DUE PROCESS AND DELEGATION: "DUE SUBSTANCE" AND UNDONE PROCESS IN THE ADMINISTRATIVE STATE

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ABSTRACT

Due process as a notion of basic fairness has deep roots and broad intuitive appeal. It is a guarantee, stretching back at least to Magna Carta, that government's most feared impositions on those within its reach—using its coercive powers to take away our lives, our liberty, or our property—can only be accomplished through processes that have qualities of regularity and impartiality under rules that are adopted through mechanisms that historically carried the hallmarks of legitimacy, generality, and neutrality. The same instincts that underlie due process guarantees also inform the structural protections that are the central features of our Constitution. The goal under either label is to protect liberty by regulating the way government goes about setting and applying legal rules.

The intuitive appeal of the notion of "due process," however, at times has obscured the limited reach of the core concept, which is restricted in both what it applies to and what it requires. Transformation of due process from that core to a looser constraint that can be shaped to fit particular notions of good governance has produced serious failures, both encouraging episodes of judicial adventurism that invade space reserved to electoral-representative processes (the story of "substantive due process") and weakening protections against inappropriate exercises of official discretion.

Reliance on softer notions of due process may be especially problematic in respect to questions of administrative *process, which often lie outside the ambit of appropriate due process*

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constraints. Even where due process does apply, other legal rules strongly influence the degree to which administrative processes work and frequently provide better avenues for constraining them. Addressing directly the problematic nature of many delegations *of authority to administrators and of inappropriate judicial* deference *to administrative determinations by and large will be preferable to due process challenges to administrative action. Due process can be a complement to reinvigorated delegation constraints and reformed deference rules or a partial substitute—used to compensate for failure to properly reform those doctrines—but it is at best a "second best" option.*

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I. INTRODUCTION

James Madison, in *Federalist* 51, famously wrote: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[1] Those who care about governance have been trying to solve that difficulty for centuries. One key concept in this effort is "due process"—a term tied to historic rights against the governors, evoking at once values of fairness, regularity, and constraint. The broad appeal of "due process," however, owes something not just to its traditional meaning but also to protean qualities less consistent with the rule of law.

Due process began life as a simple concept. It meant what it said. Specific types of procedures—*process*—were an individual's *due* in particular circumstances. If you were to be bound by a general rule for governing all behavior in a given setting, that required that the legislature pass a law saying so; the laws

[1] THE FEDERALIST No. 51 (James Madison), at 337 (Modern Library ed. 1937).

had to be made by certain procedures; and no other official—from a constable to a king—could make up a special rule for your behavior on his own. If you were to be held responsible for past conduct, you were entitled to have questions respecting what you did and how it fit with or violated established rules decided by a properly constituted tribunal.

This concept was well-understood in England and the United States when the U.S. Constitution was written. The essential notions embedded in due process rights are that government must act through regular processes, that the processes must fit the kind of decision being made, and that the processes must offer basic rule-of-law protections against arbitrary or abusive government power.[2]

These ideas lie at the core of the U.S. Constitution. The vesting clauses of the Constitution assign the power to make laws to the Congress and specify essential processes to be used in exercising that power, assign the power to implement the laws to the President and those working for him, and assign the power to resolve disputes about the law (those giving rise to cases and controversies) to the federal courts, which are composed in ways congenial to the exercise of impartial adjudication.[3] Although the original U.S. Constitution contained a range of specific procedural mandates to prevent the abuses of power that most concerned the framers, the Bill of Rights added to the Constitution, among other things, rights against any deprivation of "life, liberty, or property, without due process of law" and the right to trial by jury in any federal criminal case and in a range of civil cases as well, along with additional, specific rights in criminal cases in particular.[4]

Given the structure of the Constitution, the way it divides and

[2] *See*, *e.g.*, WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:136 (4th ed., Exshaw, Saunders, Grierson & Williams 1771) (1765) (COMMENTARIES); EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND 2:45-51 (E. & R. Brooke 1797) (1642).

[3] *See* U.S. CONST., art. I, §1; *id*., art. II, §1; *id*., art. III, §1.

[4] *See* U.S. CONST., amends. V, VI, VII.

checks governmental powers, and the various, specific safeguards in it, what work does "due process" do? How is it different from other protections built into the constitutional framework? And which approaches to interpreting its meaning best accommodate both its own constitutionally-assigned role and the role of related provisions?

Answering those questions must start with the meaning that due process had prior to the advent of the modern administrative state. The meaning of "due process" remained reasonably close to its historic meaning and reasonably constant in U.S. law through the end of the 19th Century and start of the 20th Century. Even as legislatures began expanding the ambit of authority conferred on a growing number of administrative authorities, due process, in keeping with its traditional, received meaning, remained a directive to make public decisions in accordance with the procedures suited to—and historically required for—particular types of determination.[5] The narrow ambit for due process supported structural features of the Constitution while keeping courts from using the concept in ways that intrude on constitutional commitments to political-representative decision-making.

However, two developments in the next half-century unhinged traditional understandings of due process in ways that lost both of those advantages. First, courts began to use due process to mean something very far away from simply requiring government authorities to use the process appropriate to the particular sort of decision being made. Cases such as the famous (or infamous) decision in *Lochner v. New York* (*Lochner*)[6] relied on the Constitution's protection against deprivations of liberty, person, or property without due process to strike down legislation regulating working conditions as beyond the purview of government power—beyond even the most capacious sovereign power recognized at that time, states' police power. Second, courts began approving broad delegations of power (in entities organized in more and less conventional

[5] *See* discussion and notes at Parts II & III, *infra*.

[6] 198 U.S. 45 (1905).

arrangements) to make binding rules for private conduct[7]—and to exercise broad authority over the implementation of both legislative and administrative rules[8]—opening a "Pandora's box" of problems.[9] One response to the problems that flow from administrative exercise of authority constitutionally assigned to another part of the government is the search for mechanisms that can limit the problems such constitutional creativity spawns, including use of due process to constrain decision-making at odds with widely accepted notions of fairness.[10]

This paper describes some significant applications of the due process clauses, the clauses' relation to some other legal protections—most notably the vesting clauses' restraints on assigning the powers of one branch of government to another branch and the ways in which courts choose to divide responsibility among different branches of government—and the implications of

[7] *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944); National Broadcasting Co., Inc. v. United States, 319 U.S. 190 (1943); J.W. Hampton, Jr. v. United States, 276 U.S. 394 (1928).

[8] *See, e.g.*, Auer v. Robbins, 519 U.S. 452 (1997); Babbitt v. Sweet Home Chapters of Communities for a Great Oregon, 515 U.S. 687 (1995); Chevron U.S.A. v. Natural Resources Defense Council, Inc., 476 837 (1984).

[9] *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035 (2007) (*Running Riot*); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010) (*Failed Experiment*); Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J. L. & PUB. POL'Y 147 (2016) (*Delegation Reconsidered*); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, in LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., Encounter Books 2016) (Chevron*'s Game*); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (*Structure*); Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463 (2015); David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355 (1987) (*Purposes*).

[10] *See, e.g.*, Manning, *Structure*, *supra*.

such limitations for the administrative state today. The seemingly oxymoronic concept of "substantive due process" has been a source of mischief that substitutes uncabined judicial power for what frequently are (at least in the short-run consensus view) regrettable policy decisions by the political branches. In contrast, due process in its more traditional, process-focused form can provide a salutary check on exercises of administrative authority. It can assure that procedures are used that comport with notions of legitimacy and constrained exercise of power—with government, in Madison's words, "obliged[] ... to control itself."[11]

In a wide array of settings, however, the due process clauses have little to say about *administrative* process, which often presents questions outside the ambit of appropriate due process constraints. Further, even where due process does apply, other legal rules strongly influence the degree to which processes work. The better route (at least at the federal level) often is to address directly the problematic nature of *delegations* of authority and of inappropriate *deference* to administrative rules.[12] By and large, that approach will be preferable to due process challenges to administrative action, much of which necessarily is both informal and discretionary, but which can function consistently with the rule of law only when confined within proper bounds. Due process can be a complement to reinvigorated delegation constraints and reformed deference rules or a partial substitute—used to compensate for failure to properly reform those doctrines—but it is at best a "second best" option.

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[11] THE FEDERALIST No. 51 (James Madison), at 337 (Modern Library ed. 1937).

[12] *See*, *e.g.*, Cuozzo Speed Technologies, LLC v. Lee, Sup. Ct. No. 15-446, slip op. at 1-2 (Jun. 20, 2016) (Thomas, J., dissenting); Department of Transportation v. Association of American Railroads, U.S. Sup. Ct. No. 13-1080 (Mar. 9, 2015) (*American Railroads*), slip op. at 6-7 (Alito, J., concurring); *id*., *American Railroads*, slip op. at 2-22, 25-27 (Thomas, J., concurring in judgment); Decker v. N.W. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339-42 (2013) (Scalia, J., concurring in part and dissenting in part); Cass, Chevron*'s Game*, *supra*; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985) (*Substance*).

II. DUE PROCESS AT THE FOUNDING

At the time of U.S. Constitution's framing and ratification, there was no serious doubt about the meaning of the phrase "due process of law" or about the concerns that were associated with that concept. The focus unequivocally was on *process* in the ordinary, common-sense meaning of the term.

A. *Structure and Process*

Nowhere is the overwhelming concern with process more clearly exposed than in Alexander Hamilton's *Federalist* No. 84 essay. Addressing the complaint from Anti-Federalists that the Constitution lacked a Bill of Rights, Hamilton began by reviewing protections offered by the Constitution, including the requirement that any punishment visited on an impeached and removed officer only occur following "'indictment, trial, judgment, and punishment according to law,'" strict limitations on interference with habeas corpus, and prohibitions on bills of attainder and *ex post facto* laws.[13] These protections are plainly *procedural* protections, ones that Hamilton clearly saw as among the most critical safeguards for individual rights. Hamilton also pointed to the proscription of titles of nobility, which he saw as a protection against corrupting the notion of government subservient to the people, as titles of nobility suggest (and encourage) a separation of the nobility from the broader populace.[14] Most of all, Hamilton underscores the importance of the structure of government contained in the Constitution—the framework of *procedures* for making government decisions—which limits the authority granted to the national government and apportions it in ways that restrain power and promote liberty. For that reason, Hamilton declares that "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[15]

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[13] THE FEDERALIST No. 84 (Alexander Hamilton).

[14] *See id*. at 557-59 (Modern Library ed. 1937).

[15] *See id*. at 561 (Modern Library ed. 1937).

For Hamilton, the protections that matter most were not express statements of rights but protections accorded through the commitment to processes that are designed to divide, limit, and check government power, to prevent it from being put in hands of people who will abuse it, and to provide mechanisms for giving better prospects for keeping excessive, discretionary power out of officials' hands. Hamilton's approach is quite like that seen in James Madison's essays in *Federalist* Nos. 45-51.[16] All of these essays make clear that the greatest protection for liberty lies in structures and processes for decision-making that prevent abuse of power.[17] For Hamilton and Madison alike, the Constitution's division of power between the states and national government and among three branches of the national government provides, along with the commitment of the people to support those structures, the greatest protection of liberty.

B. *Due Process as Constrained Discretion*

The same focus on process was the foundation for "due process" guarantees. Hamilton's *Federalist* No. 84 essay is not merely a paean to the virtues of the Constitution; it also recounts the connection between the concept of due process of law and the Constitution's specific protections of rights through procedural guarantees and proscriptions. That is the essence of Hamilton's invocation of Sir William Blackstone:

> The creation of crimes after the commission of the fact ..., and the practice of arbitrary imprisonments, have

[16] THE FEDERALIST Nos. 45-51 (James Madison). In fairness to Hamilton, there is some debate over the authorship of Nos. 49-51, which are at times attributed to Hamilton or Madison. *See, e.g.*, THE FEDERALIST Nos. 49-51 (Modern Library ed. 1937).

[17] In the same vein, Justice Antonin Scalia, explaining the basic understandings for the American Constitution and the relative importance of structures versus a Bill of Rights, invariably told students that while any dictator could promise the most extravagant collection of rights, even embedding them in a constitution, such promises have never made a society safe or free—structures and processes, on the other hand, can succeed without such promises. This was often accompanied with a recitation of rights guaranteed by the Soviet Union's constitution or Libya's or other examples of dictatorial, repressive regimes.

