Class Action Defendants' New Lochnerism,

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INTRODUCTION

You can’t accuse class action commentary or case law of ignoring the Due Process Clauses.¹ But you can accuse them of selective attention. Commentary and cases have focused almost exclusively on the due process rights of absent class members.² But class defendants are entitled to due process, too. And in countless briefs filed at the state and federal levels, class action defendants complain that trial courts are ignoring their due process right to a fair hearing.³

This Article undertakes a historical examination of one version of this argument, which goes like this: In civil proceedings, due process guarantees defendants a right to mount a full defense based on presentation of any probative “rebuttal evidence” that they “choose.”⁴ Trial courts, the argument goes, violate this right when they ration defendants’ opportunities to offer evidence rebutting class claims.

It’s easy to see why a court might do so in a class proceeding. When defendants want to rely on individualized evidence—that is, evidence unique to individual claims—it’s simply impossible to lump together large numbers of those claims into a class action and, at the same time, respect defendant’s rights to present that evidence. Take an employment discrimination suit alleging that a very

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¹ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).


⁴ A classic example is found in the trial and circuit briefs submitted by Wal-Mart in Wal-Mart Stores, Inc. v. Dukes. See, e.g., Principal Brief for Appellant at 45–46, Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168 (9th Cir. 2007) (Nos. 04-16688 & 04-16720), 2004 WL 3080794 (the “due process right to present a defense before being deprived of . . . property” guarantees defendants an opportunity to “present any relevant rebuttal evidence they choose, including evidence that there was no discrimination against one or more members of the class” (quotation marks omitted) (citation omitted)). On appeal to the Supreme Court, Wal-Mart moderated their due process argument, see infra note 32, and the narrower due process argument that it presented to the Supreme Court is not the focus of this Article.
large class of employees was denied promotions because of its members’ gender. After investigating the unique features of each class member’s employment history, defendants might find evidence that a number of class members were refused promotions because they were bad employees, not because they were women. And if just one of these women had sued the defendant, the defendant would certainly be allowed to develop that evidence. Yet, if the class is very large—comprising, say, hundreds of thousands, or even millions, of women—providing defendants the opportunity to rebut each claim based on particularized evidence would be utterly infeasible. Hundreds of thousands of minihearings, after all, could take years or even decades to complete.5

Trial courts, accordingly, sometimes modify the way the claims can be proven so that aggregate proof of the claim is easier to manage.6 Consider, again, an employment discrimination suit. To smooth the way for class proceedings, courts might decide that class members meeting criteria easily gleaned from defendants’ records are entitled to an irrebuttable presumption that they were victims of discrimination.7 In this way, proof of the claims is simplified and easy to administer in an aggregate proceeding.8 And when courts do this, or something like it, class defendants often argue that courts thereby deny defendants a right to assert a “full defense” against the individual claims comprising the class action—violating defendants’ due process rights.

A few lower federal courts have invoked due process to reverse certification decisions modifying evidentiary rules in this way.9 Even so, this success comes in the face of an uncomfortable fact: class action defendants’ arguments are not rooted in the historical meaning of the Due Process Clause. Their arguments, instead, feed off intuitions about good policy—namely, growing (and, I think, reasonable) concerns that plaintiffs and courts are using the class action device to pressure institutional defendants to provide relief for undeserving claims.

Indeed, in their disinterest in history, if nothing else, class action defendants’ arguments echo the due process claims made by a very different group of litigants: welfare recipients. In the 1970s, welfare-rights advocates engineered their own procedural due process revolution, by persuading the Court that due process

5 See, e.g., In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 149 (2d Cir. 2001) (Jacobs, J., dissenting) (“[T]here is good reason for considering the manageability of defenses in this [class] case [encompassing millions of claims]: even if each merchant’s claim took no more than a half a day to sort out, the damages phase of trial would last as long as the whole course of Western civilization from Ur.”).

6 See infra Part I.A.


9 See, e.g., W. Elec. Co. v. Stern, 544 F.2d 1196, 1199 (3d Cir. 1976) (noting that defendants must be afforded an opportunity to offer “any rebuttal evidence they choose” but declining to order the district court to reverse certification); see also Tager, supra note 3 (collecting cases).
required federal agencies to provide welfare recipients with certain procedural protections before taking away their benefits (the so-called “new property.”) Like today’s class action defendants, welfare advocates’ arguments were not based on the historical meaning of due process, but on intuitions about good policy—specifically, protecting vulnerable welfare recipients from welfare state bureaucrats. Indeed, there were no historical arguments to make. Up until that point, welfare benefits had been thought of as a statutory privilege that could be taken away without any process.

But the ground has shifted since the 1970s. Originalism has come into its own. There were, of course, originalists in the 1970s. And they complained (loudly) that the Brennan-era Court had constitutionalized a “view of desirable policy” with no roots in the historical understanding of the Due Process Clause. Then, though, originalists were a small, marginalized band. Today, originalism has grown in sophistication and influence, as the Court’s decision in District of Columbia v. Heller underscores. Unlike welfare rights advocates of the 1970s, class action defendants can’t afford to ignore originalism.

Today’s new originalists differ from those of the previous generation in some important ways. Even so, many (although not all) agree with the basic claim made by their precursors in the 1970s and 1980s: that when it comes to the vague and ambiguous Due Process Clause, early historical practice, as Frank Easterbrook put it in 1982, “lays down the baseline against which . . . arguments are measured . . . ”

What are originalists to make of class action defendants’ due process arguments? This Article is the first to examine the historical record with that question in mind. And, for class action defendants, the verdict is a bad one.

The gist of class defendants’ due process claim is that the Due Process Clause guarantees defendants an adversarial presentation of any probative rebuttal evidence they chose. Yet, there is no long historical tradition protecting this “choice” in civil proceedings. True, throughout our history, due process has been

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11 See, e.g., Richard A. Epstein, No New Property, 56 BROOK. L. REV. 747, 747–48 (1990) (“Goldberg represents one of those rare efforts to transform a set of academic and philosophical insights about the nature of property into the imperative language of constitutional law.”).
13 Easterbrook, supra note 12, at 125.
16 Easterbrook, supra note 12, at 92.
understood to guarantee a right to be heard before a judge “in . . . defence.” But for most of the nineteenth century, the right to a hearing was not conceived as right to present a certain amount of evidence. It was conceived as a structural right to an independent judicial hearing. Due process, in effect, selected the institution that should enter a final judgment in individual cases and controversies—a deliberative judiciary, acting free of legislative influence or control.

But as long as Congress left room for independent judicial judgment about the evidence that parties could present, the requirements of due process in the field of evidence gave out. Courts could, and did, bar defendants from presenting probative evidence when economy or public policy demanded. In effect, judicial regulation of parties’ opportunities to offer evidence was seen as a subconstitutional matter left to courts’ reasoned discretion, based entirely on “equity, reason, and good sense.”

That’s not to say there is no historical support for class action defendants’ arguments. There is. But it is found in an awkward period: the Lochner era. The Lochner era’s biggest innovation—the recognition of substantive due process rights to freedom of contract and property—is its most (in)famous. But in tandem with its development of substantive due process, the Lochner Court developed a new conception of procedural due process. Due process, the Court held,

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17 See, e.g., Hurtado v. California, 110 U.S. 516, 532 (1884) (acknowledging due process requires means for “bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defence; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there.”).


19 See infra Part III.


guarantees a right to present a “full defense” to a civil liability judgment, based on “every [probative] fact and circumstance” bearing on liability.\(^{22}\)

The two innovations were related: the Lochner era’s substantive due process cases treated property—including intangible property or wealth—as a fundamental interest that deserved heightened constitutional protection.\(^{23}\) The procedural right to present “all the facts,” in turn, protected against the erroneous taking, through civil damages, of that interest. In effect, the Lochner Court’s recognition of a right to present “every fact and circumstance” bearing on liability was the Court’s first gesture toward its current recognition that fundamental interests demand heightened procedural protections.\(^{24}\) (And, recovering this Lochner-era contribution is an important side payoff of investigating the historical bona fide of class defendants’ claims).

Lochner has had some lasting impact.\(^{25}\) But Lochner’s procedural due process cases suffered the same dire fate as Lochner’s economic substantive due process cases with which they were linked. The post-New Deal Court has rejected the idea defendants resisting civil liability must be afforded a fixed right to present all the facts.\(^{26}\) Regulation of opportunities to present evidence in civil proceedings is restrained only by the loose requirement, articulated in Connecticut v. Doehr\(^ {27}\) and Mathews v. Eldridge,\(^ {28}\) that the regulation reflect a judicious trade-off between accuracy and efficiency.\(^ {29}\)


\(^{23}\) See, e.g., Truax v. Corrigan, 257 U.S. 312, 328 (1921) (holding that deprivation of intangible property without due process “can not be held valid under the Fourteenth Amendment”).

\(^{24}\) See, e.g., Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (holding that a state must provide “fundamentally fair procedures” before depriving someone of a fundamental liberty interest). The Lochner-era cases captured brief attention in the 1970s, during the mini-boomlet in legal scholarship on the Brennan-era “irrebuttable presumption doctrine,” which drew on the Lochner era decisions. Unfortunately, commentary on the historical roots of these cases was often cursory and commentators uniformly misinterpreted them in substantive due process terms. See, e.g., Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 HARV. L. REV. 1534, 1539–40 (1974) (characterizing the Lochner cases as substantive due process decisions). As this Article shows, they grew out of, and transformed, nineteenth century decisions dealing with the implications of the due process hearing right for irrebuttable presumptions. See infra notes 217–31, 284–93.

\(^{25}\) See, e.g., Bernstein, supra note 21, at 60 (“Griswold, Roe, and their progeny can be traced back to Lochner.”).

\(^{26}\) See, e.g., Weinberger v. Salfi, 422 U.S. 749, 785 (1975) (rejecting a due process right to an individualized evidentiary hearing, including with respect to defenses to civil liability).


\(^{29}\) See, e.g., Doehr, 501 U.S. at 11 (applying the Mathews test and holding that due process, in the civil context, requires courts to weigh accuracy, the parties’ relative
In effect, modern procedural due process cases and the nineteenth century tradition converge on essentials: Neither construes due process as a fixed limit on the type or quantity of evidence presented in ordinary civil proceedings. Then and now, due process leaves a great deal of room for courts to regulate parties’ opportunities to present relevant evidence in civil proceedings in the service of equity and convenience. Class action defendants’ arguments are rooted in a brief, and brief-lived, deviation from this tradition—the Lochner era. If history provides the “baseline” against which constructions of due process should be tested, class action defendants’ claims are losers.30

This is not to say that defendants’ objections to proof rationing might not have merit on other grounds. For example, even if due process doesn’t require a particularized evidentiary hearing in every case, Congress might require one in claims arising under a particular statutory scheme. If it does, federal courts are presumably required to respect that entitlement.31 This Article’s narrow focus is on the cases where Congress (or in the case of state law, the state legislature) has not clearly displaced courts’ discretion to modify the way that claims can be proven in a class proceeding by statute. In those cases, due process, at least, does not categorically forbid courts from exercising that discretion in favor of rationing

interests, and the “ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections”).

30 Easterbrook, supra note 12, at 92. As a result, I no longer subscribe to the view articulated in an early piece written for the Cato Institute before I became an academic. See Mark Moller, The Rule of Law Problem: Unconstitutional Class Actions and Options for Reform, 28 Harv. J.L. & Pub. Pol’y 855, 857 (2005) (sketching an intuition-based, nonoriginalist argument that class-specific evidentiary shortcuts are inconsistent with due process). That article’s focus was on the procedural avenues for removing state-filed class actions into federal court if defendants’ due process argument were taken seriously. Id. at 886. My investigation of the historical evidence examined herein has, however, convinced me that defendants’ due process argument is without merit.

31 On appeal to the Supreme Court in Wal-Mart Stores, Inc. v. Dukes, Wal-Mart successfully emphasized this type of due process argument, abandoning the broader formulation of its due process rights that it had advanced in the lower courts. It no longer suggested, as it had below, that due process generally restrains courts’ discretion to restrict defendants’ “choice” of probative “rebuttal evidence” for reasons of fairness or economy. Instead, Wal-Mart claimed that Title VII required courts to give defendants individualized rebuttal hearings—Congress, in other words, had affirmatively displaced courts’ discretion to exclude relevant evidence by statute; and because due process requires courts to follow the law, denying defendants this right therefore not only violates Title VII but denies Wal-Mart due process. See, e.g., Brief for Petitioner at 42–43, Wal-Mart Stores, Inc. v. Dukes, No. 10-277 (U.S. Jan. 20, 2011) (arguing that “[u]nder Title VII, Wal-Mart is entitled to prove that an individual employment action is taken for non-discriminatory reasons” and to “rebut the claims of each individual class member”; the trial plan therefore “refashioned” Title VII by eliminating “statutory defenses” in violation of the Rules Enabling Act and due process). Questions can be raised about this argument, particularly its understanding of Congress’s intent is correct, its due process conclusion is unexceptional.
parties’ opportunities to present probative proof when doing so is necessary to facilitate class proceedings.

The argument proceeds in five parts. Part I summarizes class defendants’ due process defense. After an overview of originalism in Part II, Parts III and IV turn to examine the historical evidence. Part V concludes.

I. THE DUE PROCESS DEFENSE

A. Evidentiary Shortcuts

Class actions are more than a device for aggregating claims. They are a vehicle for amplifying the deterrent effect of the substantive law. And, they are a platform that enables self-appointed representatives of large groups (e.g., consumers or employees) to force corporate entities to the bargaining table to negotiate changes in the way they do business or treat their employees via settlement. To capitalize on these uses of the class action, courts must sometimes ration factual investigation and presentation of evidence to make class treatment possible.

Changes in the way that parties prove their claims is an inevitable artifact of the Rule 23 requirement that class claims coalesce into a cohesive core of evidence. Rule 23(b)(3), which authorizes class treatment of claims seeking monetary relief, makes this “proof cohesion” requirement explicit by requiring common issues to predominate. It is implicit in the text of Rule 23(b)(2), which authorizes class treatment for claims seeking group-wide injunctive relief and assumes “a homogenous and cohesive group with few conflicting interests among its members.”

The proof cohesion requirement ensures that a class proceeding will conserve enough administrative costs to justify sacrificing class members’ control over litigation of their own claims. It also ensures that representation of the class will not disadvantage some subset of the class—since, when evidence necessary to prove the claims coheres into a shared evidentiary unit, the interests of class members are much more likely to be aligned.

Yet, satisfying the proof cohesion requirement is often complicated by the default rules governing proof of most civil claims. In ordinary, nonclass claims, defendants are entitled to produce any probative evidence tending to rebut plaintiff’s claims. And, of course, the ultimate burden of production and persuasion usually lies with the plaintiff.

34 Fed. R. Civ. P. 23(b)(3); Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 623 (1997) (“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”).
Yet, in classes aggregating a very large number of claims, slavish adherence to these default rules makes class proceedings far too costly and unwieldy. Take a simple case: an individual fraud suit, in which plaintiffs must prove that the defendant consciously misrepresented a fact and that the claimant reasonably relied on the representation, suffering an injury as a result. If, in a large class suit, plaintiffs were forced to prove these elements in individual hearings, aggregation of the claims would be utterly, absurdly infeasible.

Courts can solve this problem by modifying the evidentiary ground rules that apply—providing substitutes for usual forms of evidence in order to accommodate the scarcity of time and resources parties have to investigate massive inventories of claims. Alterations take two forms: legal presumptions and limits on defendants’ opportunity to rebut these presumptions with individualized evidence.

Presumptions facilitate class treatment of claims in a straightforward fashion. If proof of facts common to the class creates a presumption in favor of liability, class plaintiffs can prove their claims based on a cohesive core of common proof. By itself, though, this doesn’t solve the management dilemma. If defendants were nonetheless entitled to rebut the presumption with respect to individual class members, cases involving an aggregation of very large numbers of claims would remain utterly infeasible.

