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# Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable

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The 1970s were a time of turmoil in the law of procedural due process. That ferment has produced recurring suggestions that legislatures may authoritatively determine the effective procedural scope of the due process clauses. These suggestions have come from disparate sources, on and off the Court, and have varied doctrinal roots, but each would effectively make the due process clauses nonjusticiable. Each finds a “demonstrable constitutional commitment of the issue [the meaning of procedural due process] to a coordinate political department [the legislatures].”<sup>1</sup>

The clauses provide that no person shall “be deprived of life, liberty, or property, without due process of law.”<sup>2</sup> One attack on judicial enforcement of the due process clauses argues that legislatures may define “life, liberty, or property” in procedural terms, so that whenever the government complies with the legislatively prescribed procedures, there is no deprivation of a protected interest. Another, with roots in law and economics, argues that even if there is a deprivation, legislatures may determine how much process is “due.” A third is based on bad history, and a fourth on irrelevant precedent. This Article examines and rejects each of these suggestions.

## I. The Appeal to Text: When Is Process Due?

The best known attack on judicial enforcement of the due process clauses relies on the meaning of “life, liberty, or property.” Much recent debate has focused on this phrase and the roles of courts and legislatures in defining it.<sup>3</sup> This Article addresses only a small part of that

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1. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

2. U.S. CONST., amends. V & XIV.

3. See Easterbrook, *Due Process and Parole Decision Making*, in *PAROLE IN THE 1980S* 77 (B. Borsage ed. 1981) [hereinafter cited as Easterbrook]; Monaghan, *Of “Liberty” and “Property”*, 62 CORNELL L. REV. 405 (1977); Tushnet, *The Newer Property: Suggestion for the Revival of Sub-*

issue. I assume that the Court is correct in holding that the meaning of "life, liberty, or property" depends in part on legislative definitions of entitlement.<sup>4</sup> I consider a narrower question: whether it follows that legislatures may define entitlements in procedural terms.

In an opinion announcing the judgment in *Arnett v. Kennedy*,<sup>5</sup> Justice Rehnquist reasoned that it does. There, Congress had created a form of property in public employment, providing that incumbents could not be removed from their jobs except for cause.<sup>6</sup> But the same statute provided very limited pre-termination procedures for determining cause. Said Justice Rehnquist:

Where the focus of legislation was thus strongly on the procedural mechanism for enforcing the substantive right which was simultaneously conferred, we decline to conclude that the substantive right may be viewed wholly apart from the procedure provided for its enforcement. The employee's statutorily defined right is not a guarantee against removal without cause in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of cause.<sup>7</sup>

This theory could end judicial enforcement of the due process clauses. Any legislature that wishes to limit procedural rights need only make the limitation part of the definition of the underlying substantive right. According to Rehnquist, the statute did not create a right to a job, or a right to a job unless removed for cause, but only a right to a job unless removed in accordance with specified procedures. Those procedural requirements having been complied with, the plaintiff was not deprived of the congressionally defined property, and the due process clause simply did not apply. The theory is not limited to property. In at least some contexts, the Court has held that liberty rights are defined by legislatures;<sup>8</sup> presumably, "liberty" could also be

*stantive Due Process*, 1975 SUP. CT. REV. 261; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977). Professor Easterbrook is expanding his essay for publication in a more readily available forum. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (forthcoming) [hereinafter cited as Easterbrook (forthcoming)]. I have seen a draft of the resulting article and he has examined drafts of this article. Each of us is attempting to take some account of the other's simultaneous work.

4. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972). I do not mean to suggest that legislatures can define "life, liberty, or property." The meaning of that phrase is a federal constitutional question, committed to the courts. But legislatures have discretion to create rights that fall in or out of courts' definitions. Legislatures and constitutions create rights, and courts characterize these rights as life, liberty, property, or none of these.

5. 416 U.S. 134 (1974).

6. *Id.* at 140-41.

7. *Id.* at 152.

8. *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979); *Meachum v. Fano*, 427 U.S. 215 (1976). Both cases involved prisoners whose liberty had been

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defined in procedural terms. A statute defining "life" in procedural terms would be even harder to swallow, but the logic of Rehnquist's theory would permit it.<sup>9</sup>

Rehnquist's views did not prevail; he wrote only for himself, Chief Justice Burger, and Justice Stewart. Although Justices Powell and Blackmun concurred on the ground that the statutory procedures were constitutionally adequate,<sup>10</sup> they expressly rejected Rehnquist's theory, as did the four dissenters.<sup>11</sup>

But the theory that "life, liberty, or property" may be defined procedurally did not die easily. Powell and Blackmun, who rejected the theory in *Arnett v. Kennedy*, relied on it in dissent a year later in *Goss v. Lopez*.<sup>12</sup> They were joined by Burger and Rehnquist, but failed to achieve a majority because Stewart went over to the other side. Thus, five Justices have voted for Rehnquist's theory at least once, but never more than four at the same time.<sup>13</sup> One of the five is no longer sitting. Most recently, seven Justices squarely rejected the theory in *Logan v. Zimmerman Brush Co.*,<sup>14</sup> with Justice O'Connor and Chief Justice Burger joining Justice Blackmun's majority opinion. Thus, every Justice has voted against Rehnquist on this issue at least once; his only sure vote is his own.

restricted pursuant to criminal convictions; the real issue was how much of their liberty had been taken by the conviction and how much remained. Cf. *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977) (distinguishing "liberty" within the due process clauses by their own use of the word from "state-created interest in liberty going beyond the Fourteenth Amendment's protection." *Id.* at 674 n.43).

9. A hypothetical statute defining life in procedural terms is considered below. See *infra* text accompanying notes 27-30.

10. 416 U.S. at 167-71 (Powell & Blackmun, JJ., concurring).

11. *Id.* at 166-67 (Powell & Blackmun, JJ., concurring); *id.* at 177-78, 185 (White, J., dissenting in part); *id.* at 211 (Marshall, J., joined by Douglas & Brennan, JJ., dissenting).

12. 419 U.S. 565, 586-87 (1975).

The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days . . . . Thus the very legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law. Rather, the right is encompassed in the entire package of statutory provisions governing education in Ohio—of which the power to suspend is one.

*Id.* (Powell, J., dissenting).

13. Some have written that a majority adopted Rehnquist's theory in *Bishop v. Wood*, 426 U.S. 341 (1976). *Id.* at 355-61 (White, J., dissenting). That is one possible reading of the result, but it was not the majority's theory. The majority deferred to a somewhat implausible lower court holding that state law conferred no substantive right. *Id.* at 345-46. The dissenters claimed that the lower court holding was based on the fact that state law provided very limited procedural protections, and that these had been granted. *Id.* at 355-56 (White, J., dissenting). However, the majority refused to look behind the lower court's conclusion, so the lower court's reasoning played no part in the majority's decision.