> been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life, [says he,] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, and less striking, and therefore *a more dangerous engine* of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the *habeas-corpus* act ... [18]

Hamilton's quotation of Blackstone captures perfectly the essence of the due process clause and also shows that its meaning with respect to all three subjects—life, liberty, and property—was as plain as its solutions. "Life" in the Constitution's due process clause meant exactly what is says: being alive, which makes the protection against improperly putting someone to death. "Property" meant someone's *estate*—actual things *owned* by someone. And "liberty"—in contrast to the broader term "liberties"—meant the freedom of movement that comes with not being detained, specifically in prison.[19] The appropriate protection for the items under these headings—collectively

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[18] THE FEDERALIST No. 84 (Alexander Hamilton), at 557 (Modern Library ed. 1937) (footnotes omitted; emphasis in original).

[19] *See, e.g.*, BLACKSTONE, COMMENTARIES, *supra*, at 1:134 ("personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."). Other statements by Blackstone providing a much more expansive definition of "liberty" were describing concepts of "natural liberty" (pre-political liberty) or of "political liberty" or "civil liberty" (liberty that exists in a civil society, subject to the rule of law). These uses of the term address questions such as what is most consistent with good governance, rather than what is comprehended within the terms associated with "due process" protections. *See, e.g.*, *id.* at 1:125-

"due process"—is precisely what Blackstone and Hamilton are describing in the various procedural protections they laud: requirements of regular processes such as indictment and trial before an impartial decider, insistence on trustworthy evidence, advance notice of what acts are unlawful adopted through legitimate (legislative) mechanisms, mandating that crimes be generically described rather than specially tailored to punish specific people, and so on.[20] The special point respecting habeas corpus was that this served as a back-stop for process failures that resulted in loss of liberty.[21]

At that time, it was generally understood that "due process of law" meant the same thing as the fundamental protection of Magna Carta—repeated almost verbatim in numerous state constitutions around the time of the nation's founding—that no freeman could be deprived of liberty, lose his property, or be subject to the sort of serious harms (e.g., exile, outlawry) within the power of a coercive government "save by the lawful judgment of his peers or by the law of the land."[22] The process that was due was a judgment of a properly constituted tribunal or a legal rule that was properly passed through Parliament (making it the "law of the land"), procedures that protected against arbitrary or biased decisions of the sort associated with unbridled assertions of royal prerogative.[23] The extension of that understanding in early American constitutions was that states should be bound to deny unchecked discretion to government officials and should assure that no individual would be punished without appropriate judicial process and no person would lose his property, liberty, or life based on judgments that were not in service of a properly enacted law.[24] Hamilton understood that the federal Constitution, even before adoption of the Bill of

26 ("the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the *natural*, increases the *civil* liberty of mankind.") (emphasis added).

20 *See, e.g.*, BLACKSTONE, *supra*, at 1:136.

21 *See*, *e.g.*, BLACKSTONE, *supra*, at 3:129-38.

22 *See* Magna Carta, ch. 39 (1215).

23 *See*, *e.g.*, COKE, *supra*, at 48-56.

24 *See*, *e.g.*, [Adams & Constitution of Commonwealth of Mass.].

Rights, embraced that vision in its divisions of power and specification of procedures to further circumscribe power.

III. IMPLEMENTING DUE PROCESS: BEFORE THE ADMINISTRATIVE STATE

Through the first century and more after adoption of the Constitution, pronouncements by judges, in judicial decisions and professional writings, reflected the understanding shared by Hamilton, Madison, and Blackstone. Justice Joseph Story, for example, in his *Commentaries*, declares that the meaning of "due process of law" in the U.S. Constitution is the same as in England, essentially reprising (and applying to a broader populace) "the language of magna charta ... [s]o that this clause in effect affirms the right of trial according to the process and proceedings of the common law."[25]

A. Murray's Lessee *and Process' Heritage*

Similarly, in *Murray's Lessee v. Hoboken Land & Improvement Co.* (*Murray's Lessee*), Justice Benjamin Curtis, writing for the Court, asserted that "[t]he words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Charta."[26] He recounted that "[t]he Constitutions which had been adopted by the several States before the formation of the federal Constitution, following the language of the great charter more closely [than the clause in the U.S. Constitution], generally contained the words, 'by the judgment of his peers, or the law of the land.'"[27] Curtis explained, however, that the use of the exact due process language of Magna Carta would have been misleading

[25] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 3:1783 (Hilliard, Gray & Co. 1833).

[26] 59 U.S. (18 How.) 272, 276 (1855).

[27] *Id*.

in the Fifth Amendment to the U.S. Constitution, as that document already had accounted for the appropriate *judicial* process in the body of the original Constitution—making a repetition confusing as well as unnecessary—and using merely the "law of the land" portion of Magna Carta would have suggested a limitation of the concept of due process to legislative enactment alone.[28]

Curtis' statements—that "it was not left to the legislative power to enact any process which might be devised" and that the due process clause "cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will"[29]—at times have been taken to signify a broader sense of the clause, encompassing the sort of judicial license that would evolve into decisions such as *Lochner*.[30] Yet the balance of the opinion, written in the context of deciding the constitutionality of a distress warrant for collection of funds owed (actually, the proceeds from embezzlement of customs duties collected on behalf of, but not turned over to, the U.S. Treasury), made clear that its intent was not to give judges power to decide when congressionally legislated procedures comport with *general principles* of legality—especially not substantive legality.

Instead, the decision in *Murray's Lessee* permits invalidation of laws that transgress *specific prohibitions* on legislative action either contained in the Constitution or implicit in the clause in light of the historical record of procedures accepted or rejected prior to and during the founding era.[31] In this regard, the Court's opinion in *Murray's Lessee* states that it must "examine the Constitution itself to see if this process be in conflict with any of its provisions" and, if not, to "look to those settled usages and modes of proceeding existing in the common and

[28] *Id*.

[29] *Id*.

[30] *See, e.g.*, Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CAL. L. REV. 583, 584-85 (1930).

[31] *Murray's Lessee*, *supra*, 59 U.S. at 277-81.

statute law of England, before the emigration of our ancestors."[32]

B. Calder v. Bull *and Judicial Constraint*

The sense of *Murray's Lessee*, as with other decisions in the 18th and 19th Centuries for the most part, was in line with both a focus on *process* and an approach to deciding what process was due that limited judicial discretion. *Calder v. Bull*,[33] another early decision that also is sometimes quoted out of context as supporting broader judicial freedom to invalidate legislative action, demonstrates the same focus and limitation. Despite language in Justice Samuel Chase's opinion referencing general principles of social compact and natural right[34] (objected to by Justice James Iredell as overly vague and inappropriate grounds for judicial decision),[35] the decision itself focused far more narrowly on whether the state legislative enactment setting aside a state court decision on a will contest and granting a new hearing violated the U.S. Constitution's prohibition on states enacting *ex post facto* laws.[36] The justices, including Justice Chase, saw a broadly construed *ex post facto* restriction as inconsistent both with precedent and with the general powers reposed in state legislatures, reasoning and conclusions at odds with an approach congenial to unfettered judicial discretion.[37]

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[32] *Id*. at 277.

[33] 3 U.S. (3 Dall.) 386 (1798).

[34] *See id*. at 388, 394 (Chase, J.).

[35] *See id*. at 399 (Iredell, J.).

[36] *See id*. at 389-95 (Chase, J.); *id*. at 395-97 (Paterson, J.); *id*. at 400 (Iredell, J.). In fact, Justice Iredell noted that the language he objected to was unnecessary to the decision reached by the Court and even to the determination by Justice Chase. *See id*. at 400 (Iredell, J.) (only criminal laws fall within the *ex post facto* proscription).

[37] *See id*. at 393-95 (Chase, J.); *id*. at 399-400 (Iredell, J.). Justice Chase agreed that criminal laws are the laws that fell within the *ex post facto* prohibition in England, but also reasoned that if the prohibition extended to other laws it could only affect vested rights, which did not exist in the instant case and which, by his lights, almost never could exist in any way that could

C. Hurtado *and Evolving Procedures*

Another case illustrating the approach to due process in the pre-administrative state is *Hurtado v. California* (*Hurtado*),[38] often taken to be the start of a more free-wheeling approach to determining what process is due.[39] The case, an appeal from Joseph Hurtado's conviction for the murder of his wife's lover, presented the question whether a state could permit felony charges to be brought on information filed by state officials in place of a grand jury proceeding and indictment. The argument for Hurtado was that the term "due process of law" in the Fourteenth Amendment—part of the set of Civil War era amendments extending legal protections to (primarily) African-Americans by imposing constraints on the states—included the requirement of grand jury presentment and indictment at least for any capital crime, the common practice in England prior to the time of the founding. Hurtado also urged that the language from *Murray's Lessee*—referencing "settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors"[40]—limited the set of procedures that can be deemed consistent with due process to those accepted in England in the 17th and 18th Centuries, a period when the requirement of grand jury interposition between accusation and trial was well established.[41]

Over the lone dissent of Justice John Marshall Harlan,[42] the Court rejected the argument, finding that the concept of due process was not fixed and limited to specific practices existing

be undone by a legislative act, as the vesting would occur when a final and binding determination of the rights was perfected. *See id*. at 394. For a general review of the "vested rights" approach to due process and its role in broader interpretive debates, *see*, *e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 509-20 (1997).

[38] 110 U.S. 514 (1884).

[39] *See*, *e.g.*, Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in NOMOS XVIII: DUE PROCESS 3, 18 (J. Roland Pennock & John W. Chapman eds., NYU Press 1977); [other cites].

[40] *Murray's Lessee*, *supra*, 59 U.S. at 277.

[41] *Hurtado*, *supra*, 110 U.S. at 528.

[42] *See id*. at 538 (Harlan, J., dissenting).

at the time of the founding. Rather, the justices said, those practices could establish consistency with due process but did not preclude other practices from also constituting due process so long as the fundamental interests of citizens are respected, the process is regular (not specially deployed for a particular individual or group), and is consistent with restraint upon arbitrary power of government.[43] They pointed out as well that the requirement of grand jury indictment prior to trial for "capital, or other infamous crime" was specifically provided in the U.S. Constitution with respect to federal prosecutions in the very same amendment (the Fifth Amendment) that contains the due process clause;[44] the separate statement of that requirement would have been unnecessary if it were included in the guarantee of due process, which the Fourteenth Amendment later made applicable to the states.[45]

While *Hurtado* rejected construing due process commands to freeze procedures used for bringing to bear the state's authority potentially to take a person's life, liberty, or property in the precise shape that procedures took in the late 17th to 18th Centuries (expressly allowing for variation in procedures over time), it certainly did not bless *any* process that the state chose to set up. The *Hurtado* majority's reasons for accepting California's procedure were both substantial and grounded in a fairly compelling reading of constitutional text. As the Court noted, the use of an information to commence criminal process has a long pedigree, and the process employed in California required the intervention of a judicial magistrate in addition to the executive officer who filed the information.[46] Moreover, the majority's observation that incorporating grand jury indictment as an essential element of due process would make the first clause of the Fifth Amendment a meaningless redundancy is not readily

[43] *See id*. at 529-38.

[44] *See* U.S. CONST., amend. V, cl. 1 (right to grand jury indictment); *id*., amend. V, cl. 4 (due process clause).

[45] *Hurtado*, *supra*, 110 U.S. at 534-35.

[46] *See id*. at 517-18, 528-30, 536-38.

answered.[47] Even if the original due process clause was understood as limited to a very narrow function, it is best interpreted as doing something not wholly duplicative of what is in the original Constitution and the other, specific provisions of the Bill of Rights.[48]

The first Justice Harlan's *Hurtado* dissent, while explaining the importance of protections against the initiation of criminal proceedings as well as against wrongful conviction in them,[49] lacks a persuasive answer to the majority's textual argument. Harlan does expose the problem of trying to carve out of "due process" protection the specific protections that were associated with due process and, given that importance and pedigree, were included in the original Constitution.[50] His reasoning harks back to Hamilton's *Federalist* No. 84 essay.[51] But the conclusion in *Hurtado*—rejecting the due process claim—and its reliance on the text of the Constitution as it relates specifically to the question presented (in contrast to its less constrained language about constitutional interpretation more generally) fits with the understanding of due process expressed by Justice Story and early decisions. And both Justice Stanley Matthews' majority opinion and Justice Harlan's dissent plainly reveal appreciation that constitutional due process protections, in both the Fifth and Fourteenth Amendments, are protections of *process* alone.[52]

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[47] *But see* Gary Lawson, *Take the Fifth … Please!: The Original Unimportance of the Fifth Amendment Due Process Clause*, paper prepared for Center for the Study of the Administrative State Research Roundtable on Rethinking Due Process (on file with author) (arguing that in fact this is exactly consistent with the original meaning of the due process clause: "an 'exclamation point' that highlights legal norms [in the original Constitution] but does not create them" (footnote omitted) (*Original Unimportance*).