Courts deal with the problem posed by affirmative defenses by “devis[ing] . . . evidentiary shortcuts around management problems” they pose. These shortcuts, in effect, ration defendants’ opportunities to litigate these defenses, and they take at least three different forms.

“Irrebuttable Presumptions.” First, Allan Erbsen argues that some courts seem to dispense with a meaningful opportunity to raise defenses entirely—certifying classes based on a determination that plaintiffs, after proving easily discoverable facts common to the class, are entitled to what he terms an “irrebuttable evidentiary presumption” that the defendant is liable.

Consumer fraud class actions provide the simplest example: there “plaintiffs often propose that when liability is premised on a consumer not knowing a certain fact, or relying on a given representation, the court should [irrebuttably] presume that all class members who acted in a specified manner”—say purchasing the product—“must have . . . been relying on a misleading statement.” When courts

36 Erbsen, supra note 7, at 1012.
37 Id. at 1012–13.
38 Id. at 1013 n.24. There are many examples of federal and state courts certifying classes based on this kind of presumption. Singer v. AT&T Corp., 185 F.R.D. 681, 691 (S.D. Fla. 1998) (in a civil RICO action alleging fraud in the sale of phone lines, a “uniform written price representation . . . provide[d] a sufficient basis upon which reliance may be presumed”); Smith v. MCI Telecomm. Corp., 124 F.R.D. 665, 679 (D. Kan. 1989) (where salespeople signed written commissions containing common misleading terms, plaintiffs were entitled to a presumption that they relied on the misrepresentation, making the issue of their reliance “an objective inquiry common to the entire proposed class”); Liberty Lending Servs., Inc. v. Canada, 668 S.E.2d 3, 12 (Ga. Ct. App. 2008) (“In claims of fraud based upon written representations, the reliance element may sometimes be
do so, the claims are eminently manageable as a class, since discovery and trial will be limited to discrete, readily verifiable questions: Did the defendant send class members uniformly misleading representations?

To be sure, it's hard to find class certification decisions that expressly claim they are establishing irrebuttable presumptions. But, as Erbsen says, it’s also hard to interpret at least some of these decisions otherwise. If the presumptions “were rebuttable the individual issues would remain in the case (subject to a flipped burden of proof) and would still present obstacles to adjudicating class actions.”

Some courts seem to characterize their decisions as rulings of substantive law—that parties lack a legal right to rebut the presumption. Others, though, do not purport to be interpreting the content of defendant’s legal defenses. They purport, instead, to ration the defendant’s procedural opportunity to litigate a defense—usually based on a threshold determination that defendants are unlikely to find widespread evidentiary support for their defense during merits discovery and that particularized hearings based on individualized evidence are therefore unlikely to achieve gains in accuracy significant enough to outweigh the cost of the

39 Erbsen, supra note 7, at 1013 n.23. This is not to say that all cases allowing the plaintiff class to utilize presumptions can be characterized in this way. Some dodge how to handle individualized defenses entirely by authorizing a class trial on the question of liability to the class (based on presumptive proof) and deferring a decision on whether class or individualized hearings are more appropriate for determining causation or damages. See, e.g., In re Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124, 139–41 (2d Cir. 2001) (punting on whether individualized hearings might be necessary for determining damages). Here, the decision punts to the parties, via settlement negotiations, the difficult decision about how to fashion standards and an administrative mechanism for determining which members of the class are actually entitled to relief. Id. at 45. Because a number of circuits have forbidden issue classing unless proof of every issue necessary to establish liability satisfies Rule 23’s proof coherence requirement, this approach is used only in some circuits. See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996) (noting that Rule 23(c)(4) does not give courts the power to certify classes on discrete issues if the claim as a whole doesn’t satisfy the test for certification).

40 Varacallo v. Mass. Mutual Life Ins. Co. adopted an irrebuttable presumption of reliance as a matter of law in a consumer fraud action, while suggesting that in nonaggregated claims the presumption would be unavailable. 762 A.2d 807, 817–18 (N.J. Super. App. Div. 2000); see also Erbsen, supra note 7, at 1012–13 & n.24 (citing Varacallo as an example of this use of irrebuttable presumptions).
The result is a class proceeding that is litigated as though plaintiffs were entitled to an irrebuttable presumption as a matter of law.

Sampling. Second, some courts give defendants a right to individualized hearings in a representative subset of class claims and then apportion liability for damages to the remaining class members through sampling techniques. Here, in the paradigmatic case, trial is bifurcated. After an initial proceeding, in which prima facie case for defendants’ liability to the class is assessed by one jury, a randomly selected representative set of individual claims are litigated in a series of trials. Class damages are then calculated based on the average recovery in the litigated set of claims.

In effect, sampling is a hybrid of individualized hearings and “irrebuttable presumptions.” By litigating a sample of the class claims, defendants are given a restricted opportunity to litigate some of their defenses, after which an irrebuttable presumption arises that the rest of the class has suffered damages equivalent to the average claimant in the test sample.

“Formulaic Proof.” A third set of cases combines features of statistical evidence and irrebuttable presumptions, by resorting to what is sometimes termed “formulaic proof.” Courts in these cases dispense with some opportunities to rebut the presumption of liability established in the first phase of the proceeding.

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41 See, e.g., Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 297 (1st Cir. 2000) (declining to fault trial court because the possibility of widespread meritorious affirmative defenses was too “speculative” to warrant individualized discovery and evidentiary hearings); Blackie v. Barrack, 524 F.2d 891, 906 n.22 (9th Cir. 1975) (noting that where plaintiff’s evidence will “undoubtedly be conclusive as to most of the class,” and defendants may be able to defeat a showing of causation with respect to “a few individual class members,” the district court can exercise its discretion to limit discovery and opportunities for evidentiary hearings relating to defendants’ affirmative defenses in order to make the claims manageable). Some include a disclaimer: “If . . . evidence later shows that an affirmative defense is likely to bar claims against at least some class members, then a court has available adequate procedural mechanisms[,]” including decertifying the class or excluding class members who are likely subject to affirmative defenses. Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39–40 (1st Cir. 2003).


43 See, e.g., Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 183 (N.D. Cal. 2004) (adopting a “formula approach” in lieu of individualized hearings in the context of promotions claim, but not adopting a similar approach in the context of equal pay claims); see also EEOC v. O&G Spring and Wire Forms Speciality Co., 38 F.3d 872, 874–75 (7th Cir. 1994); Domingo v. New Eng. Fish Co., 727 F.2d 1429, 1444 (9th Cir. 1984); Hameed v. Int’l Ass’n of Bridge, Structural & Ornamental Ironworkers, 637 F.2d 506, 518–22 (8th Cir. 1980).
In this way, they, too, bear some resemblance to those that adopt “irrebuttable presumptions.”

But, rather than apportioning liability for damages based on a sample of tried cases, they apportion damages based on a formula derived from econometric analysis and “objective” (i.e., easily discoverable) data about class members, located in defendants’ records.\(^{44}\) The data serves as a rough predictor of the likelihood that the class member was victimized by defendant’s conduct and the extent of injury.\(^{45}\) As a result, this approach also bears some resemblance to trials that employ sampling. In both, the damages are calculated based on an approximating method, devised by experts, that may not perfectly capture the real variance in merit and value among individual claims.

*Wal-Mart Stores, Inc. v. Dukes,*\(^{46}\) a mammoth Title VII employment discrimination class action on behalf of an estimated 1.5 million female Wal-Mart employees, is a prime example of this last sort of case.\(^{47}\) Dukes involved a disparate treatment claim under Title VII—one seeking not only back pay, but also punitive damages governed by standards promulgated in the Civil Rights Act of 1991.\(^{48}\) And in *International Brotherhood of Teamsters v. United States,*\(^{49}\) the Court set out ground rules for proving a disparate treatment claim.\(^{50}\) In the absence of direct evidence of an intentional policy of discrimination, plaintiffs can rely on evidence of a pattern or practice of discrimination in order to show discrimination was the company’s “standard operating procedure.”\(^{51}\) If the plaintiffs carry that burden, a rebuttable presumption arises that each class member is entitled to appropriate monetary relief.\(^{52}\) In a second stage, a “district court must *usually*” give the employer an opportunity “to demonstrate that the individual . . . was denied an employment opportunity for lawful reasons.”\(^{53}\)

The key word here is “usually.” Defendants usually have an opportunity to demonstrate lawful reasons for an adverse employment action in a mini-hearing in which the defendant offers (if it can) evidence that an individual employee lost a job or promotion for nondiscriminatory reasons (absenteeism or substance abuse,

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\(^{44}\)* See, e.g., Erbsen, *supra* note 7, at 1013 n.24

\(^{45}\)* See, e.g., *id.* (noting that courts allow “objective evidence (such as the defendant’s business records) of how the class member acted, which is generally easy to present in a class action, . . . [to] substitute for subjective proof . . . which is generally difficult to present in a class action”).

\(^{46}\)* This Article was written before the Supreme Court’s recent decision in the case and my focus below is on the arguments presented in the Ninth Circuit. *See, e.g.,* 603 F.3d 571 (9th Cir. 2010) (en banc).

\(^{47}\)* Compare *id.* at 578 n.3, with *id.* at 627 (Ikuta, J., dissenting).


\(^{50}\)* *Id.* at 336–43.

\(^{51}\)* *Id.*

\(^{52}\)* See *id.* at 361–62.

\(^{53}\)* *Id.* (emphasis added).
say). Yet, as the Dukes trial court noted, with a class of 1.5 million women, “the traditional Teamsters mini-hearing approach is not feasible here.” 54

Instead, the court crafted a “formula approach” for determining the back pay award for class members, 55 in which “economic models” crafted by a special master based on expert testimony would employ “performance evaluation scores, tenure, and positions held[,]” as well as “objective applicant data documenting which class members were interested in each . . . promotion,” as “rough” bases for identifying the women who lost promotions because of gender discrimination. 56

Under this approach, expert analysis of data drawn from Wal-Mart’s business records replaces the usual Teamsters minihearing. Class members who fit the “formula” are presumed to have been denied promotions based on their gender. 57 Wal-Mart would have no opportunity to offer testimony about an employee’s actual performance or a manager’s motivations for denying the promotion. It would be limited to contesting the statistical “pattern or practice” evidence and the lost pay formula. 58

B. Enter the Due Process Clause

Judicial modification of evidentiary rules raises an obvious question about courts’ authority to do so. And it can be analyzed in different ways. It can be analyzed as a problem implicating Rule 23’s text, as a problem implicating courts’ statutory authority, or as a problem implicating the due process clause.

Unfortunately, Rule 23’s text, on this point, quickly gives out. Rule 23 requires only that proof parties would independently choose to present coheres, but parties’ choices are limited by the kinds of evidence the law allows them to present. And the evidence that parties can present is dynamic not static—rules of evidence change over time, and sometimes differ based on the kind of claim asserted or the procedural context in which it is asserted.

Here, a second concern that takes us beyond Rule 23 swims into view. What if Congress modifies the evidence that parties may present in a class proceeding—eliminating parties’ privilege to present certain kinds of evidence? Alternatively,

54 Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 176–77 (N.D. Cal. 2004), aff’d, 509 F.3d 1168 (9th Cir. 2007); id. at 176–77 (“Because it is virtually impossible . . . to determine which class members would actually have been hired or promoted (and thus which class members were the actual victims of the defendant’s discriminatory policy), there is little point in going through the exercise of individual hearings.”).

55 Id. at 183 (“[T]his is the type of case in which a formula approach may be appropriate.”).

56 Id. at 180–82; see also id. at 177 (“[T]his ‘rough justice’ is better than the alternative of no remedy at all for any class member.”).

57 See, e.g., Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 643 n.20 (9th Cir. 2010) (en banc) (Ikuta, J., dissenting) (“[T]he second stage of individualized hearings is not remedial, but rather a second phase of liability . . . . ”).

58 Dukes, 222 F.R.D. at 174.
what if Congress delegates to courts the power to fashion new or different rules of
evidence, or adjust opportunities for presenting evidence, in class proceedings?

Consider Wal-Mart’s argument to lower courts in Wal-Mart Stores, Inc. v.
Dukes. There, Wal-Mart complained that the court’s certification order dispensed
with opportunities for presenting individualized proof of defenses to back-pay
liability (in other words, that one or more members of the class were not
victimized by discrimination). But what if Congress decreed that, in gender
discrimination claims proceeding as a class action, defendants are simply not
entitled to present all the evidence in support of that defense—so long as plaintiff
makes out a prima facie case of disparate treatment, defendants, where equity
demands, may be held liable to individual class members based on less accurate
formulaic proof? If so, plaintiffs surely can’t complain that the claims raise
individualized questions of proof that defeat a predominance finding. That is proof
that courts tasked with formulating the evidentiary rules in this area have decided,
pursuant to legislative authorization, that defendants simply aren’t entitled to
present in large class actions.

This point was made by an amicus brief submitted to the Ninth Circuit in
Dukes by a collection of nonprofit legal advocacy groups, including the Lawyer’s
Committee for Civil Rights under the Law and the NAACP Legal Defense and
Education Fund. Title VII, they argued, vests federal courts with “broad
discretion to devise comprehensive relief ‘in light of the large objectives of the
Act.’” That discretion, which they contended hadn’t been displaced by
amendments contained in the Civil Rights Act of 1991, includes the power
to fashion “formulaic [monetary] relief”—that is, awards of back pay based on
formulaic proof of discrimination that is less sensitive to individualized facts about
each class members’ employment history—“when the class is so large that it
would not be economical to have individual hearings.”

These amici, in other words, framed the problem as one of legislative
dlegation. Had Congress delegated to courts the power to fashion second-best
substitutes for particularized evidentiary hearings when necessary to accommodate
large-scale class proceedings? They thought it was apparent Congress, through
Title VII, had done so.

In an attempt to leapfrog over thorny questions of legislative authorization
entirely, the defendant’s argument in the lower courts pinned their objection to

60 Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168, 1175 (9th Cir. 2007).
61 Brief for Lawyers Committee for Civil Rights et al. as Amici Curiae Supporting
Appellees at 14–22, Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168 (9th Cir. 2007) (Nos.
04-16688 & 04-16720), 2005 WL 513296.
62 Id. at 19 n.7 (citation omitted).
63 Id. at 5, 19.
64 Id. at 4–5.
class-specific judicial alteration of evidentiary burdens on the due process clause.\(^{65}\) At the historical core of procedural due process is the idea that parties have a right to a “day in court.”\(^ {66}\) And Wal-Mart, like many class defendants, read into this right an implied corollary. To the extent existing law provides defendants with a defense to liability (here, the defense that one or more members of the class were not victimized by discrimination), defendants, to have a meaningful hearing, must have the opportunity to present a “full defense” based on “any rebuttal evidence they choose,” including all probative individualized evidence.\(^ {67}\) In this view, due process fixes a set of evidence that defendants can present at trial in support of their defense—“all probative evidence” relating to their legal entitlement—and guarantees defendants a procedural right to investigate and present that evidence to a fact finder in a particularized hearing.

**C. Beyond Mathews v. Eldridge**

The phenomenon of “evidentiary shortcuts” in class action practice invites more than one vein of analysis. It raises difficult questions about the extent to which due process constrains courts power to modify defendants’ entitlement to present certain kinds of proof. But it also raises statutory questions. Assuming, say, evidentiary shortcuts satisfy due process, does a statute like Title VII implicitly authorize courts to make these sorts of modifications? To what extent?

These are separate questions and exploring each would occupy a standalone article. This Article’s focus is on the first and broadest question: the extent to which evidentiary shortcuts, in general, implicate due process.