14. 102 S. Ct. 1148, 1155-56 (1982). Powell & Rehnquist concurred on equal protection grounds. *Id.* at 1162 (Powell & Rehnquist, JJ., concurring). *Accord*, *Vitek v. Jones*, 445 U.S. 480, 490-93 (1980).

However, Rehnquist's theory remains very much alive among academics. Professor Van Alstyne, who is plainly not sympathetic to Rehnquist's view, finds it irrefutable within the current doctrinal framework. As long as the Court says that legislatures create and define liberty and property rights, he sees no reason why they cannot do so in procedural terms.<sup>15</sup> Professor Tribe agrees with Van Alstyne.<sup>16</sup> Professor Monaghan finds Rehnquist's theory "not inherently illogical," although he considers the resulting merger of substance and procedure unwise and at odds with our legal traditions.<sup>17</sup> Professor Easterbrook finds Rehnquist's theory "logical" and seems to agree with Van Alstyne that it follows from the Court's current doctrine.<sup>18</sup> Professor Grey endorses it fully,<sup>19</sup> finds the Court's rejection of it paradoxical, and resolves the paradox only by concluding that the substantive rights protected by due process must independently be "shadow" or nascent constitutional rights.<sup>20</sup> Professors Stewart and Sunstein endorse the conclusion that "courts should in most cases" accept legislatively prescribed procedures, but would accord constitutional procedural protection to "a small core of interests . . .—most conspicuously, the interest in the means of subsistence."<sup>21</sup> Thus, the Court finds its position under attack from all directions.

The Court's strongest defender on this issue is Professor Michelman. He states explicitly what is implicit in the opinions rejecting Rehnquist's theory—that the due process clauses look to legislatures only for substantive entitlements, and that the clauses commit minimum procedural rights to the Constitution and therefore to the

15. See Van Alstyne, *supra* note 3, at 462-65. Van Alstyne's solution is to say that fair procedure is part of the "liberty" protected by the due process clauses—that one cannot be deprived of due process without due process, by which he means that one cannot be deprived of due process at all. *Id.* at 487-90. As he readily acknowledges, this is a substantive due process argument. *Id.* at 487. For those who have not yet dulled their consciences to the oxymoronic nature of the phrase "substantive due process," this is not a satisfactory formulation. See 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 1110-18 (1953); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEXAS L. REV. 343, 345 (1981).

16. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-12 at 534-39 (1978).

17. Monaghan, *supra* note 3, at 438-39.

18. Easterbrook, *supra* note 3, at 90 n.41.

19. Grey, *Procedural Fairness and Substantive Rights*, in NOMOS XVIII: DUE PROCESS 182, 190-92 (J.R. Pennock and J. Chapman, eds. 1977).

20. *Id.* at 197-202. The quoted phrase appears at 202.

21. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1265-66 (1982). Apparently, the authors reach this conclusion purely as a matter of policy. They cite both Easterbrook and Rehnquist as suggesting the issue, *id.* at 1258 n.270, but do not explore the argument of either, and seem generally uninterested in either textual or doctrinal justification for their conclusions. Easterbrook's main argument is quite different from Rehnquist's; it is explored in part II *infra*.

Court.<sup>22</sup> Because this point seems nearly as obvious to Michelman as it does to the Court, he states it in conclusory fashion. The substantial body of commentary since Michelman wrote,<sup>23</sup> and pungent criticism of my conclusory treatment of the point in an earlier draft of this Article, have persuaded me that it must be reexamined with more care.

Relmquist's theory purports to be derived from constitutional text, and it has been denounced as part of a "positivist trap."<sup>24</sup> In fact, his theory is quite inconsistent with the text. The syntax of the due process clauses indicates that "life, liberty, or property" is quite different from "due process." First we determine if "life, liberty, or property" is being taken; if so, then and only then do we determine what "due process" is required before the taking. We must decide what the two phrases mean to make these determinations, but even without knowing what they mean, the structure of the sentence tells us that two separate concepts are being discussed. Any theory that collapses one into the other—that allows "due process" to be defined in the course of defining "life, liberty, or property"—reduces the clauses to tautologies.

The most obvious initial hypothesis for distinguishing the two phrases is to say that "life, liberty, or property" refers to substance, and that "due process" refers to procedure. This hypothesis suggests itself immediately because, as Monaghan notes, we distinguish substance and procedure in "countless contexts," and "our legal traditions strongly oppose" their merger. Moreover, this hypothesis is consistent with the ordinary meaning of the words. "Due process" refers to procedure as surely as "life" refers to something substantive. The most obvious meanings of "property" are substantive, but procedural meanings are at least conceivable; we must decide if they are plausible in context. The most obvious meaning of "liberty"—the individual's freedom to do as he chooses—is substantive as well. But we also use the word to refer to any important right protected against government; in

22. Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS XVIII: DUE PROCESS 126, 133-34, 158-59 n.27 (J.R. Pennock and J. Chapman eds. 1977).

23. Despite its 1977 publication date, Michelman's paper was substantially completed in 1974, and he did not "[attempt] any major revision of the paper to take account of developments occurring during the intervening delays in publication." *Id.* at 153 n.\*. Professor Mashaw explicitly rejects Michelman's distinction between substance and procedure. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U.L. REV. 885, 895 n.31 (1981). His argument consists of noting the conclusory nature of Michelman's assertion and offering his own equally conclusory assertion that Michelman's distinction does not represent "a coherent positivist position." *Id.*

24. Mashaw, *supra* note 23, at 891-93. See L. TRIBE, *supra* note 16, at 534-35.

25. Monaghan, *supra* note 3, at 438; see also Grey, *supra* note 19, at 191 ("I think many lawyers and laymen alike would not press the inquiry beyond that response.").

this sense, procedural rights may be included. Surely a person cannot be deprived of the right to jury trial, or the right to vote, without due process of law. But this indicates only that there are procedural liberties as well as substantive liberties. It does not suggest a procedural component to the definition of substantive liberties.

So far, this textual analysis has established two points. Rights to life, liberty, or property are most obviously, although not universally, defined in substantive terms. Defining them substantively distinguishes "life, liberty, or property" from "due process" and avoids reducing the clauses to meaningless tautologies inconsistent with their textual structure. There is one more step to the argument. Permitting legislatures to define rights to life, liberty, or property in explicitly procedural terms leads to results that most lawyers would find erroneous and most speakers of English would find absurd. With respect to liberty and property, these absurdities have been hidden by confusion and disagreement over the larger question whether legislatures can define rights to liberty and property at all. It is therefore helpful to start with the right to life.