[48] [cite Scalia re interpretation and redundancy] *Cf.* Lawson, *Original Unimportance*, *supra* (making the case that the original clause did not add any substantive constraint as originally understood, but not that this is a sustainable interpretive proposition).

[49] *See id*. at 543-45 (Harlan, J., dissenting).

[50] *See id*. at 547-50 (Harlan, J., dissenting).

[51] *See* discussion in Part II, *supra*.

[52] For an argument that the two clauses have different meanings, the older

D. Pennoyer*: Constrained versus Soft Due Process*

Finally, in *Pennoyer v. Neff*,[53] decided a few years before *Hurtado*, the Court considered when service on a litigant could be effected by publication of a summons rather than by its personal delivery. The dispute concerned title to land in Oregon, and service to Mr. Neff, a California resident, was deemed to have been served by publication in *The Pacific Christian Advocate* in conformity to an Oregon law permitting "substituted service" by publication for non-residents who own property within Oregon.

After analyzing the standing of the ensuing Oregon court's judgment so far as California's obligation under the Constitution's "full faith and credit" clause,[54] Justice Stephen Field turned to the question whether exercise of jurisdiction over a personal conflict (not one limited to assessment against property itself) without actual service on the parties contravened the Fourteenth Amendment's due process clause. Justice Field explained the Court's approach to due process analysis:

> Whatever difficulty may be experienced in giving to those terms [due process] a definition which will embrace every permissible exertion of power affecting private rights, and exclude such as is forbidden, there can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights ... [T]here must be a tribunal competent by its constitution ... to pass upon the subject matter of the suit; and if that involves merely a determination of the personal liability of

focused on process, the newer on substantive restraints as well, *see, e.g.*, Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE. L.J. 408 (2010). *But see* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE. L.J. 1672 (2012).

[53] 95 U.S. 714 (1878).

[54] U.S. CONST., art. IV, §1.

> the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.[55]

The opinion for the Court could have drawn on broad principles, essentially requiring the understood legal procedures required for deprivation of private property rights to include the sort of notice that would make the proceedings meaningful. That sense of the due process clause as flexible guarantor of procedural fairness—or as a limited guarantee of specific processes that includes related features necessary to make the established processes effective—can be teased out of *Pennoyer*. But Justice Field did not labor over fine points of analysis or explore broad concepts associated with due process, but simply asserted that subjection to judicial process as a prerequisite for a procedurally proper deprivation of property meant that the proceeding had to be *in rem*, had to be consented to by all parties, or had to be consequent to actual service of process.[56] That was the nature of the process that the justices saw as traditionally required. Unlike the view of the dissenter, Justice Ward Hunt,[57] that was enough.

IV. PROGRESSIVISM'S LEGACY: DUE SUBSTANCE

If cases like *Hurtado* and *Pennoyer* left the understanding of due process basically intact, this may have been a "last hurrah" for the original understanding. The progressive era in American politics, starting just after *Hurtado*, ushered in a series of changes to the law that were instrumental in unraveling the consensus on due process' meaning and application.

A. *Progressivism: Winners, Losers, and* Lochner

Progressivism was characterized by expanded use of government at all levels to control behavior that American governance largely had left to private determinations, especially the conduct of business, notably extending to relationships among its

[55] 95 U.S., at 733.

[56] 95 U.S., at 733-36.

[57] 95 U.S., at 736-48 (Hunt, J., dissenting).

various constituent parts—business-consumer relationships, investor-manager relationships, manager-labor relationships.[58] As so often is the case in political life, the expansion provided opportunities not only for changing behavior in ways deemed socially beneficial by the political majority of the time but also for tilting benefits toward particular groups and competitors.[59] Creating winners also meant creating losers, people and entities that lost options for how to conduct their affairs and lost value from their investments. Those who lost challenged the changes as deprivations of their liberty and their property, wrapping the challenges in the language of due process.

Although, as numerous historical reviews have shown, the courts (the U.S. Supreme Court included) generally rebuffed these challenges,[60] the Supreme Court did famously strike down a small number of laws as violating due process rights. Chief among these was *Lochner v. New York*, which invalidated limitations on hours that could be worked by employees of bakeries (specifically making it illegal to require or permit employees to work more than ten hours per day or 60 hours per week).[61] Prior decisions had recognized a "right to contract" as

[58] *See*, *e.g.*, [cites].

[59] For the general description of this phenomenon, *see*, *e.g.*, Bruce Yandle, *Bootleggers and Baptists: Confessions of a Regulatory Economist*, 7 REGULATION 12 (issue no. 3, 1983). For application of the concept to the dispute in *Lochner* itself, *see*, *e.g.*, Richard A. Epstein, *The Mistakes of 1937*, 11 GEO. MASON L. REV. 5, 17-18 (1988); Norman Karlin, *Back to the Future: from* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 669-70 (1988); Note: *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1373 (1990) (*Resurrecting*).

[60] For a particularly helpful critical review of the evidence and historical writings on judicial review in the Progressive Era, *see*, *e.g.*, David E. Bernstein, Lochner*'s Legacy*'*s Legacy*, 92 TEX. L. REV. 1 (2003). *See also* Michael J. Phillips, *How Many Times Was* Lochner*-Era Substantive Due Process Effective?*, 48 MERCER L. REV. 1049 (1997) (analyzing the frequency and effect of substantive due process decisions in the *Lochner* era).

[61] 198 U.S. 45 (1905).

part of either the *property* or the *liberty* protected against deprivation without due process. For example, the Court in *Holden v. Hardy* found protection for contract implicit in the protection of property, as rights in property require the ability to acquire and dispose of property, which "can only be legally [effected] as between living persons by contract."[62] The preceding Term, the Court had declared in *Allgeyer v. Louisiana* that the right to contract is a part of the liberty protected under the due process clauses, which includes following one's chosen occupation.[63]

Certainly, the argument in favor of seeing regulation of restrictions on contracts respecting property as subsumed within the protections afforded property is far stronger than the argument in favor of creating a free-standing liberty right for contracts.[64] The regulation of contracts respecting property plainly is a potential substitute for a more direct deprivation of property, an argument parallel to that made in favor of treating restrictions on use of money to fund speech as equivalent to a restriction on speech itself.[65] The contract-rights-as-*liberty* argument at a minimum requires the Court first to take the logically prior step of transforming the "liberty" of the original Constitution's (and Magna Carta's) due process clause—the liberty recognized by Coke and Blackstone and Hamilton—into something beyond freedom from physical restraint.

Justice Rufus Peckham, who dissented in *Holden v. Hardy* and authored the Court's opinion in *Allgeyer*, did not spend much time in *Lochner* explaining the choice of liberty over

[62] 169 U.S. 366, 391 (1898).

[63] 165 U.S. 578, 590 (1897).

[64] While the argument for treating contracting rights as a protected right of such a nature that it might well be part of either the protected "liberty" or "property" of the due process clause traces back, in the Supreme Court's Fourteenth Amendment jurisprudence, at least to Justice Joseph Bradley's dissent in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 (1873) (Bradley, J., dissenting), that opinion generally is treated as having favored "liberty" over "property" as the source. *See, e.g.*, [cite].

[65] *See, e.g.*, [cites].

property as the basis for protecting rights to contract or exposing what turned on it. Nor was that a concern for Justice Harlan or Justices White and Day, who joined Harlan's *Lochner* dissent, or Justice Oliver Wendell Holmes, dissenting separately in *Lochner*. Justice Harlan in other cases seemed quite cavalier in his treatment of the question, essentially waving away any need to concentrate on the difference between the two sources of protection for contract rights;[66] Holmes likewise seemed unconcerned with the derivation of these rights. All of the *Lochner* justices accepted the constitutional protection of contract rights under the rubric of the due process clause as a given, focusing their dispute instead on the degree to which other state interests permit imposition of limitations on the ability of individuals freely to contract respecting particular matters.

While the source of the right has important implications for the degree of flexibility credited to the subjects for due process protection, the controversy for which *Lochner* became known was the method for evaluating when government treatment of a particular matter denied the process that was due—a source of even greater potential mischief. The precedents on which Peckham's *Lochner* opinion relied plainly saw the right to contract (however grounded) as subject to valid police power regulation.[67] Often, both before and after *Lochner*, the Court found a regulation of contractual freedom justified under that power.[68] Its reasoning in such cases was similar to its reasoning in the same era when passing on questions respecting invasion of property rights.[69]

B. *Cutting the Constitutional Anchor of Process*

What was problematic in both sorts of cases was not that the Court was constitutionalizing "Mr. Herbert Spencer's Social

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[66] *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 684 (1888); Adair v. United States, 208 U.S. 161, 172 (1908).

[67] *See, e.g.*, [cites].

[68] *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1898); [other cites; see Bernstein, *supra*].

[69] *See, e.g.*, Lawton v. Steele, 152 U.S. 133 (1894); [other cites].

Statics," the accusation made by Justice Holmes,[70] nor that the Court failed to appreciate that action and inaction by the state in respect of private economic activity equally implicate judgments on the proper role of government, the accusation advanced by Professor Cass Sunstein, among others.[71] Instead, the problem was that the Court set its analysis adrift by casting off the anchor of *process*. Once the constitutional question became something other than the process question long seen as what *due process* was all about—whether the state had provided trial-type procedures suitable to a deprivation of life, liberty, or property specific to a particular individual or entity or had adopted a more general rule in the proper fashion, through duly enacted legislation—crafting a decisional guide that would not be subject to manipulation according to the views of the justices was an almost impossible task.[72]

While "due process" has a historical context and meaning, "due substance" is a concept that lacks either of those tethers; "substantive due process" (as the *Lochnerian* approach came to be known)—the common phrasing for *due substance*—is an obvious oxymoron, no more sensible than "procedural due substance" would be.[73] It is a label lacking real meaning. More critically, it also is at odds with the entire thrust of a Constitution

[70] *Lochner*, *supra*, 198 U.S. at 75

[71] *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873 (1987). *See also* [cites].

[72] *See, e.g.*, McDonald v. Chicago, 561 U.S. 742, 797-800 (2010) (Thomas, J., concurring); Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 32 (MacMillan 1990); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (Harv. Univ. Press 1980); [other cites].

[73] The phrase "procedural due substance" is surely not original; I have heard it from a friend or two, perhaps before I began using it, which may antedate or post-date (I can't be certain which it is) the first place I have found it in print. *See* Max Isenbergh, Book Review: *Thoughts on William O. Douglas*' The Court Years*: A Confession and Avoidance*, 30 AM. U.L. REV. 415, 423 (1981). John Hart Ely offers a different formulation, comparing "substantive due process" to other oxymoronic expressions such as "green pastel redness." ELY, *supra* at 18. Others also have described "substantive due pro-

that focuses on structure and process, with only a very narrow, limited set of substantive concerns and related directions appended to the main document.[74] The tension with the Constitution's design is starker because these few substantive directions were principally motivated by and framed in terms of negative considerations, focusing on how to avoid specific problems that occurred in Europe in the five or six centuries preceding the founding era.[75]

The question asked about the consistency of the legislative mandate to some notion of protected right could be made constitutionally sensible—and justiciable—*only* by tying the inquiry back to a direct interference with the underlying rights to life, liberty (understood as freedom of person), or property (understood in its traditional sense) or by reverting to the core process issue that was originally understood to be the meaning and purpose of the clause. Any other approach, no matter what its defense, cannot be separated from particular policy preferences not rooted in the original constitutional meaning.[76] Advocates

cess" as an oxymoron or used similar terms. *See*, *e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring).