Even here, the analysis requires picking and choosing among different ways to think about due process. For example, should we confine analysis to recent procedural due process precedents, such as *Mathews v. Eldridge*\(^ {68}\) and *Connecticut v. Doehr*\(^ {69}\)? Plaintiffs and their amici in *Dukes v. Wal-Mart Stores, Inc.* thought so.\(^ {70}\) *Mathews*, of course, announced a set of factors that must be balanced when deciding the procedures due when agencies deprive welfare recipients of their entitlement to benefits.\(^ {71}\) *Doehr* extended *Mathews* to procedures adopted in civil proceedings.\(^ {72}\) Together both cases require courts to strike a fair balance between

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\(^{65}\) Wal-Mart narrowed its due process argument considerably once it was before the Supreme Court, *see supra* note 32 and accompanying text, and that very different due process argument is beyond the scope of this Article.


\(^{67}\) Principal Brief for Appellant, *supra* note 4, at 45 (citation omitted).

\(^{68}\) 424 U.S. 319 (1976).


\(^{70}\) *See Principal Brief for Appellant, supra* note 4, at 45 (characterizing plaintiff’s approach as violating due process).

\(^{71}\) 424 U.S. at 335.

\(^{72}\) *Doehr*, 501 U.S. at 9–11.
avoiding an erroneous deprivation of the parties’ interests and respecting the fiscal or administrative interests of the state. 73

Class plaintiffs argued that, in a class of such gargantuan size, these factors cut in favor of an evidentiary shortcut 74 and an en banc panel of the Ninth Circuit agreed. While the formulaic approach to proof may prove somewhat less accurate than individual hearings, said the Ninth Circuit, “adversarial resolution of each class member’s claim would pose insurmountable practical hurdles . . . since [millions of] individual adversarial determinations of claim validity would clog the docket of the district court for years.” 75

While it is tempting to dismiss defendants’ claims out of hand based entirely on Mathews and Doehr, as the Ninth Circuit did, an exclusive focus on these cases is too narrow. The Court has never held that the Mathews/Doehr test is the universal measure of procedural due process. Indeed, the Court’s recent procedural due process cases strongly suggest that it doesn’t think this is the case. In Taylor v. Sturgell, 76 the Court, for example, resisted employing the Mathews/Doehr test when analyzing the extent to which prior litigants can be deemed to “virtually represent” nonparties, precluding them from litigating related claims. Instead the Court invoked the “deep-rooted historic tradition that everyone should have his own day in court,” 77 a tradition the Court implicitly tied to the Due Process Clause. In cases like these, the Court hints that procedural due process is not endlessly elastic. It has some fixed core content.

The obvious source of this fixed content is the original meaning of the Due Process Clause. Originally understood, due process may “lock in” certain procedural entitlements, insulating them from the Mathews/Doehr weighing approach. Justice Scalia, for example, made just such a claim in his dissent in Hamdi v. Rumsfeld: “The gist of the Due Process Clause, as understood at the founding and since,” he argued, “was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property.” 78 “Whatever the merits of th[e] [Mathews balancing] technique when newly recognized property rights [such as welfare benefits] are at

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73 See, e.g., id. at 11 (“[A]ny burden that increasing procedural safeguards entails primarily affects not the government, but the party seeking control of the other’s property . . . . [N]onetheless, due regard [must be given] for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.”).

74 See, e.g., Opening Brief for Appellees at 57, Dukes v. Wal-Mart Stores, Inc., 509 F.3d 1168 (9th Cir. 2007) (No. 04-16688), 2004 U.S. 9th Cir. Briefs LEXIS 675120 (“Wal-Mart makes no effort to apply . . . . the standards for evaluating potential due process violations.”).

75 See, e.g., Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 627 (9th Cir. 2010) (en banc) (quoting Hilao v. Estate of Marcos, 103 F.3d 767, 786–87 (9th Cir. 1996)).


77 Id. at 892–93 (quoting Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996)).

issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.”

Might the original meaning of the Due Process Clause include a fixed right to present all probative evidence in defense of civil liability? The idea is surprising. But the premise for this claim shouldn’t raise too many eyebrows—not any more. Originalism is having a heyday on the current Court—it’s rescue of the Second Amendment from desuetude\(^{80}\) is ample evidence of that. Arguments against class action defendants’ due process claims accordingly ignore the possibility that the original understanding of due process supports class action defendants at their peril. If plaintiffs want to advance a rich and deeply satisfying account of courts’ power to devise evidentiary shortcuts in the class context, they have to engage with the history of the Due Process Clause.

The rest of this Article turns to investigate that history.

II. DUE PROCESS AND CONSTITUTIONAL CONSTRUCTION

Before turning to the history, it’s important to be clear why, and when, history matters for originalists. The Due Process Clauses are deeply ambiguous—they have multiple possible meanings, as Section A underscores. Many originalists, in turn, think that early historical practice has a strong claim to guide ambiguous texts, for reasons canvassed in Section B.

Together these two sections review why, and how, history serves an interpretive guide for many originalists. Parts III and IV then turn to the history.

A. The Ambiguous Due Process Clause

Originalists think the Constitution’s meaning is fixed by the conventional preratification semantic meaning of the Constitution’s text, revealed by sources, like dictionaries, evidencing contemporary usage.\(^{81}\) Yet, some constitutional texts are “ambiguous”—like the word “bank,” they were conventionally associated with two or more different meanings.\(^{82}\) Other texts are “vague”—their meaning takes the form of an abstract concept or principle whose specification in individual circumstances admits of difficult borderline cases and therefore demands a significant degree of judicial judgment or “construction” to put into practice.\(^{83}\)

\(^{79}\) Id. at 575–76.


\(^{83}\) Id.
Some, finally, are both. The text might be construed to enact either one principle or another, and some or all of the principles the text might enact are vague.84

The Due Process Clause is a quintessential example of a constitutional text that is both ambiguous85 and vague.86 Its ambiguity is rooted in its antecedents. Lifted from New York’s statutory Bill of Rights, its text is a mishmash that evokes three precursors, each of which had a different tradition of eighteenth-century interpretation.87

The first is a 1354 statute, which provided that no person may be evicted from lands or leases, disinherit, imprisoned, or executed, “without being brought in Answer by due Process of the Law.”88 As Frank Easterbrook says, this “had a plain enough meaning.”89 “[C]ourts could not proceed in any important civil or criminal case without ‘process,’ that is, without service of a writ on the defendant giving him an opportunity to appear . . . .”90

84 See, e.g., Solum, supra note 81, at 73. The distinction between “interpretation” and “construction” is among the most hotly debated terminological questions among originalists. For a discussion of the technical distinction that has grown up around the terms in originalist scholarship, see Lawrence B. Solum, The Interpretation-Construction Distinction, 27 CONST. COMMENT. 95, 100–09 (2010). In this Article, in the interest of avoiding getting bogged down in a lengthy, technical discussion of the evolving interpretation/construction distinction in originalist scholarship, I use the terms interpretation and construction interchangeably in a loose, colloquial sense, to mean the process of assigning legal content to constitutional text when preratification evidence of contemporaneous usage and intratextual clues available on the face of the constitution are insufficient to settle debates about the principles, practices, and rules that the text is meant to enact. This sense is, by the way, similar to my understanding of Keith Whittington’s use of the term “construction.” See, e.g., Keith Whittington, Constructing a New American Constitution, 27 CONST. COMMENT. 119, 120 (2010) (“The process of constitutional construction is concerned with fleshing out constitutional principles, practices and rules that are not visible on the face of the constitutional text and that are not readily implicit in the terms of the constitution.”); see also John O. McGinnis & Michael Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 NW. U. L. REV. 751, 780 (2009) (noting Whittington seems to use the term “construction” when he takes an “external” view of constitutional interpretation, and does not clearly use the term in the “positive and normative” sense employed by originalists like Lawrence Solum).


87 Easterbrook, supra note 12, at 95–100 (discussing the genesis of the Fifth Amendment’s due process clause); Rosenthal, supra note 85, at 29–34 (same).

88 28 Edw. III, c. 3 (1354) (Eng.).

89 Easterbrook, supra note 12, at 96.

90 Id.
The second statutory antecedent was Parliament’s declaration, following the dissolution of the court of Star Chamber,

[t]hat neither his Majestie, nor his Privie Councell, have or ought to have any Jurisdiction power or authority . . . to examine or drawe into question determine or dispose of the Lands Tenements Herditaments Goods or Chattels of any the Subjects of this Kingdome But that the same ought to be tried and determined in the ordinary Courts of Justice and by the ordinary course of the Law.91

The import of the statute, Blackstone thought, was also plain. “The king,” he wrote, “may erect new courts of justice; but then they must proceed according to the old established forms of the common law,” including “[n]ot only the substantial part . . . of the law, but also the formal part, or method of proceeding.”92 Modes of proceeding, he said, “cannot be altered but by parliament.”93

The third antecedent was Magna Carta’s guarantee that “[n]o free man shall be arrested or imprisoned, or disseised or outlawed . . . or in any way victimised . . . except by the lawful judgment of his peers or by the law of the land,”94 which the Framers almost uniformly equated with the Due Process Clause.95 Some, including many pamphleteers in the ferment preceding the American Revolution, thought Magna Carta’s “law of the land” provision locked in a host of natural law rights, rooted in the common law.96 Others have interpreted it as a very narrow guarantee to a few particular procedures rooted in longstanding legal practice, including “indictment and jury trial.”97

But many in the framing generation understood it in more specific terms than the first camp, but in more general terms than the second: as a right to a hearing before an independent judiciary prior to the deprivation of private rights.98

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91 16 Car., ch. 10, § 3 (1640) (Eng.).
92 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 142 (George Sharswood ed., Lippencott Co. 1893).
93 Id.
94 Magna Carta (1215 & 1225), reprinted in RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES, app. at 226, 231 (2003).
96 On some readings, Lord Coke held this view, and the phrase was interpreted this way by many pamphleteers in lead-up to the American Revolution. Id. at 614–21, 662 (noting Lord Coke’s influence on colonial law).
97 Easterbrook, supra note 12, at 97 (“Coke’s natural law was a rather tame creature, satisfied with the inalienable rights to indictment and jury trial”).
98 For one preratification association between the “law of the land” and judicial independence (and impartiality), see JOHN ADAMS, INSTRUCTIONS TO THE TOWN OF BRAINTREE: TO THEIR REPRESENTATIVE, 1765, IN 3 THE PAPERS OF JOHN ADAMS 465, 466–67 (Charles Francis Adams ed., 1851) (expansion of admiralty jurisdiction is “directly repugnant to the
authorities put it in the early decades after ratification, deprivation of rights according to the “law of the land” requires a proceeding “in its nature judicial”\(^99\) — that is, a “forensic” proceeding, \(^100\) which, said Daniel Webster, “hears before it condemns; . . . proceeds upon inquiry, and renders judgment only after trial.”\(^101\)

In effect, according to this construction of Magna Carta, it and the 1354 ban on ex parte proceedings collapse into different historical statements of a single principle. Parties have a right to a judicial hearing and independent judicial judgment prior to deprivation of core individual rights. Due process, in other words, identified the institution that must do the depriving. And that institution must be a deliberative, independent judiciary.

This reading not only had some warrant in the conventional construction of the clause’s antecedents, but, as James Thayer noted, accorded with the medieval semantic meaning of the phrase “due process of law.” In the “older days,” he said, rights were associated with custom, or with prepolitical principles of natural

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\(^{99}\) The phrase is Justice Marshall’s in *Marbury v. Madison*, where he famously noted that “[t]he question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.” 5 U.S. (1 Cranch) 137, 167 (1803). Later courts connected the idea with the Due Process Clause. See, e.g., *Taylor v. Porter & Ford*, 4 Hill 140, 146 (N.Y. 1843) (holding deprivation by “law of the land” requires that it be “ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either . . . can be taken from him. It cannot be done by mere legislation.”). For additional antebellum authorities linking “due process” with deprivation of rights through a judicial judgment, see *infra* notes 206–32 and accompanying text.

\(^{100}\) *Taylor*, 4 Hill at 147.

justice, and not, in our modern, positivist sense, with commands of a sovereign. By contrast, “[l]eges,” he says, were “what is instituted by rulers and kept up by the people . . . for settling particular controversies” and were closely associated with the “judicature” or modes of “trial.” Our due process of law phrase, said Thayer, “comes down out of the midst of all of this,” as a phrase whose original, ancient meaning required the settlement of disputes through the process of the popular “Court[s] of Justice.”

In the end, based on its historical antecedents, four competing possible meanings of the phrase “due process” swim into view. At its narrowest, it might simply ban ex parte judicial proceedings. Slightly more broadly, it might guarantee a narrow set of core procedural rights—like a right to criminal proceedings by indictment and jury trial—associated with the most restrained interpretations of Magna Carta. More broadly still (and more vaguely) it might guarantee a hearing according to settled law and procedures fixed by common law tradition. At its broadest and most vague, it might protect a variety of fundamental common law liberties.

Or, last, it might do something somewhat different than any of these three constructions. It might, consistent with some eighteenth century interpretations of Magna Carta and the most ancient semantic meaning of the words “due process,” stand instead for an important structural principle—that people’s rights to life, liberty, and property require an independent judicial hearing free from the control of the political branches.

B. Construing “Due Process”

Some ambiguous texts can be clarified by looking to intratextual evidence and surrounding context in which the ambiguous phrase is used. The Due Process Clause is not one of these. As a result, due process presents one of the thorniest of interpretive problems of any constitutional provision.

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102 JAMES BRADLEY THAYER, Law and Fact in Jury Trials, in A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 183, 199 (1898).
103 Id. at 199–201.
104 Id. at 200–01. When the Constitution was ratified, the medieval meaning of the term existed alongside other, newer meanings, some of which were more expansive. See, e.g., Gedicks, supra note 95, at 614–21. The association between due process and a vague prohibition on “non-arbitrary” law came later after the Fifth Amendment’s ratification. See DAVID P. CURRIE, THE CONSTITUTION AND THE SUPREME COURT: THE FIRST HUNDRED YEARS 112 n.43 (1985) (tracing the introduction of the “non-arbitrariness” concept to Justice Johnson’s opinions in Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819) and Livingston v. Moore, 32 U.S. 469 (1833)).
105 One can see some of the basic procedural requirements everyone agrees is at the heart of “due process”—the right to notice, jury trial, habeas—as different applications of the larger principle that an independent judicial hearing must be interposed between the legislative and executive branches and deprivations of a person’s life, liberty, and property.
106 Barnett, supra note 86, at 268 (“Most terms are not ambiguous in context.”).
Many originalists attempt to construe what the Due Process Clause means by referring to postratification judicial interpretations of the Due Process Clause.107 For these originalists, history serves as a plausible fallback interpretive guide for several reasons. First, when a text could reflect one of several different principles, evidence of contemporaneous expectations about the applications of the text revealed in treatises and postratification case law “help us determine which . . . principle was adopted.”108

At the same time, there is evidence that the Framers thought that courts should rely on an early practice of interpretation to resolve uncertainty about the meaning of a constitutional text. “James Madison and other prominent founders,” writes Caleb Nelson,

did not consider the Constitution’s meaning to be fully settled at the moment it was written. They recognized that it contained ambiguities and that subsequent interpreters would help ‘fix’ its meaning . . . . Once practice had settled upon one of the possible interpretations of a disputed provision, they expected that interpretation to persist.109

107 See, e.g., Easterbrook, supra note 12, at 100–09 (using historical judicial interpretations as evidence of the meaning of due process); Rosenthal, supra note 85, at 37–41 (examining the meaning of the Fourteenth Amendment’s Due Process Clause based on the “state of decisional law” at the time of its ratification).