Consider two possible murder laws for the District of Columbia: (1) "Any person who murders another shall suffer death," and (2) "Any person found by a preponderance of the evidence to have murdered another shall suffer death." Under the first statute, the due process clause would require the government to prove murder beyond a reasonable doubt.<sup>27</sup> What about the second statute? There, "the focus of legislation was . . . strongly on the procedural mechanism for enforcing the substantive right which was simultaneously" defined.<sup>28</sup> Rehnquist should say that a defendant's "statutorily defined right is not a guarantee against [death unless he murders] in the abstract, but such a guarantee as enforced by the procedures which Congress has designated for the determination of [whether he murdered]."<sup>29</sup> Thus, a preponderance of the evidence—or merely probable cause, if Congress really got tough on crime—could constitutionally support a judgment of death. And it could do so because, although the defendant would be quite dead, he would not have been deprived of "life" in the special sense in which the term is apparently used in Rehnquistian due process clauses.

26. See Van Alstyne, *supra* note 3, at 487-88.

27. See *In re Winship*, 397 U.S. 358, 361 (1970).

28. See *Arnett v. Kennedy*, 416 U.S. 134, 152 (1974) (first sentence quoted, *supra* text accompanying note 7).

29. See *id.* (last sentence quoted, *supra* text accompanying note 7).

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Perhaps not even Rehnquist would so vote, but he would be hard pressed to distinguish his reasoning in *Arnett*. It is true that life is more important than a government job, but that difference goes to how much process is due if the due process clause applies. His *Arnett* opinion says the clause does not apply, because no life, liberty, or property has been taken.

Nör is it sufficient to say that the right to life is inherent, or derived from natural law, but that the right to property—and certainly the right to a government job—is defined by legislation. A capital punishment statute defines the scope of the right to life, just as a civil service statute defines the scope of the right to a government job. It is true that the capital punishment statute is wholly negative, specifying when life will be taken away, while the civil service statute specifies when the job will be awarded in the first place as well as when it will be taken away. This distinction may be relevant to many questions, but it is not relevant to whether the thing taken is life or property. Rehnquist's argument is based on entitlement—that the employee took the job subject to legislative specification of the conditions that would cause him to forfeit it, and that one of those conditions was procedural. The capital punishment statute affects entitlements in exactly the same way. Every individual enters life subject to legislative specification of the conditions that will cause him to forfeit it. If my entitlement to a job can be defined procedurally, so can my entitlement to life.

Whatever the procedures, it is clear that life is taken by capital punishment. Similarly, if I am imprisoned, my liberty has been taken, and if Blackacre is forfeited for unpaid taxes, property has been taken, even if both were taken in accordance with legislatively prescribed procedures.<sup>30</sup> The procedures used in each taking do not change the nature of the thing taken. This is true even if we think of property as a bundle of sticks.<sup>31</sup> Before the tax forfeiture, the state owned a tax lien; subject to that, I owned the right to possession and future appreciation in value. After the forfeiture, I owned only the right to any surplus received at the foreclosure sale. Important sticks have been transferred to the state; it makes no sense to say I have not been deprived of property. The procedure for deciding that my taxes are delinquent is not just another stick in the bundle; it is the means by which sticks are involuntarily transferred.

30. Cf. Monaghan, *supra* note 3, at 440 (confiscation of cars for revenue purposes would be taking of property even though the legislature warned of that possibility in automobile title statute).

31. The metaphor's applicability is suggested by Monaghan. *Id.* at 438.

What is clear in the context of life, freedom from imprisonment, and Blackacre, has not seemed clear in the context of less traditional forms of property and more attenuated forms of liberty.<sup>32</sup> But the lack of consensus about the boundaries of liberty and property should not mislead us into thinking that the boundaries might be defined in procedural terms. We should not throw out what we already know as we grope for these boundaries. Clear cases shape our understanding of concepts and thus guide the analysis of hard cases. The conclusion that life, liberty, and property are substantive concepts should become a firm limit that helps to locate their boundaries, at least in the absence of a strong showing that something about extreme cases fundamentally changes the nature of the underlying concepts. There is no reason to believe that such a change is needed. A reading that turns the due process clauses into meaningless tautologies is just as indefensible near the boundaries as it is at the core. Life, liberty, and property are substantive categories, and a thing must be classified as life or not, liberty or not, and property or not, independently of the procedures used to take it away. If it is life, liberty, or property, then the due process clauses set a minimum standard for those procedures. The Court's shifting majority has been right to hold that statutory prescriptions of procedure are no part of the substantive entitlement, so that the adequacy of the statutory procedures must be determined by the Court under the due process clauses.

## II. The Appeal to Economics: How Much Process Is Due?

Identifying a threatened interest as life, liberty, or property establishes that it cannot be taken without due process. We must then decide just how much process is due. The Supreme Court has said that the due process clause "is flexible and calls for such procedural protections as the particular situation demands."<sup>33</sup> In *Mathews v. Eldridge*,<sup>34</sup> the leading attempt to specify what the situation demands, the Court said that three factors must be balanced:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest

32. If Rehnquist means to apply his theory to all forms of life, liberty, and property in all their manifestations, including traditional ones, he proposes a truly radical change in the law. If he means to retain due process protection for life and traditional forms of property and liberty, then he is merely reviving the discredited right-privilege distinction in a new guise. See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

33. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972).

34. 424 U.S. 319 (1976).

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through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>35</sup>

Reasonable people may disagree with the Court's application of such a standard to particular cases, but the approach itself seems unassailable. No feasible system can give millions of applicants for social security benefits the same hearings that it provides defendants in capital cases; no civilized system can provide as little procedural protection to capital defendants as it offers in bureaucratized mass programs. The two examples contrast both in terms of the importance of the private interest at stake and the cost to the government of administering procedures. The Court's third factor, the extent to which further procedural protection may reduce the risk of error, is also plainly relevant; procedures should not be required if they will do no good.

Despite the common sense appeal of the Court's approach, it has not been treated as unassailable. It has been attacked from both the right and the left—by a Chicago practitioner of law and economics,<sup>36</sup> and by a Yale law teacher of philosophical bent.<sup>37</sup> Indeed, both raise the same objection, although they propose quite different solutions: both think the Court has turned the question of how much process is due into a purely legislative matter, leaving no role for itself. One would have the Court recognize the implications of its test and abandon the field; the other would have the Court change its test.