[74] *See*, *e.g.*, THE FEDERALIST Nos. 45-51 (James Madison); *id.*, at No. 84 (Alexander Hamilton); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 463-99, 536-47 (Univ. of North Carolina Press 1998) (1969); Elbridge Gerry, *Observations on the New Constitution*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (2000) (De Capo Press 1968) (1788) (authorship attributed to Gerry but later reported to have been written instead by Mercy Otis Warren).

[75] *See*, *e.g.*, ALPHEUS T. MASON, THE STATES' RIGHTS DEBATE: ANTIFEDERALISM AND THE CONSTITUTION 141-78 (Oxford Univ. Press, 2d ed. 1972) (1964); ROBERT A. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, at 6-10 (Northeastern Univ. Press 1983) (1955); WOOD, *supra*; Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405 (1987); Gerry, *supra*. *See also* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

[76] For a careful examination of possible interpretive bases for "substantive due process," *see*, *e.g.*, Harrison, *supra*. On the reasons for harking back to original meaning, *see*, *e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–47 (Princeton Univ. Press 1997)

of any substantive position—whether of expansive or limited government, or of any given set of spending or regulation priorities—should be extremely wary of building on such a foundation of sand.

V. DUE PROCESS IN THE ADMINISTRATIVE STATE

A. *Administration's Modest Beginnings*

The cases that led up to *Lochner*, and many that followed, applied the Court's due process analysis to legislative decisions, whether of specific process choices (as in *Murray's Lessee* and *Hurtado*) or of substantive choices (as in *Allgeyer* and *Lochner*). Yet the broader base for government action, the larger set of decisions that could be challenged for consistency with due process protections, has become administrative, not legislative, action.

Of course, assignment of functions to administrators has been an accepted feature of American government (and of government all over the world) dating back to the very foundations of the Republic. So, for example, the first three Congresses of the United States—bodies amply stocked with legislators who had participated in the drafting and adoption of the Constitution—authorized administrative officials to perform a variety of duties that could have been undertaken more directly by Congress.[77] Among other things, administrators were empowered to determine the exact boundaries of the new nation's capital city and to provide for the buildings needed to house the new

(INTERPRETATION); John O. McGinnis & Michael Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. 383 (2007); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1988-1989); [other cites]. This is, of course, a contested choice, but one that I believe is both proper and essential to any constitutional regime.

[77] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra*; Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719-20 (1969); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738-39 (1994); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735-36 (2002).

government,[78] to set regulations for paying military pensions (including pensions owed to Revolutionary War veterans by states),[79] and to "lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require ..."[80] The First Congress also authorized the federal courts to make "all necessary rules for the orderly conducting of [their] business ..."[81]

These assignments were all of matters that fit well within the constitutional briefs given to the particular officials at issue and generally did not implicate important, politically-contentious judgments.[82] The location of the nation's capital was a matter that was both seriously debated and was of great concern to political interests, as, to a lesser extent, was the capital's size.[83] But these contentious matters were not left to the administrative commission set up to finalize the details, having already been fixed by law (in the Residency Act and Constitution).[84] In the same vein, the courts were given control over procedures connected with the courts' functions, matters of administration traditionally within courts' purview. More politically-freighted questions respecting the courts' jurisdiction generally and specific causes of action they are authorized to hear and decide were addressed in the Judiciary Act, rather than put in the judges' own hands.[85] And the authority given to the President

[78] *See* Act of July 16, 1790, 1 Stat. 130 (*Residency Act*).

[79] *See* Act of Sept. 29, 1789, 1 Stat. 95; Act of Mar. 3, 1791, 1 Stat. 218.

[80] *See* Act of Jun. 4, 1794, 1 Stat. 372.

[81] *See* Act of Sept. 24, 1789, 1 Stat. 73, 83.

[82] *See, e.g.*, Cass, *Delegation Reconsidered, supra*.

[83] *See, e.g.*, JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 50-52, 69-78 (Vintage Books 2000) (explaining the intense argument over the location of the nation's capital, the relation of that debate to other issues of regional conflict, and some of the maneuvering that led to compromise).

[84] *See, e.g.*, U.S. CONST., Art. I, sec. 8, cl. 17; Act of July 16, 1790, 1 Stat. 130.

[85] *See* Act of Sept. 24, 1789, 1 Stat. 73.

respecting veterans' pensions is a modest matter of the mechanics for such payments rather than significant responsibility for setting standards concerning eligibility or amounts.[86]

The one true delegation of substantial authority by the early Congresses respected the decision to institute an embargo, to modify it, or to repeal it. The Embargo Act of 1794 gave the President largely unconstrained discretion over the decision to lay an embargo, the reasons for such a decision, the choice of vessels, their locations, and the national origins of vessels or cargoes subject to embargo, and the modification of any embargo ordered by the President under the law.[87] Two qualifications, however, are critical to understanding this departure from the very limited grants of authority that characterized early U.S. practice. First, the power assigned under the Embargo Act concerned foreign and military affairs, a category over which the Constitution grants the President independent power in addition to whatever authority Congress chooses to provide.[88] Second, the President's authority under the Act was restricted to periods when the Congress was not in session and any embargo instituted under the law could not continue more than fifteen days past the start of the next session of Congress.[89]

Although government administrative offices and employment expanded significantly over the next century, government remained extremely small relative to economic activity and at the federal level quite narrowly oriented to benefits-administration, services (mainly postal services, but later services respecting matters such as agriculture), managerial duties, and implementation of core executive responsibilities (largely lodged in the original departments of State, War, and Treasury).[90] As late as the end of 1800s and start of the 1900s, many

[86] *See* Act of Sept. 29, 1789, 1 Stat. 95; Act of Mar. 3, 1791, 1 Stat. 218.

[87] *See* Act of Jun. 4, 1794, 1 Stat. 372.

[88] *See*, *e.g.*, U.S. CONST., art. II, §2; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936); [other cites].

[89] *See* Act of Jun. 4, 1794, 1 Stat. 372.

[90] *See*, *e.g.*, RONALD A. CASS, COLIN S. DIVER, JACK M. BEERMANN & JODY FREEMAN, ADMINISTRATIVE LAW: CASES AND MATERIALS 3 (7th ed., Wolters Kluwer 2016). *See also* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW

new government departments and bureaus, such as the Department of Labor (later the Department of Commerce and Labor, then two separate departments of Commerce and of Labor) or the Tariff Commission, focused primarily on investigating, report-writing, and making recommendations to the President and Congress, rather than exercising regulatory powers.[91]

B. *Early Cases*

The initial experience in superimposing due process considerations on the developing administrative state was broadly consistent with the principles of decisions like *Calder v. Bull*, *Murray's Lessee*, and *Hurtado*. It both focused on *process* and saw historically-followed procedures as presumptively valid but not as inflexible requirements. *Calder*'s rejection of the challenge to Connecticut's legislature serving as a court of revision (setting aside a prior judicial decision and ordering a rehearing on terms that favored the previously unsuccessful contestant of a will) read the Constitution's *ex post facto* clause respecting state laws narrowly, declaring that a broader reading would frustrate the ability of states to change law over time, an essential attribute of sovereignty.[92] The concern of the justices, in part, was to prevent specific constitutional limitations on process from becoming a straitjacket on state action. A similar inclination is evident in *Murray's Lessee* and *Hurtado*, holding in each case that the constitutional prohibition on deprivation of life, liberty, or property without due process of law does not prevent changes to governmental procedures so long as the new procedures meet basic rules of suitable judicial process for certain particular and retrospective decisions (without violating specific constitutional restrictions on the federal government's

UNLAWFUL? 193-202 (Univ. of Chicago Press 2014) (relation of decisions respecting land claims and patent claims to benefits administration).

[91] *See, e.g.*, William S. Culbertson, *The Tariff Commission and Its Work*, 207 NORTH AMER. REV. 57 (Jan. 1918); Jonathan Grossman, *The Origin of the U.S. Department of Labor*, https://www.dol.gov/oasam/programs/history/dolorigabridge.htm; [other cites].

[92] 3 U.S. (3 Dall.) 386, 393-95 (1798) (Chase, J.).

processes) and legislative process for others.[93]

That same inclination is evident in early decisions respecting administrative decision-making, particularly with respect to state administrative actions. The procedural divisions that applied to the federal government could not be applied to states by federal law, as there was no federally-mandated set of vesting clauses for the states, but the same principles respecting the process that is due obtained under the due process framework for reviewing challenges to state law in the early 1900s as they did for federal law.

The often jointly-taught cases of *Londoner v. Denver* (*Londoner*)[94] and *Bi-Metallic Investment Co. v. State Board of Equalization* (*Bi-Metallic*)[95] illustrate the turn-of-the-century (*that* century, not this one) understanding of due process as it applied to the states—and to the administrative bodies that were their creations—through the 14th Amendment. *Londoner* held that any individual determination of responsibility or liability (for a tax assessment, in that case, based on an assessment of individual benefit for a public works project) required individual hearings and appropriately judicial processes.[96] In contrast, *Bi-Metallic* concerned an across-the-board increase in property valuations, a decision with a significant impact on tax-payers, but because it was based on general public policy considerations, not individual actions or circumstances, it could be effected by legislative decree without any right to individual participation in the decision.[97] The decision was made by administrative entities, the State Board of Equalization and the Colorado Tax Commission, authorized by legislation to make property tax assessments. Justice Holmes' opinion for a unanimous Court did not focus on that fact, treating the operation of those boards as equivalent to an act of the legislature

[93] *Hurtado*, *supra*, 110 U.S. at 529-38; *Murray's Lessee*, *supra*, 59 U.S. at 276-77.

[94] 210 U.S. 373 (1908).

[95] 239 U.S. 441 (1915).

[96] *Londoner*, *supra*, 210 U.S. at 385-86.

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

itself and concentrating instead on whether a right to an evidentiary hearing existed there as it did in *Londoner*.

However difficult the judgments might be on locating the line between determinations requiring judicial (or judicial-like) procedures and those suited for legislative (or legislative-like) procedures, the basic principle encapsulated in older notions of due process continued to apply to administrative entities created by the states. Where there was no specific constitutional imperative of a particular mode of decision—as there was with separated powers for the federal government and the various particular process guarantees for federal criminal prosecutions—consistency with the basic forms, but not the specific procedures, in use at the time of the founding sufficed.

It is notable that *Londoner* and *Bi-Metallic* were roughly contemporaneous with *Lochner*. Far from a general intention to hamstring government functioning (a common accusation from commentators respecting the due process jurisprudence of the *Lochner* era), the cases together reveal an instinct of accommodation of due process restrictions to evolving norms of governance. That instinct, though, came with the caveat that the two traditional, generic process limitations—(1) evidentiary hearings before impartial bodies obtained for (at least some) particularized determinations peculiarly affecting identifiable individuals, and (2) clear legislative deputation along with generic rule-making process of some unspecified sort applied for other decisions of general application that had force as more than internal guidance or public notice of administrators' views—still constrained administrative procedures. Notwithstanding the imposition of substantive constraints where the Court viewed a program as exceeding the scope of a reasonable police power for the states or of constitutionally prescribed powers for the national government, due process was very far from a high bar to the evolution of an administrative state.[98]

C. *Delegation's Rise*

[98] *See, e.g.*, Bernstein, *supra*; [other cites].

Adherence to the traditional due process framework of *Murray's Lessee* and *Hurtado*, *Londoner* and *Bi-Metallic*, however, became increasingly less attractive to commentators and participants in the administrative process as the nature of government changed. After starting with a relatively small set of regulatory initiatives toward the end of the 19th Century and beginning of the 20th Century, the administrative state expanded dramatically with the advent of new technologies and the change in political platforms and attitudes.[99]

Federal regulatory agencies were created or expanded to regulate rates, routes, and services for railroads in 1887,[100] to oversee safety and effectiveness of food and drugs in 1906,[101] to restrain unfair methods of competition in 1914,[102] to promote and regulate merchant shipping in 1916,[103] regulation and development of hydroelectric power in 1920,[104] oversight of commodities trading in 1922,[105] and the allocation and assignment of radio broadcasting licenses in 1927.[106] Many of these new regulatory functions conformed to older patterns of licensing, common carriage regulation, or developmental and promotional support for activities designed to expand interstate commerce, but with an overlay of authorities—as in food and drug regulation—that seemed more in keeping with traditional state exercise of police powers.[107]

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[99] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (*Rise and Rise*); [other cites].