108 See John O. McGinnis & Michael Rappaport, Original Interpretive Principles as the Core of Originalism, 24 CONST. COMMENT. 371, 379 (2007). Interpreters can eliminate some principles as candidates for the “meaning” of due process by focusing not only on what early courts said, but also on what they didn’t say. Arguments from silence appear as early as Justice Bradley’s decision in Davidson v. New Orleans, 96 U.S. 97, 103–04 (1877): “It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, [the Due Process Clause] has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion.” Given that history, Justice Bradley concluded, litigants proposing aggressive interpretations of due process must have “some strange misconception of the scope of this provision . . . .” Id. at 103–04.

When the historical record is devoid of a particular interpretation of the due process clause, despite widespread practices that would seem to violate that interpretation, that’s fairly powerful evidence that the legal community of the time did not associate due process with that interpretation. The argument is even stronger when courts are not silent with respect to other practices that offend competing interpretations of due process. Where courts are willing to strike down a set of practices that offend one interpretation, but do nothing with respect to practices that offend a second, the natural inference is that courts associated due process with the first interpretation, not the second.

Not all originalists, though, agree that early precedent should limit the process of construing vague or ambiguous texts. Randy Barnett, for example, argues that abstract and vague constitutional provisions “delegate discretion to judges” to formulate constructions that “enhance[] the legitimacy of the Constitution.”110 Yet, even assuming textual vagueness should be treated as a delegation of interpretive discretion, reference to historical practice can be useful—not simply as evidence of what the framers intended when they enacted the clause, but as evidence of the best, or most wise, interpretation.

The idea that history can reveal the most wise interpretation is associated with Edmund Burke, who believed “traditions are likely to be wise” because they “represent the judgment of not just a single person, but of countless people over” time.111 As such they mimic “some of the advantages of markets, reflecting the assessments of many rather than few.”112 This is not to say that the imprimatur of tradition is conclusive evidence of wise practices—long practice can reflect prejudices, enduring errors about the state of the world, or thinking that has become outmoded by fundamental changes in the way the world works.113 But the sanction of age is at least strong presumptive evidence that a practice serves important “social interests.”114

As a result, originalists of many stripes can agree about the value of history as an interpretive source. A longstanding tradition of interpretation, with roots in early practice, can reveal the way framers understood ambiguous texts, when those texts cannot be disambiguated by reference to context. Construing texts in light of

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112 Id. See generally A.C. Pritchard & Todd J. Zywicki, Finding the Constitution: An Economic Analysis of Tradition’s Role in Constitutional Interpretation, 77 N.C. L. REV. 409 (1999) (stating courts should use common law traditions to construe ambiguous constitutional clauses because common law traditions are likely to be efficient).
113 See Sunstein, supra note 111, at 2106.
114 Id. See, e.g., infra notes 390–394 and accompanying text.

Below I characterize traditionalist arguments against class defendants’ due process defense as “originalist” arguments. See, e.g., infra notes 395–97 and accompanying text. Some originalists, who limit the term “originalism” to the practice of interpreting the original semantic content of the Constitution’s text, may resist this characterization. See, e.g., Lawrence B. Solum, District of Columbia v. Heller and Originalism, 103 NW. U.L. REV. 923, 967 (2009) (characterizing arguments that do not focus on the semantic meaning of the text as beyond the “domain” of originalism). However, the term “originalism” is conventionally used much more broadly. It is used to encompass the family of fellow-travelling interpretative approaches that many self-described originalists tend to rely on, including text, history, and—when text gives out—tradition to make sense of the Constitution. See Michael W. McConnell, Active Liberty: A Progressive Alternative to Textualism and Originalism?, 119 HARV. L. REV. 2387, 2415 (2006) (reviewing STEPHEN BREYER, INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005)) (characterizing originalism as a cluster of interpretative commitments—to text (first and foremost), as well as history and “tradition”—driven by an overarching normative commitment to judicial restraint).
early historical practices also accords with the way many framers thought the Constitution should be interpreted. And, regardless of the framers’ expectations, the fact a modern interpretation finds support in historical interpretations may suggest it is a wise interpretation that responds to important social needs. As such, it can appeal even to many moderate originalists who concede an inevitable role for judicial choice and judgment in the construction of unclear constitutional provisions.

In the next two parts, I turn to examine the history of interpretation of the Due Process Clause, with a focus on its implications for judicial power to ration opportunities to present proof in the service of judicial economy. That examination will encompass both the background practices that implicate competing constructions of due process in the evidentiary field, and inferences about original understanding that can be drawn from judicial reactions to those practices.

As we will see, that history reveals two traditions: an early tradition, which lasted for a century after the ratification of the Constitution and decisively rejected the idea that due process guaranteed an opportunity to present any specific quantum of evidence in civil proceedings; and a brief-lived departure from that tradition, during the Lochner era, where the Court recognized that civil defendants have a due process right to present all probative rebuttal evidence.

Because the earlier tradition arose shortly after the ratification of the Fifth Amendment, it has a much more powerful warrant to inform construction of the Fifth Amendment’s Due Process Clause. And because the early tradition is very close to the way modern courts approach due process, and the Lochner-era approach is a brief-lived deviation from that tradition, the early tradition also has the strongest Burkean claim to inform construction of what due process, under both the Fifth and Fourteenth Amendments, requires.115

115 For Burkeans, inconsistent interpretations of a clause do not render history inconclusive, so long as one interpretation has “stood the test of time” while others have not. After all, if the record shows that early courts gravitated toward one interpretation, which persists today, and others adopted a different interpretation that reigned for a brief period of time only to be decisively abandoned, that’s powerful Burkean evidence that the first interpretation, not the second, serves important “social interests.”

It bears noting that while this argument treats the Fifth and Fourteenth Amendment Due Process Clauses together, there is a growing body of literature that suggests the two Clauses should be interpreted differently. See, e.g., Ryan C. Williams, The One and Only Substantive Due Process Clause, 120 YALE L.J. 408 (2010). Even so, the view that the original “meaning” of the Fourteenth Amendment’s Due Process Clause was just as ambiguous as the Fifth’s when it was ratified remains dominant and, on that prevalent view, the evidence presented below ought to bear on the construction of both clauses. See Lawrence Rosenthal, The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation, 18 J. CONTEMP. LEGAL ISSUES 361, 407–08 (2009) (noting the continuing ambiguity of the meaning of “due process” at the time of the Fourteenth Amendment’s ratification, as well as evidence that the ratifiers expected its ambiguity would be construed in light of methods other than reference to its original public meaning at the time of ratification).
III. THE EARLY TRADITION

The idea that due process restrains the judicial power to modify, or restrict, parties’ opportunities to present probative evidence never seemed to have occurred to antebellum courts. It’s hard to see why it would. The common law of evidence inherited by American courts, as Section A shows, reflected a variety of judge-made restrictions on parties’ ability to present probative evidence—all in the service of promoting judicial economy and limiting the power of the jury. While early American courts modified the common law of evidence in various ways, they didn’t change their conception of judicial power. Like their immediate English precursors, as Section B shows, they continued to adapt the common law of evidence in the service of equity and convenience—sometimes expanding, and sometimes restricting, parties’ rights to present evidence. And they gave no inkling that the Due Process Clause imposed any restraints on their power to do so.

Instead, as Section C shows, courts focused their attention entirely on legislative interference in the law of evidence, by limiting legislative efforts to dictate the effect of certain kinds of proof. Of the four possible constructions of the Due Process Clause competing for judicial attention following ratification of the Fifth Amendment, Section D concludes, the pattern and reasoning of these early decisions is most consistent with one. Due process, nineteenth-century courts thought, guaranteed a right to a judicial hearing. But that right was not conceived as a personal right to present certain kinds of evidence. It was a structural right, which selected the appropriate institution that should make the final judgment in individual case and controversies: a deliberative judiciary, acting free from legislative influence or control.

And at the core of the independence secured by the Due Process Clause, nineteenth century courts thought, was their flexibility to regulate the weight and effect of evidence in the service of “good sense, equity and convenience.”

A. The Law of Evidence on the Eve of Ratification

On the eve of the Bill of Rights’ ratification, formal rules of evidence were so few that Edmund Burke could declare that the law of evidence was “comprised in so small a compass that a parrot he had known might get them by rote in one half hour, and repeat them in five minutes.”

As a result, it’s easy to think the eighteenth century system of evidence placed few restraints on parties’ opportunities to introduce evidence. Initial appearances, though, are deceptive. Driven by a concern for controlling the costs of litigation and the risks of juror error, eighteenth-century evidence law had a deeply

116 See infra note 245 and accompanying text.
restrictive ethos, limiting jury’s ability to consider probative evidence in a host of cases.\textsuperscript{118}

First, the eighteenth-century common law of evidence arrayed types of probative evidence in a strict hierarchy, forbidding jury reliance on relatively less probative forms of evidence when more probative forms were available.\textsuperscript{119} And at the top of that hierarchy was written proof. In line with a “centuries-long proclivity for suppressing resort to oral evidence at jury trial in civil matters,” courts barred the jury’s consideration of otherwise probative testimonial evidence when better evidence—written evidence—was available.\textsuperscript{120}

The preference for written over oral evidence “protect[ed] against the shortcomings of jury trial,” which “[d]espite its merits, . . . has always been fraught with . . . the risks of error and partiality . . . .”\textsuperscript{121} The common law of evidence cabined that risk by narrowing the range of cases that would turn on a jury’s fallible assessment of witness credibility. “Testimonial credibility,” notes Stephan Landsman, “was only to be scrutinized . . . when there was no other guide,” because “definitive [written] evidence was lacking.”\textsuperscript{122}

The common law “powerfully reinforced the . . . preference for written evidence” by limiting the testimonial evidence that could be admitted to the jury.\textsuperscript{123} True, the common law took a more lenient approach to some testimony we exclude today, like hearsay, which was admitted with reduced credit when definitive written evidence wasn’t available.\textsuperscript{124} But the common law also barred testimony central to most cases today: the testimony of interested parties, including the parties to the suit. In practice, this rule “greatly narrowed the range of potential witness testimony,” severely curtailing the role for the jury assessments of credibility.\textsuperscript{125} In transactional settings, for example, testimony of the parties about their knowledge of the terms of the transaction was not admissible if the meaning of the terms fell into contention, creating further incentive to channel agreements into writing.\textsuperscript{126} And in the as yet-undeveloped realm of tort, the rule also


\textsuperscript{119} See id. at 1153.

\textsuperscript{120} Landsman, \textit{supra} note 118, at 1153–54 (explaining the common law’s best evidence rule “organize[d] the different sorts of available evidence in a hierarchical fashion” and the “preeminent category in this hierarchy was written evidence”; the common law’s exclusions on oral evidence, in favor of written evidence, “extended the best evidence approach”); Langbein, \textit{supra} note 117, at 1183.

\textsuperscript{121} Id. at 1189–90.

\textsuperscript{122} See id. at 1185.

\textsuperscript{123} Id. (“Especially in a transactional setting, such as contract or conveyancing . . . the parties would not be allowed to testify about the transaction if it fell into contention.”).
“prevented the testimony of the victim and injurer, testimony that would often [be] indispensible to prove the case.” Indeed, tort law would not develop into its modern form until lawmakers lifted the ban on party testimony in the middle of the nineteenth century.

Eighteenth-century law not only sharply limited the jury’s ability to consider otherwise probative oral witness testimony, when better written evidence was available, but also heavily regulated, and rationed, parties’ proof opportunities by policing parties’ burdens of proof and the inferences juries could draw from evidence presented.

This was accomplished through “presumptive evidence,” which could be “disputable” or “conclusive.” The disputable kind is a familiar concept: the production of certain evidence shifts the burden of proof to the other party, as in the Teamsters framework in Dukes. “Conclusive evidence,” though, went farther: it gave rise to an irrebuttable presumption that the event at issue had occurred. The most famous example is the concept of prescriptive title, a lynchpin of medieval property law, which assumed that an “uninterrupted enjoyment of an incorporeal hereditament . . . beyond the memory of man . . . furnish[ed] a conclusive presumption of a prior grant . . . .”

Although conclusive evidence played a significant role in eighteenth-century property, criminal, and contract law, many modern lawyers will resist classifying conclusive presumptions as rules regulating opportunities to present proof. We divide the law into separate categories—the law of evidence, regulating fact-finding, on the one hand, and law defining “substantive rights,” on the other. And modern lawyers often treat conclusive presumptions not as rules of evidence, but as rules defining the content of “substantive rights.” The very concept of an “irrebuttable or conclusive presumption [is a] classic misnomer,” declares Weinstein’s evidence treatise: “[a] so-called ‘irrebuttable presumption’ is a rule of substantive law.”

Applied to the late eighteenth and early nineteenth century, though, our way of thinking is anachronistic. The divide between substantive and procedure, law and fact, is notoriously hazy, and lawyers of the period conceptualized the divide differently. In their view, it would be nonsensical to say that a rule specifying that proof of fact X creates a conclusive presumption that legal violation Y occurred is anything other than a rule regulating opportunities to present evidence. The presumption has not changed the definition of the parties’ substantive rights and obligations, which, lawyers of the period would say, still forbids Y. It simply reflects a judgment to bar the presentation of evidence rebutting the presumption that Y occurred.

127 Id. at 1179.
128 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 21 (9th ed. 1858).
129 Id.
130 Id. at 23.
131 Id. at 21–43 (discussing the role presumptions played in each of these areas).
132 1-301 WEINSTEIN’S FEDERAL EVIDENCE § 301.02[1].
This way of conceptualizing presumptions—as evidentiary rules that regulate, or even dispense with, consideration of further proof, not as rules defining the content of substantive rights—is evident in early cases’ and commentators’ uniform classification of conclusive presumptions either as “rules of evidence” or (using the nineteenth century term of art for rules of practice and procedure) as rules relating to “remedies” rather than “rights.” Treatment of conclusive presumptions as a species of evidentiary rule was, indeed, characteristic of every major treatment of the law of evidence prior to, and in the decades following, the Constitution’s ratification. This includes Bracton’s in the medieval period, Coke’s in the seventeenth century, Porthier’s and Gilbert’s in the eighteenth, and...

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133 See, e.g., Webb v. Den, 58 U.S. (17 How.) 576, 578 (1854) (holding that legislation codifying the doctrine of prescriptive title relates to “what should . . . be received in courts as legal evidence”); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 349 (1827) (stating that rules prescribing both the admissibility and “effect of” evidence relate to “the remedy and mode of proceeding” in court); Hobbs v. Bibb, 2 Stew. 54, 61 (Ala. 1829) (judicially-adopted conclusive presumptions “determin[e] the facts”); Rhinehart v. Schuyler, 7 Ill. 473 (1845) (syllabus) (argument of counsel) (conclusive presumptions relate to the “ascertainment” and “investigation” of adjudicative facts); Allen v. Armstrong, 16 Iowa 508, 512–13 (1864) (conclusive presumptions are “rules of evidence” and relate to the “mode and manner” by which rights are enforced); Groesbeck v. Seeley, 13 Mich. 329 (1865) (statute giving conclusive effect to evidence regulates the scope of evidentiary “hearing”); Quinlon v. Rogers, 12 Mich. 168 (1863) (argument of counsel) (legislation specifying that evidence should have conclusive effect enacts a “new rule of evidence”); Paschal v. Perez, 7 Tex. 348, 361–62 (1851) (rules governing the presumptive effect of evidence are part of the “rules of evidence,” which relate to the “remedy”); see also THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 367 (1868) (discussing irrebuttable presumptions as part of his treatment of due process implications for the “rules of evidence”); id. at 367 (classifying evidentiary rules, including irrebuttable presumptions, as rules related to “remedies,” “which are not regarded . . . as being of the essence of a right”); LYSDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 10 (1852) (conclusive presumptions, which Spooner calls “conclusive proof,” are rules of the “law of evidence” that “regulate[[]]” presentation of proof by “shut[ting] out” further evidence).