Professor Easterbrook, reflecting the imperialist view that anything sensible must be economics, looks at the Court's test and sees economics.<sup>38</sup> He imputes to the Court the economist's view that "[t]he function of procedure is to hold as low as possible the *sum* of . . . the costs created by erroneous decisions . . . and the costs of administering the procedures."<sup>39</sup> This formulation places no value on fair procedure for its own sake, and Easterbrook soon makes that explicit: "Procedural rules are just a measure of how much the substantive rules are worth . . ." <sup>40</sup> This quickly leads Easterbrook to the conclusion that

35. *Id.* at 335; accord *Schweiker v. McClure*, 102 S. Ct. 1665, 1669 (1982); *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148, 1157 (1982).

36. Easterbrook, *supra* note 3.

37. 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 (1976).

38. See Easterbrook, *supra* note 3, at 89.

39. *Id.* (emphasis in original). Grey takes the same narrow view of due process. See Grey, *supra* note 19, at 184-85, 204 n.17.

40. Easterbrook, *supra* note 3, at 94.

the Court should not decide due process cases at all. "The body that creates a substantive right is the logical judge of how much should be spent to avoid errors in the process of disposing of claims to that right,"<sup>41</sup> and the choice of procedures made by the political branches "is strong evidence that the costs of more exhaustive procedures outweigh the benefits."<sup>42</sup> Easterbrook is pleased that the Court has adopted the economic analysis of due process, but thinks that if the Court were consistent, it would realize that this analysis leaves it with no function to perform. He contrasts the due process clause with "most personal constitutional rights," which, "if taken seriously, prevail despite their effect on total social wealth";<sup>43</sup> the Court's procedural due process rules "call only for what a rational legislature would want."<sup>44</sup> When he says "rational," he means "wealth maximizing."

Professor Mashaw also equates the Court's approach in *Mathews* with the law and economics approach to due process,<sup>45</sup> although he labels it utilitarian rather than economic.<sup>46</sup> He also sees no reason for the Court to enforce the due process clause if this is what the clause means, but his solution is to claim that it means much more: "There is no reason to believe that the Court has superior competence or legitimacy as a utilitarian balancer except as it performs its peculiar institutional role of insuring that libertarian values are considered in the calculus of decision."<sup>47</sup> He would add to the Court's analysis considerations of individual dignity, equality, and tradition.<sup>48</sup> Although they reach vastly different conclusions, Easterbrook and Mashaw agree that judicial review makes no sense unless the Court is entrusted with some value that overrides utilitarian or economic considerations, and that the Court's formulation in *Mathews* excludes consideration of such values.

Easterbrook errs in viewing procedure as merely a cost incurred in the pursuit of some substantive interest, and both he and Mashaw err in imputing those economic views to the Court. What is present in the Constitution and the Court's cases, and missing from the economic ap-

41. *Id.*

42. *Id.* at 92.

43. *Id.* at 93.

44. *Id.* at 91.

45. Mashaw, *supra* note 37, at 48.

46. *Id.* at 46-49. The proponents of law and economics as a normative theory seek to distinguish it from utilitarianism. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

47. Mashaw, *supra* note 37, at 49. See also Michelman, *supra* note 22, at 137.

48. Mashaw, *supra* note 37, at 49-57. Michelman makes a similar point, urging that the due process clauses serve "revelatory" and "participatory" values. Michelman, *supra* note 22, at 126-29, 147-48. Mashaw extends his analysis of dignitary values, and collects articles in a similar vein, in Mashaw, *supra* note 23.

proach, is independent value placed on process as such. If one is deprived of ten dollars, an economist and I can agree that he has suffered a ten dollar loss. But if he were entitled to the ten dollars, and deprived of it because the dispensing authority mistakenly thought that he had done something to forfeit his entitlement, he has suffered a second loss. He is out ten dollars, and he also feels victimized. He may impugn the motives or intelligence of the authority. But he may also say that the authority has a hard job, and that it listened to both sides with an open mind and did the best it could. However, if the dispensing authority erred because it refused to listen to him when he tried to explain, he has suffered a third loss. Not only has he been denied something that was rightfully his, but the legitimate authority, *his* government, has informed him that his complaint is not even worth listening to. He will feel even more victimized; he is likely to be outraged. He will say something like, "It isn't fair," "I never had a chance," "You can't fight city hall," or "Nobody ever listens to the little guy." Easterbrook's first published article would ignore this mental distress and value the total loss at ten dollars because the substantive entitlement is all that matters.<sup>49</sup>

The substantive entitlement is not all that matters to the Court. Although the summary formulation of the three-factor test does not unambiguously acknowledge the independent value of procedure for its own sake, that value is easily included as part of the private interest to be balanced. There is no reason to read the *Mathews* formulation as silently abandoning the high value that the Court has long placed on procedure.<sup>50</sup> Indeed, elsewhere in the opinion, the Court speaks in

49. See quotations *supra* in text accompanying notes 39-40. See also Easterbrook, *supra* note 3, at 86 n.24 (noting that legislature may consider antisocial conduct resulting from resentment of inadequate procedure, implying that resentment itself is irrelevant). In his forthcoming article, Easterbrook concedes that people do value fair procedure for its own sake. Easterbrook (forthcoming), *supra* note 3, at 115. The implications of that concession are considered *infra* in text accompanying notes 64-68.

50. *E.g.*, "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). Due process expresses "feeling of just treatment," and "high moral and social values." It is "perhaps the most majestic concept in our whole constitutional system." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162, 167, 174 (1951) (Frankfurter, J., concurring). The facts of *Mathews* make it especially inappropriate to read that case as eroding the minimum guarantees of due process established by earlier cases. The disability benefits statute at issue there provided an elaborate procedure, culminating in an evidentiary hearing, an administrative appeal, and judicial review, but not until after disability benefits were terminated. 424 U.S. at 339. Before termination, the agency was obligated to obtain reports from the claimant and his sources of medical care, and he was entitled to review the file, respond in writing, and submit additional written evidence. *Id.* at 337-38. The claimant was entitled to counsel at all these stages, *id.* at 339, and a federal administrative review of any adverse state decision preceded termination of benefits, *id.* at 338. The claim that all this was insufficient, and that the Constitution required a full adversarial hearing before termination,

more traditional terms that suggest continued recognition of procedure's independent value. Thus, the Court quotes Justice Frankfurter's reminder that the "right to be heard . . . is a principle basic to our society,"<sup>51</sup> and concludes that ad hoc weighing of burdens and interests is not enough; the "ultimate balance" must "assure fairness."<sup>52</sup> Fairness, of course, is not an economic concept, and Easterbrook's economic analysis recognizes no basic principle but price.