[100] *See* Interstate Commerce Commission Act, Act of Feb. 4, 1887, 24 Stat. 379.

[101] *See* Pure Food and Drug Act, Act of Jun. 30, 1906, 34 Stat. 768.

[102] *See* Federal Trade Commission Act, Act of Sep. 26, 1914, 38 Stat. 717.

[103] *See* Shipping Act of 1916, Act of Sep. 7, 1916, 39 Stat. 728.

[104] *See* Federal Water Power Act, Act of Jun. 10, 1920, 41 Stat. 1063.

[105] *See* Commodities Exchange Act, Act of Sep. 21, 1922, 42 Stat. 998.

[106] *See* Radio Act of 1927, Act of Feb. 23, 1927, 44 Stat. 1162.

[107] *See, e.g.*, CASS, DIVER, BEERMANN & FREEMAN, *supra*, at 3-4 (describing the evolution of administrative agency assignments); Randy Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429 (2004) (explaining one view of how to conceive of limits on state police power).

The real explosive growth in government, however, came with the New Deal in the 1930s and 1940s and follow-on waves of expanding regulation, administration, and entitlement programs. As one work describes the trajectory:

> The New Deal era brought ... unprecedented growth in the number and influence of federal agencies.... [F]ederal regulatory tentacles ... reache[ed] into new industries (securities markets (1934), wholesale electric power (1935), labor-relations (1935), trucking (1935), airlines (1938), natural gas (1938)), [and] the welfare state began in earnest with major federal initiatives into social insurance, public assistance, health care, farm price supports, and housing subsidies. Another quantum leap in administrative power occurred in the 1960s and 1970s as Congress embarked on a massive campaign of "social regulation" to combat discrimination, consumer fraud, and health, safety, and environmental risks of every stripe.[108]

D. *Assignment Problems: Nature and Structure*

The result has been not merely a vast increase in the size and scope of government, but a commitment to administrators of power that was long thought—certainly by the founding generation—to be either beyond the reach of government or properly vested in legislators or judges, not executive officers.[109] Consider a few examples.

- The Communications Act of 1934 gave the Federal Communications Commission (FCC) authority to make a "fair and equitable allocation of [broadcast] licenses, frequencies, time for operation, and station

[108] CASS, DIVER, BEERMANN & FREEMAN, *supra*, at 3-4.

[109] *See*, *e.g.*, HAMBURGER, *supra*, at 4-8; Cass, *Delegation Reconsidered*, *supra*; Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (*Delegation*); Lawson, *Rise and Rise*, *supra*; Schoenbrod, *Purposes*, *supra*.

power," and to grant licenses that serve the "public interest, convenience, and necessity."[110]

- During the Second World War, Congress passed the Emergency Price Control Act of 1942,[111] which directed the Office of Price Administration (OPA)—in order "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices" and to guard against a variety of ill effects flowing from "excessive prices,"[112]—to set prices that "in [the Administrator's] judgment will be generally fair and equitable and will effectuate the purposes of this Act."[113] Among the factors the Administrator was instructed to take into account, "[s]o far as practicable," were the prices prevailing in October 1941 adjusted for "[s]peculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941" and any other factor the Administrator deemed relevant.[114]
- The Sentencing Reform Act of 1984 set up a United States Sentencing Commission to fundamentally revise rules governing sentences federal judges are authorized to impose on individuals (and entities) convicted of federal crimes—in effect to determine the length of time for which individuals may be incarcerated and to replace the discretion previously enjoyed by Article III District Judges with "guidelines" that are designed to bind judges to sentence within set ranges.[115]

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[110] *See* 47 U.S.C. §§ 307(a), 309(a).

[111] Pub. L. No. 77-421, 56 Stat. 23.

[112] *Id.* at 23-24.

[113] *Id.* at 24.

[114] *See id.* at 24-25.

[115] Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified, as amended, at various sections of 18 U.S.C. and 28 U.S.C.).

- The Dodd-Frank Wall Street Reform and Consumer Protection Act[116] of 2010 created the Consumer Financial Protection Bureau (CFPB), a statutorily separate entity within the Federal Reserve Board, enjoying broad regulatory power over anyone who offers or provides "a consumer financial product or service."[117] The Bureau is directed to use its authority "to prevent 'unfair, deceptive, or abusive [consumer financial] acts or services.'"[118] The CFPB is largely insulated against effective control by the President, the Federal Reserve Board, or Congress, among other things through constraints on removal of its Director and a guaranteed revenue source independent of federal budget processes.[119]

E. *Governmental Power: Restraints' Demise*

All of these creations step boldly away from historical practice respecting assignment of authority to administrators in at least some respect, as evident in comparing them to early examples of administrative authorization.[120] All of them except the most recent, Dodd-Frank, have been reviewed by the Supreme Court in challenges to their constitutionality. And each challenge to the transfer of power to an administrative entity in ways that depart from the original understanding of the allocation of power within government has been rebuffed.

a. Expansive Regulatory Power

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[116] Pub. L. No. 111-203, 124 Stat. 1376 (*Dodd-Frank*).

[117] *See Dodd-Frank*, *supra*, §1002(6), 124 Stat. at 1956.

[118] *See Recent Legislation: Administrative Law — Agency Design — Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 HARV. L. REV. 2123, 2125 (2011) (*Dodd-Frank Design*) (quoting *Dodd-Frank*, *supra*, §1031(b), 124 Stat. at 2006).

[119] *See Dodd-Frank Design*, *supra*, at 2125-26.

[120] *See, e.g.*, HAMBURGER, *supra*, at xx-xx; Cass, *Delegation Reconsidered*, *supra*; Lawson, *Delegation*; Lawson, *supra*, at xx; *Rise and Rise*, *supra*.

In *National Broadcasting Co., Inc. v. United States* (*National Broadcasting*),[121] the Supreme Court upheld the regulation of radio network contracts and practices as within the FCC's authority to license broadcast stations. Justice Frankfurter's opinion for the Court read the limiting context of instructions on license award and station allocation out of the mandate to the FCC before declaring that the vague instructions in the law were sufficiently clarified by the purposes of the Communications Act.[122]

The law did not commit authority clearly to the FCC to regulate stations' relations with networks or to broadly regulate network practices, and the vague purposes of the law—"to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"[123]—provide precious little clarity to the more general assignment of licensing as the "public interest, convenience, and necessity" require.[124] After reading the Act expansively in order to sustain regulatory activity that was not plainly—perhaps not even plausibly—authorized, the Court dismissed a non-delegation challenge as insubstantial because of the Act's restricted meaning.[125] Frankfurter's opinion credited the expertise of the FCC and the need for Congress to commit discretion to the experts as sufficient basis for upholding a finding of broad authority to regulate private economic relations.[126]

Similarly, in *Yakus v. United States* (*Yakus*),[127] the Court rejected a non-delegation objection to the regulatory authority granted to OPA. As with *National Broadcasting*, the Court

[121] 319 U.S. 190 (1943).

[122] *Id.* at 217-26.

[123] 47 U.S.C. § 151.

[124] *See National Broadcasting*, *supra*, 319 U.S. at 227-32 (Murphy, J., dissenting).

[125] *Id.* at 225-26.

[126] *Id.* at 215-16, 224-25.

[127] 321 U.S. 414 (1944).

strained to find sufficient clarity in the opaque legislative language authorizing administrative action.[128] In truth, the law effectively said to the OPA Administrator "try to keep prices in line with what they were before U.S. entry into the war; it's up to you to figure out how to do that." The Court might have asked whether the Constitution permitted special leeway in authorizing broad administrative discretion in aid of war efforts—at least when Congress has passed a formal declaration of war and has plainly authorized the exercise of discretion—but its *Yakus* opinion instead engages the pretense that the Price Control Act gave meaningful direction on how to go about controlling prices and that this was enough to make the powers given the OPA constitutional.[129]

b. Changing Delegation Doctrine

Approval of assignments of administrative authority of the sort at issue in *National Broadcasting* and *Yakus* represented a striking change in the canon of federal separation-of-powers law.[130] The difference wasn't the precision of the instruction given to the administrators.[131] As discussion above of the practice of earlier Congresses reveals, legislators often gave imprecise instructions to administrators, but the matters over which discretion was given were of modest importance.[132]

In fact, prior to the Supreme Court's 1928 decision in *J.W.*

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[128] *Id.* at 421-23.

[129] *Id.* at 423. In contrast to the majority, both Justice Roberts and Justice Rutledge in dissent grappled with the war power issue. *See id.* at 459-60 (Roberts, J., dissenting); *id.* at 461-63.

[130] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra*; Lawson, *Delegation*, *supra*; Lawson, *Rise and Rise*, *supra*; Schoenbrod, *Purposes*, *supra*. As Professor Hamburger explains, the change is even more striking when seen in the broader sweep of Anglo-American law respecting administrative authority. *See* HAMBURGER, *supra* at xx-xx.

[131] *See, e.g.*, Alexander & Prakash, *Running Riot*, *supra*; Cass, *Delegation Reconsidered*, *supra*.

[132] *See* discussion, *supra*, text at nn. xx-xx [cite to prior discussion of laws from first three Congresses]; Cass, *Delegation Reconsidered*, *supra*; Davis, *supra*, at 719-20; Krent, *supra*, at 738-39.

Hampton, Jr. v. United States,[133] authored by executive-friendly former Chief Executive (then Chief Justice) William Howard Taft, the standard test for constitutionality of administrative assignments was not whether they contained "an intelligible principle" but whether they gave administrators duties consistent with *administration* rather than duties requiring important judgments respecting the regulation of private conduct.[134] That was the question addressed in cases stretching from *The Brig Aurora* in 1813[135] to *Field v. Clark* in 1892.[136] After striking down broad assignments of legislative authority in the mid-1930s, however, the Court has relied on the "intelligible principle" test to assess the constitutionality of administrative assignments, uniformly finding even the most opaque instructions sufficiently intelligible to uphold.[137]

c. Approving Novel Structures: Outside the Branches

So, too, the Court's acceptance of novel structures that assign power to entities outside the obvious, original constitutional design in cases like *Mistretta v. United States* (*Mistretta*),[138] blessing the work of the Sentencing Commission, shows the strong instinct for going with the flow, for trying to see the reasonableness of boldly non-traditional assignments of government authority.

The Sentencing Commission, as Justice Scalia pointedly observed in dissent, was not a creation consistent with the exercise of Article III's judicial power; only half the members of the Commission were required to be judges appointed under that article's terms, and the Commission did not sit in judgment of any particular case or controversy, did not announce a rule of decision that applied in a case before it and might be expected

[133] 276 U.S. 394 (1928).

[134] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra*; Lawson, *Delegation*, *supra*; Lawson, *Rise and Rise*, *supra*; Schoenbrod, *Purposes*, *supra*. *See also* Alexander & Prakash, *Running Riot*, *supra*.

[135] 11 U.S. (7 Cranch) 382 (1813).

[136] 143 U.S. 649 (1892).

[137] *See, e.g.*, Cass, *Delegation Reconsidered*, *supra*; Gary Lawson, *Delegation*, *supra*; Schoenbrod, *Substance*, *supra*.

[138] 488 U.S. 361 (1989).

to be followed in future cases. Instead, it was set up as "a sort of junior varsity Congress."[139] The Commission was charged with writing rules on criminal sentencing in just the way Congress could be expected to do—making up its own collective mind on the right sort of sentence for each crime. It manifestly was not charged with recommending, interpreting, or applying rules, or even applying legislatively sanctioned policies that are more than a collection of incompatible nostrums, as would fit tasks assigned to the executive and judicial branches.

Whether acceptance of such an abandonment of Congress' traditional law-making role reflects judicial restraint, belief in the capabilities of experts, distrust of more politically responsive decision-makers to reach sensible decisions, or simply agreement with the particular biases of those who were serving on the Commission,[140] the Court's complicity in constitutional revisionism inevitably sows the seeds of difficulties of many sorts. In Scalia's words, *Mistretta* was not a case about the fit of the Sentencing Commission within the executive branch or the judicial branch; instead, it was a case "about the creation of a new Branch altogether ...."[141] That was a caution that should have been heeded—and just might have precluded even more aggressive alterations of the constitutional fabric down the line.

The creation of the CFPB is a perfect example of the problem

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[139] *Id*. at 427 (Scalia, J., dissenting).

