plyler v. Doe, 457 U.S. 202, 223 (1982) (concluding that "education [is not] a fundamental right").

467 Goss v. Lopez, 419 U.S. 565, 574 (1975).

There is no fundamental right to welfare benefits,[468] but sometimes there are procedural protections put in place before the state may eliminate a person's benefits.[469] 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.

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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).