Since *Mathews*, the Court has acknowledged the independent value of procedure in the most tangible possible way. It has held that a person who is deprived of liberty or property without due process may recover damages for emotional distress caused by the procedural deprivation, even though the substantive deprivation was fully justified and would have occurred even if the proper procedures had been followed.<sup>53</sup> Compensation was held appropriate because "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests."<sup>54</sup> Properly instructed juries have awarded substantial damages under this standard.<sup>55</sup>

Thus, the Court is not merely second guessing the legislature's scheme for implementing legislatively chosen substantive values when it enforces the due process clauses. It is also implementing independent constitutional values that apply whether the legislature likes it or not. As with other constitutional rights, due process is mandated even when it is inefficient.<sup>56</sup> Also like other constitutional values, the due process

plainly presented a maximal view of how much process is due. A standard formulated in the course of rejecting that argument should not be lightly read to overturn cases upholding more modest due process claims. If the statute had provided for termination of benefits without any hearing whatever upon the failure of a low-level functionary to conduct a timely periodic review of the file, not one Justice would have voted to uphold the statute. Cf. *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148 (1982) (forfeiture of private cause of action for agency's failure to convene settlement conference violates due process; two Justices concurred on equal protection grounds; none dissented). Easterbrook thinks *Logan* was wrongly decided. Easterbrook (forthcoming), *supra* note 3, at 119-20.

51. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

52. *Id.* at 348. See *Schweiker v. McClure*, 102 S. Ct. 1665, 1672 (1982) (challenged procedures upheld, because claimants failed to show that procedures "are not fair or that different or additional procedures would reduce the risk of [error]. . . ." (emphasis added)).

53. *Carey v. Phipus*, 435 U.S. 247, 259-64 (1978).

54. *Id.* at 262.

55. *E.g.*, *Laje v. R.E. Thoinason Gen. Hosp.*, 665 F.2d 724 (5th Cir. 1982) (\$20,000 for physician's mental distress arising from denial of hearing before discharge from hospital staff).

56. A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.

*Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972) (citations omitted). *Fuentes* has been sharply at-

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clause is not enforceable absolutely. In due process cases, the balancing is built into the definition of the right, whereas in first amendment cases the conventional rhetoric balances the right against the compelling state interest. But the two formulations are not so different. Constitutional rights are to be pursued as far as we can reasonably afford—farther than efficiency might dictate, but not to the point of destroying all other values.

Easterbrook, Grey, and Tribe forcefully argue that it is anomalous to separate substance and procedure in this way.<sup>57</sup> They say that if legislatures can repeal or refuse to create substantive rights, they should be equally free to create rights and undermine them with inadequate enforcement procedures. This is just a broader policy formulation of Relinquist's theory that substantive rights can be defined in procedural terms. As we have seen, that theory is inconsistent with the text of the Constitution.<sup>58</sup> The due process clauses treat substance and procedure as separate. So do the many other procedural rights in the Constitution. The fact that process is singled out for so much constitutional attention indicates decisive rejection of the view that legislative power over process is equivalent to legislative power over substance, and confirms the importance of process for its own sake.<sup>59</sup>

The choice made by the Framers was sound. The costs of undermining rights procedurally are not the same as those of forthright substantive repeal, and there is no reason to assume that constitutional limitations on legislative power to define substantive rights must themselves be substantive. We have already seen that procedure has independent value. The sense of unfair treatment felt by victims of inadequate procedure is precisely the sort of individual harm that constitutional rights and judicial review are meant to protect against. Even if procedure were valued solely as a means of implementing substance, there would be value in having the judiciary enforce minimum proce-

tacked for disregarding the kind of cost-benefit analysis that *Mathews* is now said to require. Compare White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 Wis. L. REV. 503, 510-11 (1973) (attacking *Fuentes*) with Yudof, *Reflections on Private Repossession: Public Policy and the Constitution*, 122 U. PA. L. REV. 954, 970-72 (1974) (defending *Fuentes* on non-economic grounds). The Court has adhered to *Fuentes* despite the criticism, see *Lugar v. Edmondson Oil Co.*, 102 S. Ct. 2744, 2752 (1982); *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 605-06 (1975), although it has not extended the doctrine as far as some would like, see *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 611-20 (1974).

57. Easterbrook, *supra* note 3, at 94; Grey, *supra* note 19, at 184-85, 204 n.17; L. TRIBE, *supra* note 16, at 536.

58. See *supra* text accompanying notes 24-32.

59. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring); Laycock, *supra* note 16, at 358.

dural standards. Courts can claim considerable expertise in assessing the risk of erroneous fact finding and the likelihood that a hearing will reduce that risk.

Creating a substantive right and then undermining it with inadequate procedure is also conducive to equal protection problems. Those who administer the law can discriminate, consciously or unconsciously, and the victims have no remedy. Indeed, equating substantive rights with their attendant procedures seems to contemplate unequal protection as a matter of policy. Easterbrook and Grey should say that a ten percent across the board cut in social security benefits is equivalent to a procedural change designed to save ten percent by increasing the rate of erroneous denials. But the two measures are quite different; one spreads the burden of austerity evenly, while the other benefits the many at the expense of a few. In general, according procedural rights to every individual is an important protection against government's tendency to ride roughshod over the interests of individuals in pursuit of collective goals.<sup>60</sup>

Finally, because substantive rights are much more politically visible than procedures, directing the courts to ensure minimally adequate procedures prevents a sort of legislative fraud. Legislators cannot purport to give their constituents something they demand, and then take it away with inadequate procedure. This is an unacceptable form of political compromise, because it bargains away a constitutional value and because it erodes political accountability.<sup>61</sup> And it aggravates the victims' sense of unfair treatment. Those who thought they were promised something in the visible substantive provisions of the bill will feel deceived and cheated when they learn it was taken back in the unpublicized procedural sections.

Because I believe that the constitutional text clearly creates a right to due process and places it beyond legislative control, the arguments in the preceding three paragraphs merely confirm the wisdom of the

60. See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

*Id.*

61. Cf. J. ELY, *supra* note 16, at 131-34 (delegation of controversial decisions to bureaucrats makes legislators politically unaccountable). The delegation doctrine is either dead or very feeble, but procedural constraints on agencies serve part of the same function of constraining agency discretion. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 26 (1982). Any constraint on agency discretion makes agency implementation of legislation more predictable at the time of enactment, and therefore increases the legislature's political accountability for agency action.

Framers' choice.<sup>62</sup> But for those who find the text ambiguous, such arguments are an important reason to resolve the ambiguity in favor of judicial authority.<sup>63</sup> Certainly they refute any claim that separating control over procedure from control over substance is so foolish that it must be rejected despite the apparent meaning of the text.