[140] For a collection of different reasons for assigning tasks to administrative agencies and for deferring to their discretionary determinations, *see*, *e.g.*, Colin S. Diver, *Statutory Interpretation and the Administrative State*, 133 U. PA. L. REV. 549 (1985); David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and Separate Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947 (1999); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (2007); Oona Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391 (1987) [other cites].

[141] *Mistretta*, *supra*, 488 U.S. at 427 (Scalia, J., dissenting).

that comes from abandoning enforcement of structural restraints. The insulation of the Bureau from control by the President, by the head of any constitutionally cognizable department of government or even of any other constitutionally responsible executive official, and from the Congress—which lacks any budget control whatsoever—makes the CFPB a wholly independent branch of government. Its rulemaking and enforcement powers provide sufficient control over private entities—and sufficient basis for threatening actions that would impose penalties on private entities even without successful enforcement actions—to constitute just the sort of unchecked government authority the Constitution's separation of powers was intended to prevent.[142]

It would be comforting to think that the judiciary would be willing to strike down revision of the Constitution's basic structure even when the departure is embodied in legislation. Cases such as *Yakus* and *Mistretta* show that this is a faint hope.

d. Self-Expanding Jurisdiction

When an agency steps outside the lines of its authority, courts have been equally reluctant to intervene. That is the story of *National Broadcasting Co.*, for example. It is a story repeated in episodes such as the FCC's other regulatory expansions. After years of asserting it lacked jurisdiction over cable television (which fit under neither its authorization to regulate telephone and telegraph services nor its authority over broadcasting and other uses of the radio spectrum)—and seeking legislation to expand its jurisdiction to effect such regulation—the FCC decided that it had that authority all along. The rules that followed the Commission's change of heart were brought before the Supreme Court in *United States v. Southwestern Cable Co.*[143]

The FCC's argument for concluding that its jurisdiction over television broadcasting required it to regulate (and, hence, gave

[142] *See Dodd-Frank Design*, *supra*, at 2126 (although there are some controls, "the control mechanisms are unlikely to constrain the Bureau significantly ... and the Bureau ... possesses a previously unseen degree of insulation for decisions that the public perceives to be based on policy preferences."). *Compare id. with* THE FEDERALIST No. 51 (James Madison).

[143] 392 U.S. 157 (1968).

it authority to regulate) cable television was remarkable. In essence, the FCC said: (1) because radio spectrum is scarce, government must (and did) control its allocation; (2) to serve the public interest, the government reserved some licenses for public broadcasting, which has a more educational mission than private, for-profit broadcasting; (3) because cable television has the capacity to end the scarcity associated with use of the radio spectrum, it threatened to upend the FCC's allocation scheme, as people might divert viewing from educational offerings to other fare; so (4) the FCC had authority to regulate cable to protect availability of public television and related public-interest offshoots of broadcast regulation.[144] The argument is akin to declaring that because government came up with a rationing scheme to deal with an oil shortage (advancing public interests as best it could, given the shortage), the government rationing authority needed to prevent free distribution of a dramatic new source of oil (or other competing energy source) in order to avoid upsetting the rationing scheme.

One might have expected such bootstrapping to be swatted away pretty quickly by the courts. The Supreme Court, however, found the Commission's argument—along with the broad language of the Communications Act's introductory provision (containing a general statement of the Act's purpose)—persuasive enough to find that the Act confers "ancillary" authority for the FCC to regulate a communications activity that is neither common carriage by wire (regulated under Title II of the Act) nor broadcasting (regulated under Title III of the Act).[145]

Although the story does not yet have a conclusion, the FCC again sought expansion of its jurisdiction to permit regulation of Internet services. Again, it unsuccessfully sought legislative authorization; again, it failed to secure it; and again, the Commission belatedly discovered the authority had been there all along.[146] At present, the FCC has a case pending, having lost

[144] *See id*. at 173-77.

[145] *See id*. at 177-78.

[146] *Compare* In re Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384, 387 ¶¶5-7 (1980); In re Appropriate

two challenges to its assertion of new regulatory authority over the Internet and finally won one, asserting a different regulatory theory.[147] However this plays out, it is not a story conducive to belief in regulatory modesty.[148]

e. Limitations: Retained Restraints

To be sure, not all efforts by administrative officials to expand their regulatory jurisdiction are successful. For example, the Food and Drug Administration's belated discovery of authority to regulate tobacco as a drug-delivery device containing nicotine was rejected by the Supreme Court as inconsistent with the long-understood meaning of the Federal Food, Drug & Cosmetic Act's use of the terms "drugs" and "devices."[149] It would have worked a dramatic change in the application of the law, one that would have drawn more than a little comment and controversy. Justice Scalia later characterized the decision rejecting such an interpretation as applying the principle that "Congress does not ... hide elephants in mouseholes."[150]

The Court, in *Utility Air Regulatory Group v. Environmental Protection Agency* (*UARG*), also told the Environmental Protection Agency (EPA) that, although greenhouse gases might come within the definition of "air pollutants" in some parts of the Clean Air Act, the agency could not force the law to

Framework for Broadband Access to the Internet Over Wireline Facilities, 17 F.C.C.R. 3019, 3037-40 ¶¶36-42 (2002); In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, 20 F.C.C.R. 14853, 14862 ¶12 (2005); In re Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, 22 F.C.C.R. 5901, 5901-02 ¶1 (2007), *with* In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 F.C.C.R. 13028, 13034-41 ¶¶ 14-22 (2008); In re Preserving the Open Internet, 24 F.C.C.R. 13064, 13099 ¶¶83-85 (2009).

147 *See* United States Telecom Ass'n v. Federal Communications Comm'n, no. 15-1063 (D.C. Cir. Jun. 14, 2016); Verizon Communications, Inc. v. Federal Communications Comm'n, 740 F.3d 623 (D.C. Cir. 2014); Comcast Corp. v. Federal Communications Comm'n, 600 F.3d 642 (D.C. Cir. 2010).

148 [Note similar arguments in City of Arlington v. FCC].

149 *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 200 (2000).

150 Whitman v. American Trucking Association, 531 U.S. 457, 468 (2001).

accommodate treating greenhouse gases as air pollutants under permitting provisions aimed at "prevention of significant deterioration" of air quality (PSD).[151] However controversial the Court's earlier authorization—actually, its command—for EPA to include greenhouse gases under the definitional umbrella of air pollutants,[152] the *UARG* Court found that extending that to the PSD program manifestly did not work. EPA plainly knew that, as it adopted the "tailoring rule" at issue in *UARG*—raising the requisite level of pollutants for treatment under the PSD program to 750 times the statutorily-prescribed level for some stationary sources and 400 times the statutory level for other sources—to accommodate the "absurdity" (the agency's own description) of treating greenhouse gases the same as the pollutants subject to PSD regulation.[153] Decisions such as *UARG*, however, are rare and much criticized in academic circles.[154]

VI. CHALLENGING THE ADMINISTRATIVE STATE

A. *Sizing Up the Behemoth*

[151] *See* Utility Air Regulatory Group v. Environmental Protection Agency, 134 S. Ct. 2427 (2014) (*UARG*).

[152] *See, e.g.*, Ronald A. Cass, Massachusetts v. EPA*: The Inconvenient Truth about Precedent*, 93 VA. L. REV. IN BRIEF 75 (2007); Freeman & Vermeule, *supra*; Andrew P. Morriss, *Litigating to Regulate:* Massachusetts v. Environmental Protection Agency, 2006-2007 CATO SUP. CT. REV. 193 (2006).

[153] *See, e.g.*, *UARG*, *supra*; Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation Under the Obama Administration*, 34 HARV. J.L. & PUB. POL'Y 421 (2011).

[154] *See, e.g.*, Willam Buzbee, *Anti-Regulatory Skewing and Political Choice in* UARG, 39 HARV. ENVTL. L. REV. 63 (2015); Jody Freeman, *Why I Worry About* UARG, 39 HARV. ENVTL. L. REV. 9 (2015); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (2017) (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757770; Richard Lazarus, *The Opinion Assignment Power, Justice Scalia's Un-Becoming, and* UARG*'s Unanticipated Cloud Over the Clean Air Act*, 39 HARV. ENVTL. L. REV. 37 (2015).

At present, the federal government, although mainly operating by informal decision-making at lower levels of official authority, also maintains a corps of administrative judges and administrative law judges far larger than the body of Article III judges[155]—the only officials constitutionally authorized to exercise federal judicial power[156]—and a rule-making apparatus that churns out rules each year at 10 to 25 times the rate of laws passed by Congress.[157] The result, on the rule-making side, is a Code of Federal Regulations that is in the vicinity of 180,000 pages long, dwarfing the body of laws codified in the 50-odd volumes of the United States Code.

In part, the consequence has been to provide individual bureaus and officers with power to particularly affect specific people and enterprises, tilting the playing field toward some and against others, imposing or threatening to impose sanctions, to

[155] *See, e.g.*, [cites]. Notably, however, the vast majority of federal adjudication using administrative law judges takes place within the Social Security Administration and focuses on questions of benefits-administration that look very much like those traditionally within the scope of executive authority.

[156] *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[157] For information respecting federal rulemaking, *see, e.g.*, Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Rulemaking, and Pages in the Federal Register* 5, 16-17 (Cong. Research Serv., May 2013). The annual number of rules promulgated has been in the 3,000-5,000 range since the mid-1980s. The pages devoted to rulemakings in the Federal Register account for something on the order of 40-50 percent of Federal Register pages. *See id.*, at 16-17. For information respecting federal legislation, *see, e.g.*, Susan Davis, *This Congress Could be Least Productive Since 1947*, USA TODAY, Aug. 15, 2012, available at http://usatoday30.usatoday.com/news/washington/story/2012-08-14/unproductive-congress-not-passing-bills/57060096/1; Matt Viser, *This Congress Going Down as Least Productive*, BOSTON GLOBE, Dec. 4, 2013, available at http://www.bostonglobe.com/news/politics/2013/12/04/congress-course-make-history-least-productive/kGAVEBskUeqCB0htOUG9GI/story.html.

award or withhold benefits that have enormous potential consequences to the individuals involved.[158] In part, the consequence has been a general shift of power from private to public hands, not always for the better. Although the amount of money committed to government spending each year is at least generally known, the impact of this expansion of government regulatory activity on the economy is far more difficult to calculate.

Yet some of the numbers suggested by researchers—one report puts the figure at roughly $2 trillion per year[159] while another estimates that regulatory interventions between 1980 and 2012 imposed a cost on the economy that reduced its size by $4 trillion as of 2012[160]—are staggering. Whether one credits or disputes any of the particular numbers,[161] it is obvious why there would be intense concern over the impact of government regulation and similarly intense interest in seeking and in challenging regulatory decisions.

B. *The APA and Challenges to Administrative Action*

Most challenges to administrative decisions, however, face an uphill fight. At the federal level, the basic law providing for, and setting the terms of, such challenges is the Administrative

[158] For explanations on why this takes place, *see, e.g.*, Peter H. Aronson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); George J. Stigler, *Economic Competition and Political Competition*, 13 PUBLIC CHOICE 91 (1972).

[159] *See* CLYDE WAYNE CREWS, TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE (Competitive Enterprise Inst. 2016).

[160] *See* Bentley Coffey, Patrick McLaughlin & Pietro Peretto, *The Cumulative Cost of Regulations*, Mercatus Working Paper, Apr. 26, 2016, available at https://www.mercatus.org/publication/cumulative-cost-regulations.

[161] The methodologies of calculating costs are matters of substantial debate, as are calculations of the other side of the cost-benefit equation, the beneficial contributions of regulations. *See, e.g.*, [cites]. However one evaluates these matters, it is undeniable that administrative regulation has very significant effects on the American economy.

Procedure Act (APA).[162] The APA declares that reviewing courts are to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."[163] It also directs that courts are to "hold unlawful and set aside agency actions ... found to be ... in excess of statutory jurisdiction, authority, or limitations,"[164] as well as actions the court finds "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[165] The APA does except review "to the extent that ... agency action is committed to agency discretion by law."[166] Consistent with pre-APA practice, it was generally understood that the relevant APA provisions assign the law-interpreting function to reviewing courts while directing the courts to respect the degree of discretion given to agencies, checking exercises of discretion for various forms of unreasonableness, not correctness.[167]

In keeping with the APA's direction, substantive challenges should be the appropriate route for many regulatory missteps and over-reaches—challenges based on the absence of statutory authority. The evidence from many years of judicial review, however, both before and after the APA, is not entirely reassuring with respect to enforcement of statutory limitations on administrative authority. So, for example, the rules reviewed in *National Broadcasting* and *Southwestern Cable* cannot easily be defended as within the reach of the agency's authority. Yet both agency actions were affirmed. More recently, the "Net

[162] *See* 5 U.S.C. §§ 701-706 (2012).