The first major, influential American critique of the traditional association between presumptions and rules of “evidence” came in a famous 1889 essay by James Thayer; and the modern concept of the law of evidence, as something that excludes conclusive presumptions, is part of a conceptual world that Thayer, in effect, helped to create. See James B. Thayer, Presumptions and the Law of Evidence, 3 HARV. L. REV. 141 (1889).


135 Id. at 207–08.

136 Id. at 208–09 (Coke’s brief discussion of presumptive evidence was, for a century, “the most authoritative statements of presumption and circumstantial evidence in English law texts”).
and Simon Greenleaf’s in the mid-nineteenth century. Each, to varying degrees, conceived of the law of evidence as a system for regulating opportunities for proof through a series of presumptions, each treated conclusive presumptions as an evidentiary judgment to, as Greenleaf put it, “dispense” with “corroborating evidence” and forbid “opposing evidence.” Indeed, as Stephan Landsman notes, Baron Gilbert even thought the common law’s best evidence rule, which Gilbert thought to be the organizing idea behind the entire law of evidence, was based on a conclusive presumption. If a party cannot produce written evidence, and the other can, “the very not producing it” raised a conclusive presumption against the former party, dispensing with the need for considering other proof.

Presumptions were largely judge-made—and courts adopted conclusive presumptions based on an array of considerations. One was the probative strength of the evidence given conclusive effect. “Just as in natural science,” Greenleaf

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137 Id. at 222–26 (discussing Porthier and Gilbert); see also 2 William Blackstone, Commentaries 370 (Philadelphia 1893) (1768) (discussing the law of circumstantial evidence in terms of a series of evidentiary presumptions).

138 Greenleaf, supra note 128, at 21–62 (treating presumptive evidence under the “nature and principles of evidence”).

139 See Shapiro, supra note 134, at 206–09, 220–41 (discussing how the major treatise writers in the seventeenth, eighteenth, and early nineteenth century borrowed from and refined the canonists and civilians’ use of presumptions in their treatment of circumstantial evidence); see also Landsman, supra note 118, at 1158–59 (explaining that presumptions informed the eighteenth-century rules governing not only inferences and proof, but admissibility. For example, rules against admitting documents with certain flaws were based on the idea that these documents were presumptively inauthentic).

140 See, e.g., Greenleaf, supra note 128, at 22 (characterizing presumptions as decisions to “dispense[] with,” or “forbid[],” opposing or corroborating evidence).

141 Landsman, supra note 118, at 1153 (“Th[e] best evidence principle governed the whole of Gilbert’s work [on evidence].”).

142 Id. at 1158 (quoting G. Gilbert, The Law of Evidence 4 (1754)).

143 As a result, presumptions effectively transferred fact-finding to the judge. Shapiro, supra note 134, at 242; see also Anne Woolhandler & Michael G. Collins, The Article III Jury, 87 Va. L. Rev. 587, 657–58 (2001) (noting that it “was the understood duty of the federal judiciary . . . to expand the realm of reason by expanding the realm of law, specifying its particular applications, and narrowing the more chaotic realm of fact”); Thayer, supra note 102, at 212 (common law courts used presumptions to “modify[] the jury’s action in dealing with questions of fact” in order to promote “consistency in administration” and as a “sharp and short way of bridling the jury”). Presumptions were a basis not only for granting a new trial or special verdict, when the jury found the facts inconsistently with a presumption; but for excluding evidence related to defenses foreclosed by a conclusive presumption. See, e.g., Thayer, supra note 133, at 161–63 (discussing new trials and special verdicts); Greenleaf, supra note 128, at 35 (noting that no averment or evidence may be “received” to controvert a conclusive presumption); see also Thayer, supra note 133, at 146–47 (suggesting that courts’ reliance on presumptions as a basis for excluding evidence, coupled with courts’ statement of presumptions in “evidential” terms, lead to what Thayer insisted was a mistaken view of presumptions as rules of evidence, rather than as rules of “substantive law”).
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says, “universality of experience” leads to “the presumption of aquatic habits of an animal found with webbed feet,” the same “universality of experience” supports legal presumptions, like a “presumption of a malicious intent to kill, from the deliberate use of a deadly weapon.” In either case, “one fact being proved or ascertained, the other, its uniform concomitant, is . . . safely presumed.”

The other considerations were predictability and judicial economy. Conclusive presumptions, he says, “consist [mainly] of those cases” in which the universal experience of correlation between facts was so powerful that it “render[ed] it expedient for the common good”—that is, “for the sake of greater certainty,” and the “promotion of peace and quiet in the community”—that “all corroborating evidence [be] dispensed with, and all opposing evidence . . . forbidden.”

(Similar considerations, Greenleaf’s English contemporary W.M. Best noted, could also lead courts to convert irrebuttable presumptions into rebuttable presumptions—in light of “enlarged experience” about the probative value of presumptive evidence or a changing understanding of policy trade-offs implicated by a truncated evidentiary hearing.)

In effect, conclusively “presumptive evidence,” as lawyers of the period conceptualized it, begins to look a bit like a primitive, brutish ancestor of the more evolved forms of evidence so central to, and so controversial in, many class cases: statistical and formulaic proof. Like these forms of proof, proof that gives rise to a conclusive presumption was thought to have such strong, empirically grounded predictive power that it could substitute for a more fact-intensive evaluation of the facts at issue, in the service of conserving on the unpredictability, cost, and inconvenience of fact-finding in a world of imperfect institutions and process scarcity.

The bottom line: like rules governing admissibility of evidence, conclusive presumptions were treated as procedural rules defining the proper scope of an evidentiary hearing. The point bears special emphasis. When we turn to postratification evidence of the original understanding of the Due Process Clause, our modern habit of conceptualizing conclusive presumptions as rules of

144 Greenleaf, supra note 128, at 21.
145 Id. at 21–22; see also 1 Thomas Stairke, A Practical Treatise of the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings, at iii–iv (London, J. & W.T. Clarke 1833) (characterizing evidential presumptions of law as technical and “positive rules” that “exclude evidence” based on “utility and convenience”). This view was not so different from Gilbert’s a century earlier. Landsman, supra note 118, at 1158 (explaining that Gilbert “advocated presumptions because they could be precisely fashioned and applied in a fixed and mechanical manner,” resolving “doubtful questions without resort to an [imprecise and unpredictable] in-court testing of credibility”).

146 W. M. Best, A Treatise on Presumptions of Law and Fact: With the Theory and Rules of Presumptive or Circumstantial Proof in Criminal Cases 21–22 (Philadelphia, T. & J.W. Johnson 1845) (“Many presumptions, which, in earlier times, were deemed absolute and irrebuttable, have, by the opinion of . . . judges, acting on more enlarged experience, either been ranged among presumptiones juris tantum [rebuttable presumption] or considered . . . to be made at the discretion of a jury.”).
substantive law can blind us to the import of some nineteenth century due process cases. Because lawyers of the period conceptualized these presumptions as procedural rules regulating the scope of an evidentiary hearing, their treatment in the due process law of the period sheds light on early American lawyers’ understanding of *procedural*, not substantive, due process.  

Our focus, in this Section, however, is on the preratification law of evidence. And the preratification prevalence of conclusive presumptions, coupled with the way they were conceptualized, underscores the thoroughgoing degree to which eighteenth century lawyers thought that courts could ration parties’ opportunities to present probative evidence. In the old common law, there was simply no absolute right to present any particular quantum of evidence—everything depended on judicial judgment, seasoned by experience and sensitive to the need for predictability and conservation of judicial resources. And, in certain circumstances, these considerations led courts to dispense with corroborating evidence and *forbid*, not just restrict, the defendant’s power to submit *any* probative rebuttal evidence.

### B. Post Ratification Judicial Practice

The key question for us is the extent to which the Constitution altered this understanding. Antebellum courts had ample opportunity to confront that question. A tide of reform reshaped the American law of evidence between 1780 and 1850—offering litigants disadvantaged by the change an opportunity to cry a constitutional foul by invoking the protection of the Due Process Clause.  

Lord Mansfield was, arguably, the godfather of this era of reform. Consistent with his general “unwillingness ‘to be bound . . . by strict rules and precedents,’” Mansfield had “played down the authority of precedents in his . . . decisions.” The common law, including the law of evidence, he thought, “did not consist of particular cases, but in general principles”—reflecting “reason, equity, and

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147 *See also infra* Part IV.B.2–3 (elaborating on this point). For discussion of postratification cases involving conclusive presumptions, see *infra* notes 176–88, 217–23, 231 and accompanying text.

148 *See supra* notes 119–47 and accompanying text.

149 *See supra* notes 119–47 and accompanying text.

150 James Oldham, *Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders: The More Things Change, the More They Stay the Same*, 8 GREEN BAG 2D 269, 269 (2005); Wood, *supra* note 20, at 800 (“Mansfield played down the authority of precedents in his . . . decisions and instead emphasized reason, equity, and convenience . . . .”); *see also* CHRISTOPHER J.W. ALLEN, *THE LAW OF EVIDENCE IN VICTORIAN ENGLAND* 16 (1997) (Mansfield thought “[t]he law did not consist of particular cases, but in general principles that ran through the cases and governed the decision of them”).

151 Wood, *supra* note 20, at 800.
convenience”—that “ran through the cases and governed the decision of them.”

His views were shared by many late eighteenth-century lawyers, who believed the “principles of nature and reason—morality and logic—. . . were part of the common law and enabled it to operate as an instrument of reform.” It was a view stated forcefully in Blackstone’s Commentaries. Even though Blackstone had suggested common law courts must adhere to settled law, including “the formal part, or method of proceeding,” he celebrated the role that common law courts had played in reforming the adjective law, which in aggregate, he thought, had ensured “speedy and substantial justice, much better than could . . . be effected by any great fundamental alterations” by Parliament.

American courts took a page from Mansfield and Blackstone, the proponent of judicial discretion, not Blackstone the proponent of judicial stasis. State courts adopted new rules affecting admissibility, many of which expanded parties’ opportunities for proof. Federal courts happily applied them. Take Hinde v. Vattier. The defendant insisted that federal courts follow the “settled rule” that required the plaintiff to establish his chain of title by “producing. . . the [original] grant[s], or an official or sworn copy” of those grants. Ohio courts, however, relented in cases where those grants had gone missing, allowing recordings in Ohio’s “book of land laws. . . to be taken as sufficient evidence of the grant. . . .” And the federal trial court followed that rule, with the Supreme Court’s approval. It is “fully [in the power] of courts to depart from the settled law of evidence, said Justice Baldwin, so long as new rules are “reasonable” and “conducive to the convenience of suitors.”

Hinde reflects a small-bore relaxation in the rules governing admissibility; other changes—which evolved in response to the rise the adversarial system in the last two decades of the eighteenth century—were much more momentous. For example, as “a more aggressive attitude on the part of lawyers striving to keep

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152 Id. at 800.
153 ALLEN, supra note 150, at 16.
154 Id. at 15.
155 BLACKSTONE, supra note 137, at 267–68. For an illuminating discussion of this passage, see CARRESE, supra note 98, at 163–67 (Blackstone’s remarks “advocating liberal reform by judges amply indicates a project to cloak British politics and law with the moderating power of the judiciary”). As Christopher Allen notes, Blackstone’s views were common among lawyers of the period. ALLEN, supra note 150, at 19 (“Lawyers in the seventeenth and eighteenth centuries had preferred common law to statute as an instrument of reform because it was thought that statutes. . . were unable to deal efficiently with the variety of situations giving rise to legal disputes.”).
156 See Wood, supra note 20, at 801 (“In the decades following the Revolution, many Americans. . . took th[e] heightened interpretive power of English common law jurisprudence and ran with it[.] . . . sacrificing precedents for the sake of principle.”).
158 Id. at 399 (syllabus).
159 Id. at 401.
160 Id.
problematic testimony from the ears of the jury . . . manifested itself first in the
criminal courts and spread from there into civil litigation” in the last quarter of the
eighteenth century,161 courts softened the rigor of the best evidence rule,
admitting, in fits and starts, oral testimony to contravene written evidence, with the
expectation that vigorous cross-examination would discipline jurors.162

This is not to say that antebellum change was a one-way ratchet. Courts also
began to take a more exclusionary approach to more suspect oral testimony—
abandoning, for example, their once-permissive approach to the admissibility of
hearsay. Just twenty-five years before the American Revolution, John Langbein
finds that, in civil trials, there is “scant indication that anything resembling the . . .
hearsay rule was in force . . . .”163 Then, hearsay seems to have been admitted, he
says, with reduced “weight or credit,” not excluded entirely, as we do today; judges policed against its misuse by telling juries they shouldn’t place much
weight on it.164 The hearsay rule familiar to us—a formal exclusionary rule—
began to take hold in civil trials in the 1780s165 as judges, in face of an increasingly
aggressive bar, lapsed into passivity, giving up their old power to comment on the
evidence.166 Rather than police against misuse of hearsay by commenting on the
evidence, they barred lawyers from introducing it.167 Courts in the first quarter of
the nineteenth century continued to work out and refine the system of exceptions
with which we are familiar today.168

Even as they adjusted the strictures of the best evidence rule and tamped
down on the admissibility of hearsay, American courts, like their prerevolutionary

(1999).
162 See Landsman, supra note 118, at 1160–75.
163 Langbein, supra note 117, at 1187; see also id. at 1188 (noting “episodic
indications of official disquiet about hearsay” in the mid-eighteenth century); Gallanis,
 supra note 161, at 512 (in 1755, hearsay “was accepted almost without comment.”).
164 Langbein, supra note 117, at 1189–90; see also Gallanis, supra note 161, at 512
(discussing the eighteenth century trial judge’s “discretionary power” over “areas of
evidentiary practice governed today by strict rules,” including the law of hearsay).
165 Gallanis, supra note 161, at 551 (while very little development in the growth of
exclusionary rules occurred “between 1754 and 1780,” the 1780s “were a period of
considerable activity” and “by 1800 much of the modern approach to hearsay was already
in place”).
166 Langbein, supra note 117, at 1198.
167 See id. (suggesting that “[a]dversary procedure pressured the judge toward
passivity and broke up the older working relationship of judge and jury.”); see also ALLEN,
 supra note 150, at 186 (stating that as the adversarial system became entrenched by the
middle of the nineteenth century, the common law of evidence, applied to testimonial
evidence, “became increasingly exclusionary”).
168 Gallanis, supra note 161, at 502 (“[t]he period crucial to [the hearsay] rules’ full
development and consistent application” spanned “late eighteenth and early nineteenth
centuries”); id. at 535 (adding that in “the first quarter of the nineteenth century,” courts
“reinforced and refined” the major exceptions to the hearsay rule, while adding a few new
ones—notably the exception for necessity).
English precursors, continued to employ evidentiary presumptions to regulate, and sometimes restrict, opportunities for proof. Sometimes, courts adopted new rebuttable presumptions. For example, in *The Luminary*,\(^{169}\) in which the United States sought to condemn a ship that the government claimed had travelled under fraudulent papers to evade certain duties, Justice Story—over a typically vigorous dissent by Justice Johnson—adopted a presumption to ease the government’s burden of proof. The United States had raised a reasonable suspicion the papers were fraudulent, he argued, and so was entitled to a presumption of fraud, shifting the burden of proof to the parties opposing condemnation, because they had better access to relevant documentation establishing the chain of conveyance.\(^{170}\)

Similarly, in *American Fur Company v. United States*,\(^{171}\) a case in which the government sought forfeiture of a trader’s goods for engaging in proscribed trade in “ardent spirits” with Native Americans, the Court affirmed the trial court’s decision to allow the government a rebuttable presumption that the defendant had acted with the proscribed intent so long as the spirits were found mixed with goods intended for sale.\(^{172}\) This obviously furthered the deterrent policies of the forfeiture statute. And later courts saw these decisions as pragmatic innovations that assigned greater effect to plaintiff’s evidence “than it [had] possessed at common law.”\(^{173}\)

In prize cases, courts sitting in admiralty employed a mixed form of evidentiary presumption that combined rebuttable and irrebuttable features. Ships and cargoes found in the enemy’s possession were presumed to be property of the enemy, a presumption that could be rebutted by a neutral party claiming ownership rights to the prize. But admiralty courts limited rebuttal evidence, as a default

\(^{169}\) 21 U.S. (8 Wheat.) 407 (1823).
\(^{170}\) Id. at 411.
\(^{171}\) 27 U.S. (2 Pet.) 358 (1829).
\(^{172}\) Id. at 367–68.
\(^{173}\) See, e.g., State v. Cunningham, 25 Conn. 195, 203 (1856). *Cunningham* attributed the evidentiary alteration to Congress, not courts. *Id.* (attributing the evidentiary alteration in each case to the “legislature[”]). Yet, while both *The Luminary* and *American Fur Company* involved federal statutory violations—a violation of section 27 of a 1792 act concerning registration of ships (*The Luminary*) and a violation of an act regulating trade with Native Americans (*American Fur Company*)—the presumptions adopted in each case were not commanded by the statutes at issue, which were silent with respect to how the statutory violations at issue could be proven. *See, e.g.*, An Act concerning the registering and recording of ships or vessels, ch. 1, § 27, 1 Stat. 287 (1792) (providing that the punishment for use of a “fraudulent[]” certificate of registration was forfeiture of the ship, without providing how fraud may be proven); An act to regulate trade and intercourse with Indian Tribes, ch. 13, § 21, 3 Stat. 682 (1802) (barring transportation of “spirituous liquors” into Indian territory for the purpose of “vending or distributing” them, without specifying how that intent might be proven). The presumptions adopted in each case were, rather, a judicial gloss intended to further the statutes’ purpose. In effect, in these cases, early courts were acting much like modern courts in employment discrimination suits, which adopt evidentiary presumptions to further the goals of Title VII. *Cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 416–17 (1975) (federal courts have discretion to fashion rules governing award of back pay, which must be guided by the “large objectives” of Title VII).
matter, to documentary evidence found on the ship and the testimony of the captured crew. In effect, the absence of onboard documentary evidence favoring the claimant gave rise to a default conclusive presumption against the claimant, who it was said, had no absolute right to introduce “farther proof”—for example, probative documents located on other ships. The right to a more particularized evidentiary hearing was, instead, committed to judicial discretion.