In his forthcoming article, Easterbrook concedes that people value procedure for its own sake.<sup>64</sup> But he insists that I beg the question by asserting that protection of that value is committed to the courts. In his view, there is no reason to believe that legislatures systematically undervalue fair procedure, and whatever independent value procedure may have is simply one more item to be bargained over in the legislatures. At most, this argument responds to arguments based solely on policy analysis;<sup>65</sup> it does not respond to arguments based on constitutional text or the alleged intent of the Framers. My case for judicial protection of procedure rests squarely on constitutional text, together with the traditional and accepted view that constitutional rights are to be enforced by the courts. I still believe that “[i]t is emphatically the province and duty of the judicial department to say what the law is”;<sup>66</sup> that if the Constitution guarantees “due process,” it is therefore up to the Court to define that term and enforce the right; and that doubts about whether the constitutional right is really necessary are no reason to abandon that function or to be especially deferential in performing it.<sup>67</sup>

Easterbrook has not yet denied the general propriety of judicial review. His claim that the meaning of due process is committed to the legislatures is based on the historical argument taken up in the next section. By conceding that procedure has independent value, he makes this historical argument the key to his whole position. There is plainly no anomaly in courts protecting independent procedural values, unless he can show that these values were historically committed to legisla-

62. For an elaboration of my textual approach to the Constitution, see Laycock, *supra* note 16.

63. Stewart & Sunstein, *supra* note 21, at 1258-66, find such arguments only partly convincing. Grey, *supra* note 19, at 192-97, considers similar arguments and finds them unconvincing. I agree that they are unconvincing if offered as the sole justification for a constitutional rule not based in text, which is how Stewart, Sunstein, and Grey consider them. I offer them, together with analysis of the procedural values directly served by the due process clauses, to confirm the apparent meaning of the text by showing sound reasons for it.

64. Easterbrook (forthcoming), *supra* note 3, at 115.

65. Such arguments are made by Grey, *supra* note 19; Mashaw, *supra* note 23; Michelman, *supra* note 22; and Stewart & Sunstein, *supra* note 21.

66. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

67. *Cf.* Laycock, *supra* note 16, at 378-81 (equal protection clause protects every individual—not just members of discrete and insular minorities).

tures. Others continue to advance the economic argument,<sup>68</sup> but for Easterbrook it no longer has independent significance. His conclusion ultimately depends on his claims about history.

### III. The Appeal to History: Quotation Ripped from Context

It has become commonplace for those with minimalist views of the Constitution to claim that their views represent the precise intention of the Framers. The generally sufficient response to such claims is that the Framers rarely had a precise collective intention, and even when they did, we can rarely uncover it today.<sup>69</sup> The specific response depends on the nature and quality of the evidence offered to support the particular historical claim.

Easterbrook asserts that the Framers specifically intended that no legislatively established procedure should ever be held to violate the due process clauses. The argument is so weak that it must be quoted at length to prove that I have not distorted it.

The phrase 'due process of law' had a well understood meaning in 1789. It was shorthand for the regular course of 'process' in courts, which inaugurated the right of defense. Courts were forbidden to condemn a person to loss of life, liberty, or property without observing the traditional rules of notice, summons ('process'), and defense. Most *ex parte* procedures were impermissible. But the framers of the Constitution were quite clear that the Clauses did *not* authorize courts to upset procedures established by statute.<sup>70</sup>

The footnote to the last sentence quoted reads as follows:

The only clear statement at the time the Constitution was written was offered by Alexander Hamilton, who said, "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 the legislature."<sup>71</sup>

As quoted, the statement is ambiguous at best, lending little support to Easterbrook's claim that the due process clause was not intended to invalidate procedural statutes. In context, Hamilton's remarks are plainly inconsistent with Easterbrook's claim. *Hamilton was speaking on the floor of the New York Assembly, urging that a pending bill would violate the state's due process clause!* The bill would have

68. Grey, *supra* note 19, at 184-85, 204 n.17. See Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 400-02 (1973).

69. Laycock, *supra* note 16, at 351.

70. Easterbrook, *supra* note 3, at 82 (footnotes omitted).

71. *Id.* at 82 n.16, (citing PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962)). The citation does not indicate which of the twenty-six volumes contains the quotation.

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disqualified former privateers from holding public office. Here is what Hamilton really said:

No man shall be disfranchised or deprived of any right he enjoys under the Constitution, but by the *law of the land*, or the judgment of his peers. Some gentlemen hold that the law of the land will include an act of the legislature. [Hamilton says that Lord Coke disagreed with this.] 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 or deprived of any rights, 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.

Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session?<sup>72</sup>

This is substantive due process with a vengeance, light years from Easterbrook's minimalist view of the clauses. Hamilton is saying that legislatures cannot enact statutes depriving persons of rights, because only courts can deprive persons of rights. He is plainly wrong; only with statutory authorization from the legislature could the courts deprive persons of the right to hold public office. The argument is a bit of legal flimflam in support of a political goal—Hamilton's campaign against indiscriminate persecution of suspected Tories.<sup>73</sup> But whether Hamilton was right or wrong, he certainly lends no support to Easterbrook. The "only clear statement" at the time of the framing of the Constitution is flatly inconsistent with Easterbrook's claim.<sup>74</sup>

Easterbrook expands his historical argument in his forthcoming article.<sup>75</sup> He traces the due process clauses to the "law of the land" clause in Magna Charta<sup>76</sup> and to a statute that used the phrase "due

72. IV PAPERS OF ALEXANDER HAMILTON 35-36 (H. Syrett & J. Cooke eds. 1962).

73. See *id.* at 34-37. See generally J. COOKE, ALEXANDER HAMILTON 39-42, 46-47 (1982) (describing Hamilton's views and activities with regard to this matter).

74. In his forthcoming article, Easterbrook attempts to rehabilitate his reliance on Hamilton. He lamely asserts that Hamilton must have meant the bill would violate some other clause of the bill of rights. Easterbrook (forthcoming), *supra* note 3, at 98-99 n.35. But the only other clause Hamilton mentioned is the "law of the land" clause from the original Constitution. Easterbrook considers "law of the land" and "due process of law" clauses to be substantially equivalent. So did Hamilton, but he considered the due process clause more precise on the question that is central to Easterbrook's claim—whether such clauses restricted the legislature. Probably the bill violated the law of the land clause, he said, but the addition of the due process clause removed all doubt.