[163] *See* 5 U.S.C. §701 (2012).

[164] *See* 5 U.S.C. §706(2)(C) (2012).

[165] *See* 5 U.S.C. §706(2)(A) (2012).

[166] *See* 5 U.S.C. §706 (2012).

[167] *See, e.g.*, Beermann, *Failed Experiment*, *supra*; Ronald A. Cass, *Vive la Deference? Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1311-14 (2015) (*Rethinking*); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 118 (1998); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under* Chevron, 6 ADMIN. L.J. AM. U. 187, 189-90 (1992).

neutrality" rules of the FCC and the "Clean Power Plan" of the EPA are agency actions that at least on the surface boldly exceed statutory authority.[168] The Clean Power Plan was stayed by the Supreme Court during pending litigation, yet to be resolved.[169] As noted above, two versions of the FCC's "Net neutrality" rules were held to be improper assertions of authority;[170] but a third version was upheld in the U.S. Court of Appeals for the District of Columbia Circuit.[171]

C. *Deference and Statute-Stretching*

Although similar legal challenges for want of authority often are both sensible structurally and well-grounded in fact, the courts' tendency to defer to administrative decisions produces a far greater number of decisions upholding agency action than reversing it.[172] In part (though not entirely) for that reason,

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[168] *See* Environmental Protection Agency, Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (*Clean Power Plan*); Federal Communications Comm'n, Open Internet Order, 80 Fed. Reg. 19,737 (Apr. 13, 2015) (*Net Neutrality III*).

[169] *See* West Virginia v. Environmental Protection Agency, No. 15A773 (U.S. Sup. Ct. Feb. 9, 2016).

[170] *See* Verizon Communications, Inc. v. Federal Communications Comm'n, 740 F.3d 623 (D.C. Cir. 2014); Comcast Corp. v. Federal Communications Comm'n, 600 F.3d 642 (D.C. Cir. 2010).

[171] *See* United States Telecom Ass'n v. Federal Communications Comm'n, no. 15-1063 (D.C. Cir. Jun. 14, 2016).

[172] *See, e.g.*, E. Donald Elliott, Chevron *Matters: How the* Chevron *Doctrine Redefined the Roles of Congress, Courts, and Agencies in Administrative Law*, 16 VILL ENVTL. L.J. 1 (2005); William Eskridge & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretation from* Chevron *to* Hamdan, 96 GEO. L.J. 1083 (2008); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990). Even though the academic studies offer different views on the effect of deference doctrine versus other factors favoring affirmance of administrative decisions, there is remarkable agreement on the very heavy preponderance of judicial affirmance of agency actions, ranging from more

contests over the consistency of administrative actions with statutory commands often are unsuccessful, even when the statutory language must be strained beyond reason to accommodate the administrative action.

Perhaps the best recent illustration of such statute-stretching is the decision in *King v. Burwell*,[173] reading the provision of the Patient Protection and Affordable care Act respecting tax credits for purchases of insurance health policies through "an Exchange established by the state under Section 1311" to also mean an Exchange established and operated by the Secretary of Health and Human Services (the alternative to having an Exchange operated by the state) under a different provision, Section 1321, of the law.[174]

D. *Deference to Regulatory Interpretations*

Even more striking than judicial deference to agency assertions of authority based on questionable readings of law is the practice of judicial deference to agencies' constructions of their own rules. Agencies may rightly be credited with understanding the meaning of a rule when writing it, and a contemporaneously published interpretation or application of it may be especially apt.[175]

than 70 percent to nearly 90 percent in different time periods and data sets.

[173] No. 14-114 (U.S. Sup. Ct. June 25, 2015).

[174] *See, e.g.*, Cass, Chevron*'s Game*, *supra*, at [pp].

[175] *See, e.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001) (similar reasoning for crediting contemporaneous interpretation of statute); *National Muffler Dealers Assn., Inc. v. United States*, 440 U.S. 472, 477 (1979) (same); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012) (exploring arguments agencies give to constrain judicial intervention). *See also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, (forthcoming, YALE L.J.; presented at George Mason University Center for the Study of the Administrative State Conference on the Future of Deference) (*Origins*) (early cases of deference to contemporaneous interpretation mistaken by courts for broader practice of deference to executive interpretations).

That was the setting for *Bowles v. Seminole Rock & Sand Co.* (*Seminole Rock*),[176] the Supreme Court's first notable pronouncement on deference to agency interpretation of its own rule.[177] The Court's extension of *Seminole Rock* to the broad run of agency self-interpretations 30 years later in *Auer v. Robbins* (*Auer*)[178] abandoned any tie to the sort of conditions that made *Seminole Rock* sensible. Had the interpretation in *Seminole Rock* been adopted as part of the rule or formally appended to the rule, it doubtless would have been treated as authoritative; because it was both adopted at the same time and distributed to the public along with the rule, the Court rightly could see the interpretation in *Seminole Rock* in exactly the same light.[179]

Auer, however, opened the door to the oddity of an agency essentially granting itself leeway over future interpretations of its rules, a prospect fraught with potential for manipulation, dissembling, and misunderstanding, as well as problems of partiality that could implicate due process concerns.[180] Although *Auer* has been criticized by several justices and arguably clipped by other decisions, it remains the Court's last unequivocal statement on deference to agency interpretations of agency regulations.[181]

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[176] 325 U.S. 410 (1945).

[177] *See, e.g.*, Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 59-65, 100 (2015).

[178] 519 U.S. 452 (1997).

[179] This is, indeed, consistent with the brief for United States government in *Seminole Rock*, written by Henry Hart. *See* Aditya Bamzai, *Henry Hart's Brief, Frank Murphy's Draft, and the* Seminole Rock *Opinion*, YALE J. REG. NOTICE & COMMENT (Sep. 12, 2016), available at http://yalejreg.com/nc/henry-harts-brief-frank-murphys-draft-and-the-seminole-rock-opinion-by-aditya-bamzai/.

[180] *See, e.g.*, Manning, *Structure*, *supra*; Aaron L. Nielson, *Beyond* Seminole Rock, (forthcoming; presented at George Mason University Center for the Study of the Administrative State Conference on the Future of Deference).

[181] *See, e.g.*, Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012); Nielson, *supra*, at xx (detailing many of the critiques of *Auer-Seminole Rock* deference).

The point is not that courts should decide all matters *de novo*. Instead, it is that courts should decide questions of *law* and defer to administrators *only* on matters committed to administrative discretion and *only* to the extent of the *law*'s commitment of discretion. That should be a common-sense proposition: that courts, which are constitutionally committed the law-deciding function in the cases and controversies that come before them, should decide what the law is, and when the law commands deference to an administrative decision, courts should follow the law.[182] And it is the reason courts should abandon the *Chevron* formula (derived from *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*),[183] which has been a source of confusion about what courts are deferring to and why, and return to the Administrative Procedure Act's instructions.[184]

E. *Abandoning Constitutional Limitations*

Even where there is no pretense of deferring to administrative decisions, however, challenges to administrative action often fail. So, for instance, contests asserting that actions, though consistent with governing statutory law, fall outside the bounds of limited federal power are routinely—though by no means universally—unsuccessful.

The Constitution's limitation of federal power predicated on regulation of interstate and foreign commerce clause—granting

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[182] *See, e.g.*, Beermann, *Failed Experiment*, *supra*; Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of* Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 264 (1988); Cass, *Rethinking*, *supra* at 1311-14; John F. Duffy, *supra*, at 118; Farina, *supra*, at 456; Herz, *supra*, at 189-90.

[183] 476 U.S. 837 (1984). Although this decision gives the deference doctrine its name, the *Chevron* decision is best read as a badly written attempt to articulate at most a modest qualification of the then-governing law and is not in line with some of the decisions invoking "*Chevron* deference." *See, e.g.*, Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1 (2013); Thomas W. Merrill, *The Story of* Chevron*: The Making of An Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398 (Peter L. Strauss ed., Foundation Press 2006).

[184] *See, e.g.*, Beermann, *Failed Experiment*, *supra*; Cass, Chevron*'s Game*, *supra*; Duffy, *supra*.

Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"—has been distorted beyond all recognition in upholding assertions of broad regulatory power. Look, for examples, at decisions such as *Wickard v. Filburn* (upholding federal power to regulate the production and sale of 239 bushels of wheat, sold within the state in which it was grown),[185] *Perez v. United States* (affirming convictions for local loan-sharking activities not involving interstate activity, interstate communications, or interstate commerce),[186] and *Hodel v. Virginia Surface Mining Association* (supporting constitutionality of regulation of strip-mining, despite concentration of impact within the state and, even more, within local communities, in part on grounds that it was not irrational to see national benefits in preventing harm to "fish and wildlife habitats," "impairing natural beauty," and "degrading the quality of life in local communities").[187]

Perhaps, the prospect of a hard-and-fast rule limiting federal power to the constitutionally permitted—and relatively narrow—set of tasks committed to the national government simply seemed too daunting for judicial enforcement in the post-New Deal world of broadly expansive assertions of federal regulatory authority. Yet restricting and channeling government power into different tracks, some at the state level, some at the national level, was as much part of the protection of citizens against overreaching, tyrannical government as the division of federal power among different (and differently constituted) bodies. The effective demise of constitutional limitations on federal power raises the stakes in the enforcement of other constraints on the growing administrative state.

F. *Substantive Due Process Challenges*

[185] 317 U.S. 111 (1942).

[186] 402 U.S. 146 (1971).

[187] 452 U.S. 264 (1981).

Early invocations of the due process clauses to impose substantive limitations on what government can do focused on interference with established (vested) rights, including legislative interference.[188] *Lochner*'s expansion of the ambit of substantive restrictions to include preventing impositions on "rights" and freedoms—such as freedom of contract—broadened the reach of the clause to protection of interests less readily identified as legally vested rights.[189] The interests protected could be assimilated to liberty or property rights, but not without dramatic departures from text and history.[190]

Over the past 80 years, however, challenges to government action based on claims that they violate a substantive element of due process (apart from specific Bill of Rights guarantees made applicable to states through the fiction of their incorporation in the Fourteenth Amendment's due process clause) have succeeded primarily in the peculiar context of "privacy rights" to protect contraception, abortion, sexual activities, and relationships related to these categories.[191] Substantive due process challenges to the broad run of economic regulations, whether by legislative or administrative action, have fared quite poorly over this era.[192]

Some defenders of economic freedom have urged a reinvigoration of *Lochner*-era substantive due process to curb growing interference with economic activity that lacks persuasive justification as promoting public good.[193] Whatever benefit there

[188] *See*, *e.g.*, Harrison, *supra*.

[189] *See*, *e.g.*, Harrison, *supra* (explaining, however, that the underlying supposition informing decisions such as *Lochner* likely was that the freedoms judges saw themselves protecting against deprivation were regarded as falling within the ambit of traditional vested rights, an observation consistent with the absence of clear attention in such cases to a source for new substantive restrictions on legislation).

[190] *See*, *e.g.*, Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (1982) (*Substance*); Harrison, *supra*, at 509-24.

[191] *See*, *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); Harrison, *supra*, at 501-04.

[192] *See*, *e.g.*, Easterbrook, *Substance*, *supra*; Note: *Resurrecting*, *supra*.