Chief Justice Marshall put his imprimatur behind the continuing use of irrebuttable presumptions in *Hamilton v. Russell,* a once controversial but now forgotten decision, in which the Chief Justice addressed how litigants could prove violations of Virginia’s 1779 fraudulent conveyance act. The act voided debtors’ sales of their property to third parties when the sale was made with the intent to avoid the reach of creditors. The statute, like most states’ fraudulent conveyance statutes of the time, reproduced the text of the 1571 English fraudulent conveyance act, which didn’t specify how fraudulent intent might be proven. And, at the time of the Virginia statute’s enactment in 1779, English authorities hadn’t resolved that question.

The conveyance at issue in *Hamilton* certainly looked suspicious. The debtor, Thomas Hamilton, had sold his brother property sought by Hamilton’s creditors, but his brother conveniently allowed him to keep the property. The creditor, in turn, argued the Supreme Court should follow the interpretation in *Edwards v. Harben,* a 1788 King’s Bench decision construing the English fraudulent conveyance act (a decision that postdated the Virginia statute’s enactment by a decade). In it, Justice Buller had held that possession of property should be treated as “clear and conclusive evidence” of the seller’s fraudulent intent. Hamilton, in turn, urged the Supreme Court to disregard *Edwards* and give him an opportunity to prove the sale of the property to his brother was not fraudulent. “Fraud or no fraud,” he argued, is for the jury.

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174 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 458, 461–65 (1846).
175 Id.
176 5 U.S. (1 Cranch) 309 (1803).
177 Virginia’s statute read: “Every gift, grant, or conveyance of lands, tenements, hereditaments, goods or chattels, . . . contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions . . . or to defraud or deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them, shall be . . . deemed . . . clearly and utterly void.” An Act to Prevent Frauds and Perjuries, Rev. Bills of Va., Ch. XXV (1779).
178 The King’s Bench would not resolve the question until 1788. See infra note 180 and accompanying text.
179 Hamilton, 5 U.S. at 310.
181 Hamilton, 5 U.S. at 312 (transcript) (noting the King’s Bench had held that “[i]f the possession be inconsistent with the deed, it is clear and conclusive evidence of fraud.”).
182 Id. at 314 (transcript) (“Fraud or no fraud, is a point to be decided by the jury and not by the court. . . . The possession of the vendor is not . . . a fraud, but only a
The creditor’s position was controversial. North Carolina courts, three years earlier, had adopted the debtor’s position. We “cannot agree,” said Justice Taylor in *Vick v. Kegs*, 183 “with [Edwards] that the property going otherwise as to its possession than the deed points out is absolutely fraud”; it is only a “mark of fraud” to be considered by the fact-finder.184 Other state courts would stake out similar positions, some in unusually heated opinions. The Alabama Supreme Court complained, for example, of the “evil” occasioned by deference to the high-toned English construction, which usurped the fact-finding “genius” of the jury.185 And that construction warred, the court said, with the text of the fraudulent conveyance act, which, by hinging the validity of the conveyance of the conveyer’s “intent” suggested the need for a particularized factual inquiry into the conveyor’s state of mind.186

Even so, in *Hamilton*, Marshall sided with the creditor. The best construction, said Marshall, furthers the statute’s overarching purpose—preventing fraudulent conveyances.187 And those conveyances, he said, are more likely to be deterred if a sale unaccompanied by a transfer of possession is treated as conclusive evidence of fraud.188 The reasons are obvious. Opening the trial to a more fact-intensive

circumstance from which, connected with others, the jury may presume the fact of a fraudulent intent.”).

183 3 N.C. (Cam. & Nor.) 121 (1800).
184 *Id.* at 121–22.
185 Hobbs v. Bibb, 2 Stew. 54, 61 (Ala. 1829) (“How, then, can the Court . . . say that if the possession remains with the vendor, it is conclusive evidence of fraudulent intent, not to be controverted by any testimony to shew the fairness of the transaction? It is contrary to the genius of our government . . . that Courts should encroach on the peculiar privileges of the jury, in determining on the facts. . . . . Such assumptions of authority render the boasted trial by jury a mere farce. This is an evil that has, to some extent, crept into the judicial tribunals of our own country, from too close an adherence to English authority.”).
186 *Id.* at 60 (“On reading this statute it does seem that the unsophisticated mind would be much at a loss to imagine, by what possible artificial rule of construction invented by the ingenuity of man, a contract entered into with good faith, and for a fair and valuable consideration, could be brought within its proscriptive influence. He would at once say that the statute forbids no honest transaction, it only proscribes fraud. The intention of the parties to the contract is . . . clearly one of fact to be determined by the jury”); *id.* at 62 (“If sound policy requires that he who has once owned a chattel shall never have possession of it after he has sold it, by hire, loan or otherwise, it is a proper subject for the attention of another branch of the government. Courts should never undertake to distort the words of a statute, to effect any object, however salutary.”).
187 *Hamilton*, 5 U.S. at 318 (the best construction “best promote[s]” the “intent of the statute” by “most effectually prevent[ing]” fraudulent conveyances).
188 *Id.* (“[F]raudulent conveyances, which are made to secure to a debtor a beneficial interest while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud, unless possession ‘accompanies and follows the deed.’”).

Some might read the decision as an interpretation of the substantive elements of the cause of action. This, though, anachronistically reads modern concepts into the decision. Because contemporary sources treated presumptions as “evidentiary” judgments committed
investigation of the debtor’s intent would increase the cost of litigation for creditors, increase the risk of erroneous or biased decisions against creditors by juries, and therefore increase the incentives for debtors to attempt fraudulent conveyances to third parties.

The upshot: In the antebellum period, parties’ opportunities to present proof expanded along some dimensions. They constricted along others. And, in the interest of economy and public policy, American courts continued to recognize “presumptive evidence” as means of regulating, and sometimes limiting severely, parties’ opportunities to present evidence.\(^{189}\)

For our purposes, the crucial point of consistency with the old common law was courts’ view of their own power over evidence. Lawyers of the period were conscious they were living through a dynamic period in the law of evidence,\(^ {190}\) and they were equally conscious that judges were responsible for that dynamism. Early nineteenth-century treatise writers, for example, acknowledged that evidence law was a “judicial development,” and much of it was of recent vintage.\(^ {191}\) Yet, federal and state courts gave no hint that their respective due process guarantees either limited, or compelled, courts’ departures from the common law baseline. The legal weight and effect given to evidence was said to be a matter for reasoned “judicial discretion,”\(^ {192}\) in light of the “great principles” of reason, equity and convenience that had always informed the common law of evidence.\(^ {193}\)

to judicial discretion subject to the loosely guiding principles of the common law, and the oral argument in the case argued the case for a presumption on these terms (by characterizing discrepancy between possession and the deed as “conclusive evidence” of fraud, see infra note 183), Marshall’s opinion is better seen as an exercise of traditional judicial judgment in the field of evidence, albeit one guided by his understanding of the goals of the statute, rather than what we would characterize as a construction of the proper definition of the “substantive” right created by the statute.

\(^{189}\) Antebellum courts, said the English commentator W. B. Best, were “slow[er] to recognize presumptions as irrebuttable” than their seventeenth and eighteenth century precursors. Best, supra note 146, at 22 (“On the whole, modern courts are . . . disposed rather to restrict, than to extend, their number.”).

\(^{190}\) See, e.g., THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE, at vii (2d ed. London 1804) (the “rules of evidence [concerning oral testimony] have been so much altered, and so much light . . . thrown on them by modern decisions, that, comparatively, little is to be collected from ancient books that is satisfactory on the subject”); see also ALLEN, supra note 150, at 25 (the proliferation of evidence treatises in the early nineteenth century reflected a “change in the conception of the case law.”).

\(^{191}\) See ALLEN, supra note 150, at 24 (nineteenth century commentators “acknowledged and approved of judicial development of evidence law” and recognized much of that law was a “modern development”); see, e.g., BEST, supra note 146, at 36 (“[O]ur system of judicial evidence is . . . spoken of as something altogether modern.”).

\(^{192}\) See United States v. Lyon, 25 F. Cas. 249 (D. Mich. 1840) (No. 15,651) (finding Congress is without power to limit “the exercise of judicial discretion” concerning the weight and effect of evidence).

\(^{193}\) Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46–47 (1825) (absent legislation, courts must exercise discretion to develop “modes of proceeding” based on “great
Indeed, to the extent courts and commentators acknowledged the Due Process Clause in the field of evidence, it was in the course of denying that the clause compelled courts to retain, add to, or take away traditional opportunities to present proof: There was, as Thomas Cooley summarized the state of the law at the close of the antebellum period, no “vested right” to be governed by any particular rules of evidence.194

C. Legislatures and Evidence

Even if antebellum courts didn’t seem to think due process restrained their own common lawmaking in the field of evidence, they didn’t think the Due Process Clause was inert in that field. It just had bite on a different branch—the legislature.

principles” of the common law); see also Odgen v. Saunders, 25 U.S. (12 Wheat.) 213, 349 (1827) (Marshall, C.J., concurring) (Congress may regulate “the remedy and mode of proceeding” in federal courts, including by “prescribing the evidence [that] shall be received . . . and the effect of that evidence”). For other statements equating the common law with principles of reason or common sense, see Hinde v. Vattier, 30 U.S. (5 Pet.) 398, 401 (1831) (noting state courts’ power to adopt new rules of evidence consistent with “reason[]” and the “convenience of suitors”); GREENLEAF, supra note 128, at 18–19 (principles of presumptive evidence reflect the “first principles of justice; or the laws of nature; or the experienced course of human conduct and affairs”); William David Evans, Appendix to 2 M. Pothier, A TREATISE ON THE LAW OF OBLIGATIONS 142 (W. Evans trans., 1806) (advocating a pragmatic approach to the best evidence rule, and noting that the excellence of the law of evidence consists “in requiring as much certainty and regularity as is consistent with general convenience, and in admitting as much latitude to private convenience as is consistent with general certainty and regularity”); see also ALLEN, supra note 150, at 16 (for many eighteenth-century English lawyers, “[t]he law did not consist in particular cases, but in general principles that ran through the cases and governed the decision of them”).

194 Cooley, supra note 133, at 367 (“It appears also that a right to be governed by existing rules of evidence is not a vested right.”). The striking absence of any concern for due process in Hamilton suggests this was Chief Marshall’s view, as well. To be sure, Hamilton involved a Virginia statute, and the Virginia Constitution’s due process clause, at the time, guaranteed due process only in cases that threatened deprivations of liberty and therefore had no applicability to a civil case involving property rights. See Siegel, supra note 22, at 33 n.160. Even so, the litigants were proceeding in federal court and appealing to federal judicial power, and so one would expect someone would have invoked the Fifth Amendment if there was any reason to think the federal Due Process Clause might plausibly restrain federal courts’ recognition of such presumptions. The fact that no one ever broached the issue suggests that neither Marshall nor the parties in the case viewed the federal Due Process Clause to incorporate any such restraint. Compare Livingston v. Moore, 32 U.S. 469, 549–53 (1833) (noting the parties had raised numerous state and federal constitutional arguments against a state statute directing that an executive settlement of accounts established a lien on private property in favor the state, before engaging in a choice-of-constitutional-law analysis).
Due process, antebellum courts uniformly held, guarantees a judicial, not a legislative, hearing—that is, an opportunity for exercise of “judicial discretion,” and judicial judgment, with respect to what happened and what the law required given the facts of the case before depriving someone of her property. The due process right to a judicial hearing, in turn, was thought to dictate certain features of judicial proceedings. A judicial hearing required the presence of adverse parties—an actor and reus—brought before the court through service of process. Ex parte proceedings, accordingly, were not properly “judicial.”

A judicial hearing also required a judex, or an impartial judge excising duly constituted judicial power, who “hears before [he] condemns.” But the right to a judicial hearing had its greatest bite as a qualified limit on the legislative power. Legislatures were not courts. And they could not usurp the judicial function by declaring private rights in an individual case through a legislative judgment.

For an excellent discussion of this case law, see also Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 590–91 (2007) (“[T]he legislature could not conclusively determine what have come to be called ‘adjudicative facts’”; with respect to those questions, “courts had to be able to exercise their own judgment . . . about . . . relevant details of [the parties’] individual interaction”).

See, e.g., Nelson, supra note 195, at 574 (observing that in the state and federal systems “form generally required the presence (actual or constructive) of adverse parties” and that “[p]roceedings that did not satisfy these minimal requirements were often said to be . . . not properly ‘judicial’”).

3 BLACKSTONE, supra note 137, at 24.

United States v. Klein, 80 U.S. (9 Wall.) 128, 147 (1871) (the power to “give the effect to evidence which, in its own judgment, such evidence should have” is an essential attribute of the “judicial” power); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819) (argument of Daniel Webster).

See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 13 (14th ed. 1896) (due process means law “in its regular course of administration, through courts of justice”); THOMAS MCINTYRE COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 319 (1880) (“The legislature makes the laws, but cannot pass judgments or decrees, or make a law that is such in substance.”); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 676–77 (1857) (“by the right to the law of the land is meant the right to judicial procedure, investigation, and determination, whenever life, liberty, or property is
of Robinson v. Barfield (1818), a woman and her husband had executed a deed conveying their property. But a North Carolina statute dictated that the conveyance of a married woman is valid only if she is examined in a private examination by a judge, to ensure her part in the conveyance was voluntary. Yet, the woman in Barfield had died before she could be subject to an in camera judicial examination. The grantee and her husband successfully petitioned the North Carolina legislature to fix this problem by passing a special bill declaring the deed valid and quieting title in the grantee.