75. *Id.*

76. "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement [*sic*] of his peers or by the law of the land." Magna Charta ch. 39, reprinted in J. HOLT, MAGNA CARTA 327 (1965).

process of law" in 1354.<sup>77</sup> He shows that, except for Lord Coke, no one thought that these provisions bound Parliament.<sup>78</sup> But it does not follow that similar language in our Constitution was not intended to bind Congress. No English rights bound Parliament.<sup>79</sup> The great innovation of American bills of rights was that they restrained legislative power, and there is no reason to believe that due process clauses were not part of that innovation.

Indeed, the Supreme Court found it obvious that Congress could not control the scope of due process. It unanimously and emphatically rejected that notion in its first major due process opinion, *Murray's Lessee v. Hoboken Land and Improvement Co.*<sup>80</sup> After noting that the Constitution "did not even declare what principles are to be applied" in deciding whether a procedure afforded due process,<sup>81</sup> the Court said:

It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will.<sup>82</sup>

Easterbrook might say that this is dictum and an usurpation, but he does not. Instead, he turns to the Court's test for identifying due process.<sup>83</sup> The Court said that in determining the scope of due process, it would

look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.<sup>84</sup>

Easterbrook reads such passages to mean that the courts construing the due process clauses are bound by the precedents of 1791.<sup>85</sup> Be-

This chapter was slightly expanded and renumbered as chapter 29 in the re-issue of 1225. *Id.* at 1, 355. Easterbrook's claim that this clause had a precise and well understood original meaning is not supported by historians. *See id.* at 5-9, 17-18, 226-29.

77. 28 Edw. III ch. 3 (1354).

78. Easterbrook (forthcoming), *supra* note 3, at 96.

79. *Hurtado v. California*, 110 U.S. 516, 531-32 (1884); 1 W. BLACKSTONE, COMMENTARIES \*90-91; L. HAND, THE BILL OF RIGHTS 35 (1958).

80. 59 U.S. (18 How.) 272 (1855).

81. *Id.* at 276.

82. *Id.*

83. Easterbrook (forthcoming), *supra* note 3, at 101.

84. 59 U.S. (18 How.) at 277.

85. Easterbrook (forthcoming), *supra* note 3, at 104-05. He reads cursory statements by Chancellor Kent and Justice Story the same way. *Id.* at 99-100. Kent merely quotes Coke. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 9-10 (New York 1826). Story equates due process with common law, but does not indicate that he means Easterbrook's frozen common law. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (Boston 1833).

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cause he apparently believes that this would get modern courts out of the due process business as effectively as a rule that legislatures decide what process is due, he treats the two tests as substantially equivalent.<sup>86</sup>

The two tests are not as similar as he suggests. Accepted usage in 1791 is not the same as whatever the legislature says. The hypothetical statute considered earlier, authorizing criminal convictions by a preponderance of the evidence, would be invalid even under a static historical test.<sup>87</sup> The statute struck down in *Logan v. Zimmerman Brush Co.*,<sup>88</sup> under which clerical oversights by state officials deprived litigants of vested claims, would surely be invalid as well. And a static historical test may have nothing to say about cases like *Goldberg v. Kelly*<sup>89</sup> and *Arnett v. Kennedy*.<sup>90</sup> If in 1791 there were no detailed welfare and civil service codes creating vested rights in public benefits and government jobs, then there could be no settled procedures for determining such rights. The nearest analogy might be the poor laws and public employment at will, but it might just as plausibly be civil litigation over vested rights.<sup>91</sup>

Moreover, there is no reason to assume that a historical test must be static. Easterbrook reads the early cases that way; in his view, the due process clauses give courts absolutely no power to improve on the procedures of 1791.<sup>92</sup> That is one possible reading, but it is not the only plausible reading. In *Murray's Lessee*, for example, the Court looked to practice in many jurisdictions, both before and after 1791, to ascertain settled usage.<sup>93</sup> It also argued that summary procedure was a necessity in tax cases.<sup>94</sup> Much of this authority and reasoning would have been unnecessary if the precedents of 1791 had been conclusive. The facts did not require the Court to clearly separate its assessments of

86. Easterbrook (forthcoming), *supra* note 3, at 103.

87. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 558-59 (1898); Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. REV. 507 (1975).

88. 102 S. Ct. 1148 (1982).

89. 397 U.S. 254 (1970) (holding that welfare recipients are entitled to hearings before termination of benefits).

90. 416 U.S. 134 (1974) (described *supra* text accompanying notes 5-6).

91. *Cf.* *Curtis v. Loether*, 415 U.S. 189, 195-97 (1974) (holding that a jury trial must be available on demand in private actions for housing discrimination, because action and remedy are analogous to common law tort actions and remedies, and not analogous to equitable actions and remedies). In any event, it is an error to think of *Arnett* as unprecedented and employment at will as the only eighteenth-century model. Public offices were often property at common law. 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*36-37. At least one early decision held that incumbency in public office is protected by the law of the land clause in the state constitution. *Hoke v. Henderson*, 15 N.C. 1, 10-19, 4 Dev. 1, 12-25 (1833).

92. Easterbrook (forthcoming), *supra* note 3, at 104-05.

93. 59 U.S. (18 How.) at 277-80.

94. *Id.* at 282, 285.

history, necessity, and fairness, because each led to the same result. Indeed, the result in *Murray's Lessee*—that due process is satisfied by summary seizure of assets for delinquent taxes followed by a refund suit against the government—is still good law today.<sup>95</sup>

Easterbrook reviews the gradual, almost imperceptible steps that brought the Court's due process doctrine from the opinion in *Murray's Lessee* to *Goldberg v. Kelly*, and finds such evolution illegitimate. But evolution has been the genius of the common law. To incorporate a frozen common law is to incorporate a contradiction in terms. Even the seventh amendment right to jury trial, which explicitly incorporates "the rules of the common law," has not been thought to freeze forever the rules of 1791.<sup>96</sup>

Other early interpretations of due process cast further doubt on each of Easterbrook's inconsistent claims about the original understanding. State courts construing due process and law of the land clauses announced a variety of interpretations,<sup>97</sup> including some sounding in substantive due process.<sup>98</sup> Open ended paraphrases of "law of the land" can be found in an 1819 Supreme Court opinion<sup>99</sup> and in Daniel Webster's argument in the Dartmouth College case.<sup>100</sup> *Hurtado v. California*<sup>101</sup> is a paean to the capacity for growth in both the common law and the Constitution,<sup>102</sup> and it notes approvingly that the un-

95. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352 n.18 (1977); *Myers v. United States*, 647 F.2d 591, 601-04 (5th Cir. 1981). Cf. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981).

96. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336-37 (1979); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459 (1977) (dictum); *Galloway v. United States*, 319 U.S. 372, 392 (1943); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320-21 (1902). See generally Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEXAS L. REV. 1065, 1078-83 (1979); Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 731-47 (1973).

97. Corwin, *The Doctrine of Due Process Before the Civil War* (pts. 1 & 2), 24 HARV. L. REV. 366, 460 (1911).

98. See, e.g., *Wynehamer v. People*, 13 N.Y. 378, 382-406 (1856); *Hoke v. Henderson*, 15 N.C. 1, 10-15, 4 Dev. 1, 12-19 (1833); *Trustees of University of North Carolina v. Foy*, 5 N.C. 57, 62-63, 1 Mur. 58, 87-89 (1805).

99. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819). The court stated: As to the words from *Magna Charta*, incorporated into the constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.

*Id.* at 244.

100. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 581 (1819) (Mr. Webster for the plaintiffs in error stated: "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.").

101. 110 U.S. 516 (1884).

102. *Id.* at 528-32.

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derstanding of Magna Charta had expanded for half a millenium.<sup>103</sup> Easterbrook implausibly claims that *Hurtado* meant only that constitutional rights could contract, not that our understanding of them could expand.<sup>104</sup> One sentence lends some support to such a view,<sup>105</sup> but that is not the fair tenor of the whole opinion.

Plainly, modern due process is not identical to the common law procedure of 1791. But equally plainly, modern due process law is based squarely on the values and principles of common law procedure. Notice, hearing, cross-examination, and independent counsel served the same purposes in 1791 as they do today. The Court has been faithful to the best of the common law tradition.

It is time to retrace and summarize the argument. There is no support for Easterbrook's claim that the Framers intended due process to be whatever legislatures say it is. There is scattered and ambiguous support for his quite different claim that due process means the procedures of 1791. Early judges looked to the common law as one source of guidance in defining due process, and some of their language hints at a frozen common law. But these opinions are most plausibly read as looking to the living common law, a law that has always grown in response to changed conditions and increased appreciation of the implications of its principles. And as usual with claims about the intent of the Framers, there was no uniform understanding. There is as much or more historical support for substantive due process as for Easterbrook's frozen due process, and much more than for his legislatively determined due process. I continue to believe that text is the best guide to the meaning of the Constitution. But for those who choose to look elsewhere, history offers little support for a minimalist view of due process.

103. It was a peculiar advantage that the consequences of its principles were, if we may so speak, only discovered slowly and gradually. It gave out on each occasion only so much of the spirit of liberty and reformation as the circumstances of succeeding generations required and as their character would safely bear.

*Id.* at 530, quoting 1 J. MACKINTOSH, A HISTORY OF ENGLAND 221. Mackintosh wrote in 1830. 352 The National Union Catalog Pre-1956 Imprints 425 (1974). Easterbrook seems to think not only that due process of law should not have changed from 1791 to 1982, but that it did not change from 1215 to 1791.

104. Easterbrook (forthcoming), *supra* note 3, at 103-04.

105. 110 U.S. at 528 ("The real syllabus of the passage quoted [the passage from *Murray's Lessee* quoted in part *supra* at text accompanying note 84] is, that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country. . . .").

#### IV. The Appeal to Precedent: The Distinction Between Due Process Rights and Other Procedural Rights

Not all procedural rights are due process rights. I do not mean merely that courts and legislatures sometimes provide procedural rights in excess of what the due process clauses would require. I mean that some procedural rights do not even serve the same purposes as the due process clauses.<sup>106</sup>

The core values of the due process clauses are accurate decision making and full hearing of all sides. Exclusionary rules are procedural rules that are fundamentally inconsistent with those purposes. When they operate to exclude evidence that is both reliable and relevant, exclusionary rules prevent one side from being fully heard, and do so at considerable risk to accurate decision making.<sup>107</sup> Thus, due process values are sacrificed in order to serve other values—to provide an extra incentive to comply with other rules. The other rules may be substantive, such as freedom from unreasonable searches,<sup>108</sup> or procedural, such as freedom from custodial interrogation without being advised of the right to remain silent.<sup>109</sup> It makes sense to say that the exclusionary rule merely indicates the importance of the rule that it serves, and that both should be enacted by the same authority. However, the separation of powers issue rarely arises in that form, because most exclusionary rules enforce constitutional rights. The Framers having been silent with respect to remedies, the Court has undertaken both to construe the constitutional protections and to determine the remedies that enforce them.

The issue did arise in *United States v. Caceres*,<sup>110</sup> in which the Court refused to exclude evidence gathered in violation of investigative rules voluntarily promulgated by the Internal Revenue Service. The Court indicated that the executive branch had “the primary responsibility for fashioning the appropriate remedy for the violation of its regulations.”<sup>111</sup> Easterbrook cites *Caceres* as recognizing his claim that “procedural rules are just a measure of how much the substantive rules are worth, of what we are willing to sacrifice to see a given goal at-

106. Grey, *supra* note 19, at 184-85. See Posner, *supra* note 68, at 400-01.

107. See *Stone v. Powell*, 428 U.S. 465, 489-90 (1976). The Court has distinguished procedural rules that improve the accuracy of fact finding from those that do not in the cases deciding which newly announced rules of criminal procedure shall have retroactive effect. See, e.g., *United States v. Johnson*, 102 S. Ct. 2579, 2584, 2594 n.21 (1982); *Ivan v. City of New York*, 407 U.S. 203, 204 (1972); *Linkletter v. Walker*, 381 U.S. 618, 639 (1965).

108. See U.S. CONST., amend. IV; *Mapp v. Ohio*, 367 U.S. 643 (1961).

109. See U.S. CONST., amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966).

110. 440 U.S. 741 (1979).

111. *Id.* at 756.

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tained.”<sup>112</sup> He accurately describes the exclusionary rule at issue in *Caceres*, but he fails to recognize that exclusionary rules have nothing to do with his main thesis. *Caceres* is simply not a due process case, and it does not follow that the political branches should be fully entrusted with the constitutional values that the due process clauses protect.

### V. Conclusion

The Supreme Court has been defining the scope of procedural due process for a long time, and it is not likely to abandon that function to legislatures. Neither text, nor economics, nor history, nor precedent provides a plausible reason for it to do so. This is an issue on which sophisticated analysis has obscured the obvious. The due process clauses create procedural protections for certain rights created elsewhere. Under our system of judicial review, enforcement of those procedural protections is entrusted to the Court. That is the meaning that appears on first reading, and that is the meaning that remains after considering all the arguments of the Court’s critics.

112. Easterbrook, *supra* note 3, at 94.