[193] *See*, *e.g.*, BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE

might be in a thoughtfully applied constraint on expansive, wealth-reducing regulation, substantive due process is a poor horse to ride: it is apt to produce few victories, supplants democratic-constitutional choice processes, lacks textual support, and is likely to produce decisions as anchored in personal prejudices and as analytically questionable as the general run of rejected actions.[194]

G. *Due-Process-as-Process*

Even arguments against administrative action based on due-process-as-process are unlikely to prevail, despite the evident sense in ascribing *some* content to the procedural guarantee of judicial process or legislative process for decisions that effect deprivations of life, liberty, or property. As the Court said in *Hurtado* and *Pennoyer*, not every procedure associated with a generally accepted mode of decision-making constitutes *due* process.[195]

Still, cases in which due process claims have succeeded, such as *Goldberg v. Kelly*'s due process-based requirement of an evidentiary hearing for termination of welfare benefits[196] (on reasoning later limited by *Mathews v. Eldridge*),[197] are exceptional. Further, the morass of litigation and general absence of

CONSTITUTION (Transaction Pub., 2d ed. 2006); Epstein, *supra*; Norman Karlin, *Substantive Due Process: A Doctrine for Regulatory Control*, 13 SW. U. L. REV. 479 (1983); Christopher Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L. Q. 479 (1983); Note: *Resurrecting*, *supra*. *See also* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

[194] *See, e.g.*, Frank H. Easterbrook, *The Constitution of Business*, 11 GEO. MASON L. REV. 53, 64 (1988); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Harrison, *supra*; Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962).

[195] Hurtado v. California, 110 U.S. 514 (1884); Pennoyer v. Neff, 95 U.S. 714 (1878).

[196] 397 U.S. 254 (1970) (*Goldberg*).

[197] 424 U.S. 319 (1976).

victories (after the initial declaration that *some* combination of procedures is indeed due in making individualized benefit determinations) indicates the improbability of finding clear doctrinal ground for much beyond the rule announced in *Londoner* more than a century ago.[198]

That does not mean that there is no role for due process to play beyond minimal guarantees of decision-making by courts and legislatures. The Supreme Court has used the sort of soft, due-process-as-fair-process approach that could have been a basis for *Pennoyer* in cases that involve small-scale judicial processes, including ones overseen by officials who are not judges in the ordinary sense.[199] These decisions show that absence of essential elements of the sort of processes associated with traditionally rights-protective judicial and legislative decisions can be a basis for invoking due process guarantees; otherwise, the guarantees could merely protect the empty shells of process without the essence of those processes (impartiality, for instance, as part of the due process of adjudication for covered rights).[200] And academic commentary has explored ways in which similar due process concepts could provide additional support for concerns that informed structural features of the original Constitution.[201] The Court has not, however, expanded

[198] *See, e.g.*, Adrian Vermeule, Essay: *Deference and Due Process*, 129 HARV. L. REV. 1890, 1892-93 (2016). It is notable that, rather than actually having been decided by the Court, the linchpin question for application of the due process clause to decisions respecting government benefits determinations—whether there is *property* at issue to which due process requirements attach—was assumed away in *Goldberg v. Kelly* (indeed, the critical observation appears in a footnote), on the ground that the question was not contested there. *See Goldberg, supra*, 397 U.S. at 360 n.7; *id*. at 361.

[199] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972) (*Ward*); Tumey v. Ohio, 273 U.S. 510 (1927) (*Tumey*).

[200] In addition to cases such as *Ward* and *Tumey*, courts have insisted that impartiality is an essential part of due process guarantees protecting life, liberty and property. *See, e.g.*, Williams v. Pennsylvania, No. 15-5040 (Jun. 9, 2016); In re Murchison, 349 U.S. 133 (1955). The Supreme Court has even extended this to protect against a perception of partiality, *see* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2010).

[201] *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139

this insight into a robust set of rules on how decisions must be made, leaving the details on administrative process principally in the legislature's hands.[202]

The general lack of judicial support for quite robust due process constraints on government is reasonable when seen in light of the relatively narrow procedural focus of the clause. The original understanding of the constraint as requiring appropriate judicial process for law enforcement actions against individuals and properly enacted laws for any general rule still permits scope for administrative enforcement activity and for administrative rule-making, and it certainly permits an array of "process-free" or "process-light" activities. The administration of benefits programs, the management of government property, the performance of basic services (of mail delivery, traffic management, fire departments, military operations, and much more)—none of these would have been thought to involve questions of the sort addressed in the predicates of the due process clauses and none would have been thought (nor should be thought) to require any constitutional process constraints.[203]

Efforts to graft onto government benefit programs the procedures appropriate to protection of privately-held tangible property, physical liberty, or life have run into difficulty because the settings differ and the scale of procedures and functionaries

U. PA. L. REV. 1513 (1991); Manning, *Structure*, *supra*; Paul R. Verkuil, *Separation of Powers, the Rule of Law, and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1989).

[202] *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519 (1978). In the same vein, while inveighing against partiality in adjudications, the Court has been loath to find impermissible partiality in a variety of administrative procedures. *See*, *e.g.*, Withrow v. Larkin, 421 U.S. 35 (1975).

[203] That is, decisions made in the ordinary course of performing these functions generally would not have been thought (and should not) to require special process constraints, *see*, *e.g.*, HAMBURGER, *supra* at xx; [other cites], though protections against special, targeted penalties (based on considerations put out of bounds by specific constitutional provisions, such as the freedom of speech or freedom of association clauses of the First Amendment) would apply.

needed for decision-making in the disparate settings differs. *Mathews*' sliding scale of procedures is a wonderful tool for teaching students the difficulty of process constraints that fall outside the standard packages for judging and law-making, but it is a woeful tool for judicially managing the match between administrative process and law.[204] Simply put, the due process clause was not designed to control in any detail the ways that the vast bulk of administrative decisions get made.[205]

H. *Renewing Restraints: Due Process and Delegation*

That said, however, the due process clause should have traction in assuring that the *nature* of the administrative decision does not extend beyond the properly limited realm of official action. In other words, courts should take seriously the question whether the assignment of, or assumption of, power by an administrative agency to make certain types of decision comports with due process, as the process that is due in a particular instance should be *legislative* or *judicial*, not *administrative*. As explained earlier, this is a question at the heart of due process concerns, both historically and analytically.[206]

At the federal level, there is a different, and better, vehicle for asking and answering that question. The Constitution's basic structure—captured in the three "vesting" clauses—makes clear the assignment of different decisions to different officials and

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[204] *See, e.g.*, Jerry L. Mashaw, *Administrative Due Process as Social-Cost Accounting*, 9 HOFSTRA L. REV. 1423 (1981); Jerry L. Mashaw, *The Supreme Court's Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. (1976); [other cites].

[205] That does not mean that no administrative decisions have been constrained by procedural requirements pegged to due process. A class of decisions that has been, and should be, of special concern are those involving governmental enforcement activities. *See, e.g.*, General Elec. Co. v. Jackson, 610 F.3d 110 (D.C. Cir. 2010); [other cites]. For explanation of reasons for special concern with this class of decisions, *see, e.g.*, PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (New York Univ. Press, Anthony S. Barkow & Rachel E. Barkow eds. 2011); Ronald A. Cass, *Power Failures: Prosecution, Discretion, and the Demise of Official Constraint*, 16 ENGAGE 29 (no. 3, Nov. 2015).

[206] *See* discussion and notes at Parts II & III, *supra*.

processes.[207] The delegation doctrine (or non-delegation doctrine) tackles precisely the question that is relevant, and reachable, for implementation of core due process concerns so far as administrative action is involved: does the Constitution permit the decision being made by an administrator to rest in that official's hands, or must it be made by Congress or an Article III court? This is a question that can be answered by courts.[208]

Chief Justice John Marshall's opinion for the Court in *Wayman v. Southard* (*Wayman*),[209] almost 200 years ago, together with Justice Scalia's dissent in *Mistretta* less than 30 years ago,[210] point to the critical considerations. Marshall wrote that some matters were of such great importance, dealing with "rules for the regulation of society," that the decision needed to be made by Congress through the constitutionally-prescribed steps required of law-making, while for decisions "of less interest ... a general provision may be made [by Congress, permitting] ... those who are to act under such general provisions to fill up the details."[211] He thought it obvious that the Constitution placed responsibility for important decisions in the legislature's hands. Justice Scalia, though not proffering this thought as part of a broader non-delegation doctrine, emphasized in *Mistretta* that the assignment of authority to an agency, whether of rule-making or adjudication, had to be consistent with the core, constitutionally appropriate functions of the relevant branch of government.[212]

Together, these conditions—embedded in Marshall's test in *Wayman* and Scalia's in *Mistretta*—frame a workable test for

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[207] *See, e.g.*, Alexander & Prakash, *Running Riot*, *supra*; Cass, *Delegation Reconsidered*, *supra*; Lawson, *Delegation*, *supra*; Schoenbrod, *Purposes*, *supra*.

[208] *See, e.g.*, Cass, *supra, Delegation Reconsidered*; Gary Lawson, *Delegation*, *supra*; Schoenbrod, *Substance*, *supra*.

[209] 23 U.S. (10 Wheat.) 1 (1825).

[210] *Mistretta*, *supra*, 488 U.S. at 417-22 (Scalia, J., dissenting).

[211] *Wayman*, *supra*, 23 U.S. at 43.

[212] *Mistretta*, *supra*, 488 U.S. at 417 (Scalia, J., dissenting).

whether an assignment of decisional authority fits constitutional requisites.[213] That is the essence of due process, but better effectuated in delegation terms. Perhaps, due process must provide a back-stop for failures of non-delegation analysis or of deference or other doctrines that should serve to restrict assignment or assumption of broad administrative authority; but a working non-delegation doctrine would go a long way to protect the values that due process and the structural constitution both express.

VII. CONCLUSION

Due process as a notion of basic fairness has deep roots and intuitive appeal. It is a guarantee, stretching back at least to Magna Carta, that government's most significant (most feared) impositions on those within its reach—taking away our lives, our liberty, or our property—can only be accomplished through processes that have qualities of regularity and impartiality under rules that (given their provenance and nature) have the hallmarks of legitimacy, generality, and neutrality.

Those are critical protections against arbitrary exercise of government power, uses of government's coercive authority that long have been associated with tyranny. The same instincts that underlie due process guarantees also inform the sort of structural protections—separation of powers, inclusion of checks and balances that let parts of government counter discretionary power in other parts—that are the central features of our Constitution. The goal under either label is to protect liberty by regulating the way government goes about setting and applying legal rules.

The intuitive appeal of the notion of "due process," however, at times has obscured the limited reach of the core concept, which is restricted in both what it applies to and what it requires. Seeing due process as a protean concept that can be

[213] *See* Cass, *supra*, *Delegation Reconsidered*. Others also have worried about the fit between legislative pronouncements and the role of the entity or official charged with implementing the pronouncement, including courts. *See, e.g.*, Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405 (2008).

shaped to fit particular notions of good governance—stopping bad administrative actions, permitting good ones—has two serious flaws. It permits challenges to administrative action to be framed in due process terms even when government employs the sorts of processes that this concept requires, giving rise to episodes of judicial adventurism that invade decisional space reserved to choices better left to political processes. It also encourages officials who must apply the concept to see due process as a soft, cautionary instruction to make sure government works well, rather than a narrower, harder-edged imperative. That failing risks losing the utility of due process as a protection against official discretion.

More broadly, a result of seeing constitutional commands in general and due process protections in particular as empowering judges to promote notions of good government, good substantive decisions, or good approaches to decision-making has been that the softer side of due process supervision at times overwhelms the task of sticking to our constitutional knitting. The more constitutional protections are matters of judicial discretion, the less they serve the considerations that informed their adoption.

That was a frequent theme for Justice Scalia, and it was the point he made emphatically in *Mistretta*. After declaring that the innovation of a Sentencing Commission might make better rules than would emerge from letting Congress choose how long sentences should be, on what terms, how metered, and how moderated, Scalia added this thought:

> But there are many desirable dispositions that do not accord with the constitutional structure we live under. And, in the long run, the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.[214]

This caution was well-conceived as applied to creation of the Sentencing Commission. It was similarly apt as a caution

[214] *Mistretta*, *supra*, 488 U.S. at 427 (Scalia, J., dissenting).

against the innovation of a wholly independent special prosecutor, freed from effective executive or judicial control.[215] It is just as apt—even more so—for the incredibly insulated CFPB, constructed as an entity outside effective control of President, courts, or Congress.

Attending to questions of structure and connection to constitutionally appropriate assignments captures the heart of due process as *process*—and, at the federal level, should avoid most of the analytical problems due process has engendered. While the capacity of duly selected officials, no less than innovative academic theorists, to create mischief should not be understated, starting out on more solid constitutional ground at least sets a higher bar for new ventures.

[215] *See* Morrison v. Olson, 487 U.S. 654, 697, 699, 703-15 (1988) (Scalia, J., dissenting).