The woman’s heirs sued, arguing that the special bill was an impermissible legislative decree. The North Carolina Supreme Court agreed. “[T]he Legislature,” wrote Judge Daniels in the North Carolina Supreme Court’s decision upholding their challenge, “has not the power to take the lands of A. and give them to B.” The transfer of property from one individual, who is the owner [under generally applicable legal principles], to another individual, is a judicial and not a legislative act.” As the New York Supreme Court would later put the same point in a different case, the transfer of property requires a proceeding in which it is “ascertained judicially that [a party] has forfeited his privileges. . . . [i]t cannot be done by mere legislation.”


Taylor v. Porter, 4 Hill 140, 146 (1843). For a sample of similar statements before and after Barfield, see Wynehamer v. People, 13 N.Y. 378, 433 (1856) (“[B]oth courts and commentators in this country have held that [the due process clause] . . . secure[s] to every citizen a judicial trial, before he can be deprived of life, liberty or property.”); Univ. of N.C. v. Foy, 5 N.C. (1 Hayw.) 58, 87–89 (1805) (due process protects vested rights to property until “the judiciary of the country in the usual and common form pronounce them guilty of such acts as will . . . amount to a forfeiture”); Norman v. Heist, 5 Watts & Serg. 171, 173 (Pa. 1843) (due process requires deprivation “by the judgment of his peers,” not “an ex post facto . . . [legislative] decree made for the occasion”); State v. Heyward, 37 S.C.L. (3 Rich.) 389, 410–12 (1832) (“a corporation can only be deprived of its powers, rights, privileges, and immunities, by a judgment of forfeiture, obtained according to the law of the land,” meaning “a trial had, and a judgment pronounced, in the court of law of this State”).
As the antebellum period wore on, courts expanded on this idea, relying on the Due Process Clause and its state analogues to bar not only special bills declaring special rights in individual cases, but, more broadly, retroactive alteration of laws in a way that provided that “past acts meeting the new requirements had already effected a transfer of property.”\(^{207}\) The rule against retroactive divestment of “vested rights” in effect acted as a prophylactic rule that prevented legislatures from retroactively manipulating generally applicable substantive standards in a way that would foreseeably change the outcome in identifiable disputes.\(^{208}\)

Initially, however, some courts refused to recognize due process restrictions on legislative power to regulate remedies, including evidence. While legislatures could not enter legislative decrees by dictating the results in individual cases, legislatures had, said Justice Marshall, the “acknowledged power” to regulate “the remedy and mode of proceeding” in federal courts, including by “prescribing the evidence which shall be received . . . and the effect of that evidence.”\(^{209}\) Congress and state legislatures “may,” as one court put it, “so change the rules of evidence as to make it difficult to establish our rights.”\(^{210}\) Indeed, legislatures could

\(^{207}\) Mendelson, supra note 199, at 126–27 (the antiretroactivity principle was an organizing principle of pre-Lochner due process cases, rooted in a separation of powers-influenced understanding of the right to a hearing); Woolhandler, supra note 199, at 1018–25 (same); Siegel, supra note 21, at 56 (between 1818 and 1829, “most, if not all, courts used the concept of [the distinction between judicial and] legislative power to build a textually based constitutional prohibition of retrospective laws”); Kainen, supra note 199, at 88–89 (“the principle of non-retroactivity” was the primary organizing principle in the Court’s pre-Lochner due process cases).

\(^{208}\) See, e.g., Mendelson, supra note 199, at 127 (the Court’s vested-rights retroactivity cases were aimed at preventing legislatures from affecting the outcome in “particular cases”); see also Gordon S. Wood, The Origins of Vested Rights in the Early Republic, 85 Va. L. Rev. 1421, 1439 (1999) (the vested rights doctrine reflected a concern with preventing state legislatures from “meddling” in “disputes between contending parties”); Woolhandler, supra note 199, at 1025 (the vested rights doctrine was wrapped up in separation of powers concerns that retroactive legislation usurped the judicial role over cases and controversies). Courts of the period also thought retroactive confiscation of property was a form of “punishment,” which could only be imposed after a judicial hearing. EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT 93 (1948).

\(^{209}\) Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 349 (1827); see also Gibbs v. Gale, 7 Md. 76, 87 (1854) (the legislature has the power “to abolish or modify [a rule of evidence] in every case, or to modify and annul it under particular circumstances”).

\(^{210}\) Edwards v. Pope, 4 Ill. (3 Scam.) 465, 468 (1842); Oriental Bank v. Freeze, 18 Me. 109, 112 (1841) (“When a person, by the existing laws, becomes entitled to recover a judgment . . . he is apt to regard the privilege, which the law affords him, as a vested right, not considering that it has its foundation only in the remedy, which may be changed, and the privilege thereby destroyed.”).
retroactively impose new rules of evidence even in pending cases. “It is not our province,” one judge put it bluntly, “to determine the expediency of such legislation [dealing with adjective law]; that is a matter confided to another and independent branch.”

The latitude was often explained by the notion that remedies were separate from rights. While legislatures could not usurp a “judicial” disposition of rights by retroactively declaring that A has a right to B’s property, changes in evidence were said to affect the “remedy,” which was distinct from the “rights” in controversy. Changes in the law of evidence, even retrospective ones, therefore did not impinge on a “judicial” disposition of private rights.

Even so, this deference principle was in tension with the principle that legislatures could not deprive people of property through “legislative decrees.” After all, case-specific legislative changes in the rules of evidence could certainly dictate the outcome of cases. Indeed, it was hard to distinguish the special bill found unconstitutional in Barfield from a statute proposing case-specific rules of evidence, as counsel for the grantees defending the bill noted.

True, the North Carolina bill had transferred property rights from A to B, by validating the deed and overruling the operation of the ordinary law. But, because the bill included legislative findings that the wife’s conveyance had been attested by two witnesses out of court and these witnesses supported the conveyance’s validity, it might also have been characterized as a declaration of special, “for this case only” evidentiary rule. “Cannot the legislature,” argued counsel for the grantees,

say, that other proofs than those required by existing statutes, shall be good as to the execution of deeds by feme-coverts? If so, could not the Legislature of 1788, say, that the acknowledgment of Mrs. Brown to the two witnesses to the deed, ‘of her having executed it freely and voluntarily,’ should be deemed good evidence of the execution of the deed? And having said so, shall not Courts of Justice be bound by it? . . . The Legislature cannot exercise judicial powers, properly speaking; but they can . . . establish the rules of evidence in all cases whatsoever.

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211 Webb v. Den, 58 U.S. (17 How.) 576 (1854); see also Bartlett v. Lang, 2 Ala. 401, 406 (1841) (“A statute which merely changes the remedy, it has been often holden . . . may, where such seems to have been the intention of the legislature, operate retrospectively.”).

212 Gibbs, 7 Md. at 88.

213 See Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819) (“The distinction between the obligation of a contract, and the remedy given by the legislature . . . exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct”).

214 See Cooley, supra note 133, at 367 (rules of evidence “pertain to the remedies which the State gives to its citizens, and are not regarded as . . . being of the essence of a right” and “are therefore at all times subject to modification and control by the legislature”).

215 Barfield, 6 N.C. at 401 (syllabus).
Courts eventually resolved the tension by imposing some limits—with fuzzy outer edges—on legislative interference with judicial judgments about the inferences juries could draw from evidence. The first move came in the bluntest sort of case. Legislatures, rather than explicitly decreeing that A receive the property of B, as in Barfield, declared the existence of facts that would entitle A to relief from B. This, in turn, invited courts to treat the legislative findings as presumptive evidence of the truth of those facts in an ensuing lawsuit. As the Court of Appeals of Kentucky said, in the course of rejecting this type of gambit: “Once adopt the principle that such facts are conclusive or even prima facie evidence against private rights, and many individual controversies may be . . . drawn from the functions of the judiciary into the vortex of legislative usurpation.”

It was a short step from there to reject not only legislative efforts to “declare” facts in particular cases, but also legislation mandating that courts give conclusive weight to certain classes of evidence. The problem was presented in a series of cases challenging federal and state statutes making various official documents created by executive officials “conclusive evidence” of rights to property. For example, statutes treating tax deeds prepared by a public auditor and given to buyers of property seized to satisfy a tax delinquency as “conclusive evidence” of valid title or of the property’s value. The obvious problem with these statutes was that the legislature had substituted the judgment of executive officials for judicial judgment about adjudicative facts. In doing so, the legislature allowed executive officials to dictate the outcome of individual cases.

As counsel put it in Rhinehart v. Schuyler, an illustrative Illinois case, “due process of law” requires “judicial process” and “judicial judgment” prior to the deprivation of property—which means that an opportunity has to be afforded the owner of the seized property to appear and “be heard in his defense”—that is, to appeal to judicial judgment, after a “judicial investigation” of the facts. “[T]he exercise of a power of inquiry into, and a determination of facts between debtor and creditor . . . conclusive upon the rights of all persons affected by it . . . makes it judicial,” not an executive or legislative power. Accordingly, that power must remain with the judiciary. Decisions by public auditors therefore cannot be made conclusive—they can receive their effect only “from judicial confirmation and

216 Elmondorff v. Carmichael, 13 Ky. (3 Litt.) 472, 480 (1823); see also Parmelee v. Thomson, 7 Hill 77, 80 (N.Y. 1845) (citing Elmondorff with approval and noting “the legislature has no jurisdiction to determine facts touching the rights of individuals.”).

217 See, e.g., Wantlan v. White, 19 Ind. 470, 472 (1862) (statute making evidence conclusive is void because a declaration “would seem to be a judicial act”); Groesbeck v. Seeley, 13 Mich. 329, 332 (1865) (making auditors’ deeds conclusive evidence of title unconstitutionally deprived the claimant of a judicial “hearing”); see also Cooley, supra note 133, at 367–69 (discussing cases).

218 7 Ill. (2 Gilm.) 473 (1845).

219 Id. at 485 (syllabus).

220 Id.

221 Id.
sanction.”\textsuperscript{222} If it were otherwise, “[t]he judiciary would have nothing to do but to register legislative edicts.”\textsuperscript{223}

In the two decades bookending the Civil War, the Supreme Court extracted from these cases some general principles with fuzzy edges. With respect to deprivation of private rights, it declared in \textit{Murray’s Lessee v. Hoboken Land and Improvement Company},\textsuperscript{224} and \textit{Hurtado v. California},\textsuperscript{225} due process requires a “judicial” hearing.\textsuperscript{226} A hearing, to be properly “judicial,” the Court suggested in \textit{Hurtado} and \textit{United States v. Klein},\textsuperscript{227} requires that courts exercise their own “deliberation and judgment” about the “effect of . . . evidence” concerning adjudicative facts in individual cases and controversies.\textsuperscript{228}

In \textit{Hurtado}, the Supreme Court summed up the basic points of agreement in this century-long train of decisions. Legislatures cannot declare special law, or special remedial rules, for “particular case[s]” through “legislative judgments and decrees,” bills of attainder, “acts reversing judgments,” or “acts directly

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{222} Id.
\item \textsuperscript{223} Id. The court in \textit{Rhinehart} dealt with the problem by finding that the auditor’s deed created a rebuttable presumption that the tax sale was lawful, which the former owner could rebut in an ejectment action. \textit{Id.} at 528. The Supreme Court, a decade later, “acknowledged the traditional framework,” see Nelson, \textit{supra} note 195, at 586, and solved the due process problem by holding that framework applied in cases involving a “private right,” but not “public rights,” such as proceedings involving the collection of tax revenue. \textit{Den ex dem Murray v. Hoboken Land & Improvement Co.}, 59 U.S. (18 How.) 272, 284 (1855). As Caleb Nelson notes, this “deviation from the traditional framework” proved to be “quite limited.” Nelson, \textit{supra} note 195, at 585.
\item \textsuperscript{224} 59 U.S. (18 How.) 272 (1855).
\item \textsuperscript{225} 110 U.S. 516 (1883).
\item \textsuperscript{226} \textit{Murray}, 59 U.S. at 280 (“'[D]ue process of law’ generally . . . [requires] a trial according to some settled course of judicial proceedings.”); \textit{Hurtado}, 110 U.S. at 533 (suggesting due process is generally satisfied by a “ trial . . . according to the settled course of judicial proceedings,” in which “provision has been made . . . for giving [the party] an opportunity to be heard in his defence [sic]; for the deliberation and judgment of the court”).
\item \textsuperscript{227} 80 U.S. (13 Wall.) 128 (1871).
\item \textsuperscript{228} \textit{Hurtado}, 110 U.S. at 533, 535 (due process requires a “judicial” trial, which “hears before it condemns which proceeds upon inquiry,” and provides room for judicial “deliberation and judgment”); \textit{Klein}, 80 U.S. at 147 (the power to “give the effect to evidence which, in its own judgment, such evidence should have” is an essential attribute of the “judicial” power). \textit{Klein}, in particular, built on the antebellum state decisions invalidating statutes legislating conclusive presumptions: It struck down a postwar federal statute that instructed courts to treat a presidential pardon as “conclusive evidence” that the recipient had aided the Confederacy, emphasizing, in the process, that decisions about the “effect of . . . evidence” were an attribute of the judicial power, which must be left to the judiciary. \textit{Id.} For further discussion, see also Nelson, \textit{supra} note 195, at 590–91 (according to the nineteenth century understanding of due process and separation of powers “[w]hen core private rights were at stake, courts had to be able to exercise their own judgment . . . [about] relevant details of their individual interaction”; as a result “the legislature could not conclusively determine what have come to be called ‘adjudicative facts’”).
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\end{footnotesize}
transferring one man’s estate to another.” And the Court suggested a general principle that flowed from, and explained, these points of agreement. Congress must define rights and regulate remedies in a way that leaves courts room to “hear” before “condemning”—that is (as the Court had emphasized in Klein) to independently assess the weight and “effect of evidence” in individual cases and controversies.

D. Due Process and Judicial Independence

In the end, viewed against the pattern of early history of construction of the Due Process Clause, the idea pushed by defense counsel in Dukes v. Wal-Mart Stores, Inc., that due process guarantees an individual right to a deeply contextual, especially fact-intensive evaluation of the underlying claim is anachronistic. Due process did guarantee civil defendants a right to a right to be “heard” before a

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229 Hurtado, 110 U.S. at 536.
230 Id. (while each state “prescribes its own mode of judicial proceeding,” due process forbids states from adopting “special rule[s] for a particular person or a particular case”; rather they must regulate rights and remedies in a “general way,” conducive to the “public good,” ensuring space for courts to “hear” before “condemning”).
231 Klein, 80 U.S. at 146–47 (insisting Congress must leave decisions about the “effect of . . . evidence” to the judiciary). This principle, applied to conclusive presumptions, had fuzzy edges. Rhinehart and its federal companion, Klein, never specified whether the problem with legislatively enacted conclusive presumptions was a general one or was confined to the facts of either case.

Portions of each decision suggest the courts viewed the problem as a general one, stemming from the presumptions’ thoroughgoing intrusion on the judicial power to investigate and weigh the evidence. See, e.g., id. at 147 (stating flatly that legislation giving a “conclusive” effect to evidence categorically infringes on the “judicial” power). However, both courts may have been particularly troubled for a different, narrower reason: the presumption’s operation in each case effectively allowed the political branches to dictate the effect of individual cases in advance, making an end-run around the due process-derived rule forbidding executive or legislative “decrees.”

In Rhinehart, for example, the presumption gave an executive agent, a public auditor, the final word about the validity of particular tax seizures. In Klein, the Court considered the constitutionality of a legislatively mandated conclusive presumption that persons who had received a post-Civil War presidential pardon were guilty of aiding the Confederacy and therefore not entitled to the return of or compensation for seizure of their property. Indeed, in Klein, the statute was enacted after the respondent, Klein (the administrator of the estate of a pardon recipient), had prevailed against the United States in the Court of Claims on just such a property-recovery claim; the statute dictated the outcome of the United States’ appeal in the United States’ favor. See, e.g., David P. Currie, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 311 n.173 (1985) (noting one basis for Klein, although in his view not the best, was that the “United States was attempting to decide its own controversy” by “set[ting] aside a decision already rendered”). In either case, the presumption not only deprived courts of an opportunity to make an independent judgment about the effect of evidence, but made the political branches the ultimate arbiter of their own controversies. Id. at 311 n.173.
judge “in defense.” But that right was not conceived as a personal right to a maximally fact-intensive evidentiary hearing. It was a structural right, which selected the institution that should make the final judgment in individual case and controversies: a deliberative judiciary, acting free from legislative influence or control.

In this, the Due Process Clause was construed in a way that paralleled the focus of other provisions in the Bill of Rights, which, Akhil Amar has shown, were “more structural than not.” Amar also shows that the Bill of Rights was in many respects more majoritarian than counter-majoritarian. But the antebellum construction of the Fifth Amendment’s Due Process Clause was counter-majoritarian—it envisioned the judiciary as a buffer between individuals and the popular elected branches.

This construction was rooted in antecedents of the Due Process Clause, like Magna Carta. But an account that explains the antebellum construction solely by reference to the clause’s formal antecedents obscures the deeper reasons for its appeal to antebellum lawyers. That appeal was rooted in a larger vision of the judiciary’s role in a system of separated powers with wide currency in the legal profession during and after the framing period.

John Adams and Alexander Hamilton were the framers most associated with this theory. “[L]ittle that Adams ever wrote,” David McCullough notes, “ever had such effect as his Thoughts on Government,” his tract that made the plea for an independent judiciary. In it, Adams made the usual argument for judicial independence: it was essential to judicial review of the constitutionality of legislative and executive actions. But, echoing Blackstone, he also stressed that an independent judiciary “experience[d] in the laws, of exemplary morals, invincible patience, unruffled calmness and indefatigable application” would ensure political “stability” and “upright and skillful administration of justice.”

In the Federalist Papers, Hamilton elaborated it is “not with a view to infractions of the constitution only that the independence of the judges may be an

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232 See, e.g., Hurtado, 110 U.S. at 533.
234 AMAR, supra note 18, at xiii.
235 Id. at xiii, 137–294.
238 Id. at 207. For a discussion of Blackstone’s views, see supra note 155 and accompanying text.
essential safeguard,” he wrote in Federalist 78.\textsuperscript{239} The “firmness of the judicial magistracy,” he said, “is [also] of vast importance in mitigating the severity and confining” the effect of “unjust and partial laws” enacted under the influence of popular passions.\textsuperscript{240} At the same time, an independent judiciary is best fit to exercise the “discretion” to construe the law in line with “reason” and “propriety” and to conduct the “administration of justice” toward the end of “utility.”\textsuperscript{241}

The judiciary, in effect, would guard against popular whims and legislative “ill humor” by “confining” and “modera[ting]” unjust laws.\textsuperscript{242} And, in line with Blackstone’s account of the English judiciary, it would also be a mildly progressive influence: The judiciary would take the lead in improving the administration of justice through its independent power to administer the judicial system.\textsuperscript{243} It would mold the foundation on which legislatures might build.

This benign view of the judiciary wasn’t universally shared among the framers. But it was Adams and Hamilton who won the day, as Jefferson, who came to oppose their vision of a quietly dynamic judiciary, conceded late in his life: “[A]ll the young brood of lawyers,” Jefferson complained to Madison in 1826, subscribe to Blackstone’s “honied Mansfieldism,”\textsuperscript{244}—that is, the view associated with Adams and Hamilton in the framing era colonies, but with Mansfield and Blackstone in England, favoring a quietly innovating judiciary that exercises “discretion” to improve law “in accord with equity, good sense, and convenience.”\textsuperscript{245}

\textsuperscript{239} The Federalist No. 78 (Alexander Hamilton), reprinted in 1 The Papers of Alexander Hamilton 662 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (1788).

\textsuperscript{240} Id.

\textsuperscript{241} Id. at 439, 442. For an insightful discussion of Hamilton’s defense of an independent judiciary, see Carrese, supra note 98, at 197–207. Adams and Hamilton echoed the establishment view of the preratification English legal profession, and anticipated the view of the American legal profession postratification. See Allen, supra note 150, at 19 (“Lawyers in the seventeenth and eighteenth centuries had preferred common law to statute as an instrument of reform because it had been thought that statutes . . . were unable to deal efficiently as with the variety of situations giving rise to legal disputes.”); Wood, supra note 20, at 800–01 (American lawyers of the period thought that “judges in their multiplicity of piecemeal decisions could control and transform the law more rationally” than legislatures).

\textsuperscript{242} See Hamilton, supra note 239, at 440.

\textsuperscript{243} Alexander Hamilton, Farmer Refuted, reprinted in 1 The Papers of Alexander Hamilton, supra note 239, at 137 (“All Lawyers agree that the spirit and reason of a law, is one of the principle rules of interpretation . . . .”). For discussion of Blackstone’s influence on Hamilton, see Carrese, supra note 98, at 187–90 (at the founding, “Blackstone’s Commentaries was replacing Coke-Littleton as the basic law text, and Hamilton seems to have discerned the quiet emphasis that both English jurists placed on an effectively independent, moderating judiciary”).


\textsuperscript{245} See, e.g., Posting of Gordon S. Wood re: “Mansfieldism,” H-Net Discussion Network (Aug. 17, 2005), http://h-net.msu.edu/cgi-bin/logbrowse.pl?tx=vx&list=h-
The antebellum construction of due process reflects the degree to which this view of the judiciary’s role captured the imaginations of antebellum American lawyers. It also illustrates one way in which antebellum lawyers envisioned courts would take on this role. Some modern commentators suggest courts should boldly “improve” the law by updating statutes to reflect contemporary policy preferences.\textsuperscript{246} The antebellum due process cases, instead, emphasized courts’ power to renovate and mitigate the law’s severity in a more cautious, less nakedly legislative, way—through their power over evidence, including their power to limit opportunities for proof by adjusting parties’ evidentiary burdens or adopting legal presumptions when necessary to promote predictability, protect against biased fact-finding, and conserve on the costs of jury trial, much as Marshall did in Hamilton v. Russell.\textsuperscript{247}

This vision was countermajoritarian, but not aggressively so. The legislature had the acknowledged authority to regulate rules of evidence. It might build on—or even overrule—judicial innovations. But its authority needed tempering, lest legislatures rashly predetermine cases against unpopular parties by dictating the effect of evidence in individual cases and controversies.

By construing due process in a way that imposed most of its bite on legislatures’ exertions in the fields of evidence and adjective law, antebellum courts put this vision into effect. They asserted the power to incrementally improve the administration of justice by “minute,” sometimes fictional, “contrivances” in the fields of procedure and evidence.\textsuperscript{248} They acknowledged legislatures’ concurrent power to legislate in the field of evidence. Through the Due Process Clause, though, they tempered that power by barring dangerous legislative micromanagement of adjudicative fact-finding in individual cases. In the process,

\begin{footnotes}
\footnoteref{246} See, e.g., William Eskridge, Dynamic Statutory Interpretation (1994) (discussing the practice of dynamic statutory interpretation).

\footnoteref{247} See supra notes 176–89 and accompanying text. The claim that due process presupposes judicial flexibility in the field of evidence is not that different from claims made by many originalists today (although, these claims have been made without the postratification historical support developed here); see, e.g., Rosenthal, supra note 85, at 44 (the “original meaning” of the Due Process Clause was “non-originalist,” meaning it delegated discretion to judges to adopt fair procedures). It also parallels Frank Easterbrook’s claims about statutory interpretation. He thinks statutes should be interpreted against a background presumption against disturbing judicially devised evidentiary and procedural rules. Frank Easterbrook, The Case of the Speluncean Explorers: Revisited, 112 Harv. L. Rev. 1876, 1913 (1999) (suggesting statutes must be interpreted against “the legal system’s [judicially] accepted procedures, evidentiary rules, [and] burdens of persuasion”). The claim here is that the same background assumption in favor of judicial discretion in this field informed the early understanding of the Due Process Clause.

\footnoteref{248} Cf. 3 Blackstone, supra note 137, at 268.
\end{footnotes}
by requiring legislatures to legislate in a way that left room for judges to “hear” before “condemning,” and decide the “effect of evidence,” they also ensured themselves room to mitigate the effect of unwise or unjust laws through their power to define the weight and sufficiency of evidence necessary to prove violations of rights on a case-by-case basis.

But as long as Congress left some room for independent judicial judgment about the weight and sufficiency of evidence, the requirements of due process in the field of evidence gave out. Judicial regulation of parties’ opportunities to offer evidence was, instead, a subconstitutional matter: a question properly left to courts’ reasoned discretion, based entirely on judicious weighing of the principles of “good sense, equity and convenience” undergirding the common law of evidence.

IV. THE RISE AND FALL OF LOCHNERIAN PROCEDURAL DUE PROCESS

As the last Part showed, class action defendants’ argument—that due process guarantees civil defendants a fixed right to present all probative rebuttal evidence—finds little support in the early-nineteenth-century liquidation of the meaning of due process. Through most of the nineteenth century, due process was understood in structural terms: as a limit on legislative interference with courts’ traditional discretion to determine “the effect of evidence.” What courts did with that discretion, however, was a subconstitutional concern.

That doesn’t mean class defendants’ view of due process lacks historical support. As Section A explains below, for a three-decade period—the so-called Lochner era—the Court enforced a version of due process indistinguishable from class action defendants’

A. The Right to a Hearing in the Lochner Era

The idea that due process guaranteed civil defendants a right to present all probative evidence was driven by interrelated conceptual shifts, which fused together to support recognition of a right to a maximally fact-intensive evidentiary hearing. The first, most profound of these is also the most well known. In the closing decade of the nineteenth century, courts abandoned the old structural

\^249 See infra Part III.
conception of due process—concerned with protecting the right to an independent judicial hearing—and replaced with it substantive due process.

The sources of this shift have been exhaustively examined elsewhere, and don’t need to be reviewed at great length here beyond a brief summary. The first tremor came in Mugler v. Kansas, an 1889 decision upheld a Kansas statutory provision declaring breweries “common nuisance[s],” and authorizing the destruction of liquor found on their premises, as well as injunctions to “abate and perpetually enjoin” their operation. The petitioners had challenged the statute by employing a creative extension of antebellum due process analysis. They argued that the legislature had “by the mere exercise of its arbitrary caprice,” without “notice, trial, or hearing,” declared a brewery to be a common nuisance, and then “prescribe[d] the consequences which are to follow inevitably by judicial mandate,” effectively turning courts into “legislative agent[s].” The statute amounted to an extrajudicial “legislative decree”—depriving the defendant, in turn, of his due process right to an independent exercise of “judicial discretion or judgment” about whether breweries were common nuisances.

The Court rejected this argument. In the process it brushed aside the old structural way of thinking about due process on which it was premised, linking “the extent of protection accorded to [the petitioner’s] property with the scope of the police power, which it judged in a manner characteristic of Lochner.” In the succeeding decades, the old equation of due process with a right to an independent judicial hearing was demoted to a subordinate strand of the Court’s due process analysis, as the Court, starting in the late 1890s, focused its due process jurisprudence on protecting fundamental substantive rights, at the center of which

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250 See, e.g., Bernstein, supra note 21; Siegel, supra note 21.
251 123 U.S. 623, 671 (1887).
252 Id. at 677.
253 Id. at 671; see also id. at 639 (argument of petitioners that the statute “without notice, trial or hearing . . . declared [the brewery] to be a common nuisance”).
254 Id. at 642 (argument of petitioners).
255 Id. at 672 (describing petitioner’s argument).
256 Id. (argument of petitioners) (the statute violated due process because it permits “the exercise of no judicial discretion or judgment”; rather “[t]he brewery being found in operation, the court is not to determine whether it is a common nuisance, but under the strict behest of the statute is to find it to be one”).
257 Id. at 264.
258 Kainen, supra note 199, at 133–41. But see Mendelson, supra note 199, at 135 (it is not until 1896 in Missouri Pacific RR. v. Nebraska that one finds “a Supreme Court majority invalidating legislation . . . without reliance upon some element of separation [of powers]”).
259 By the end of the Lochner era, the equation of due process with an evidentiary hearing in the judicial branch was jettisoned entirely. See, e.g., Crowell v. Benson, 285 U.S. 22, 56 (1931).
lay rights to property and freedom of contract—subjecting legislation affecting those rights, in turn, to heightened scrutiny.\footnote{The scrutiny imposed was a precursor to modern substantive due process “strict scrutiny.” Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner, 76 N.Y.U. L. Rev. 1383, 1416 (2001).}

The second shift is the collapse of the old right/remedy distinction. In the latter half of the nineteenth century, courts progressively abandoned the idea that remedies are separate from, and subordinate to, rights.\footnote{Kainen, supra note 199, at 140–41 (detailing the rise of the modern notion that “the existence or nonexistence of a remedy implied the existence or nonexistence of a right”).} Instead, lawyers came to recognize, as we do, that the value of a right depends on the remedies provided for protecting it.\footnote{Skepticism about the distinction between rights and remedies was evident in the Supreme Court’s late antebellum period Contract Clause cases, when the Court, in the 1840s, qualified the usual rule that altering remedies does not impair the underlying contract right with the proviso that legislatures may not \textit{eliminate} remedies for violations of preexisting contracts. \textit{See}, e.g., Bronson v. Kinzie, 42 U.S. (1 How.) 311, 317–19 (1843).} At some point, remedial frameworks may create such a large risk of error that the framework is tantamount to a deprivation, or “spoliation,” of the right itself.\footnote{See, e.g., Truax v. Corrigan, 257 U.S. 312, 329–30 (1921) (withdrawal of “real remedy” for violation of a legal entitlement respecting property rights is arbitrary and capricious infringement of those rights); \textit{see also infra} note 279 and accompanying text.}

Third, the conception of the value of a “hearing” changed. The old construction of due process had treated the right to a judicial hearing in classical separation of powers terms, with roots in Enlightenment political theory: as a right to a decision by the right institution, an independent judiciary. By the closing decades of the nineteenth century, courts began to explain the value of the judicial hearing in new ways, by emphasizing the truth-seeking value of robust adversarial presentation of evidence.

The change reflected the normalization of the adversarial system, which was slow in coming. Into the 1840s, lawyers and lay people on both sides of the Atlantic complained that the “extent to which it [had become] possible for counsel . . . to control proceedings” in civil cases had increased the cost of litigation and perverted the trial’s truth seeking function.\footnote{See, e.g., Amalia D. Kessler, Deciding Against Conciliation: The Nineteenth Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Litigation, 10 THEORETICAL INQUIRIES L. 423, 445–51 (2009) (discussing mid-nineteenth-century American hostility, mostly rural, religious, and populist, to the lawyerization of the civil trial). \textit{See generally} ALLYSON N. MAY, THE BAR AND THE OLD BAILEY: 1750–1850 (2003) (discussing the early nineteenth-century controversy in the

after the founding for the adversarial system to make significant inroads on American equity practice. Federal equity rules and leading state courts of equity, like New York’s, abandoned their judge-dominated inquisitorial features—including judicial control of discovery and ex parte judicial examination of witnesses—in favor of adversarial in-court presentation of evidence only after the 1840s. And as Amalia Kessler has recounted, from the 1840s until the 1870s, some prominent American procedural reformers, concerned with the “evils of lawyers and legalism” in which civil trials had become enmeshed, pushed reforms designed to undo the growth of the adversarial process, by shunting civil litigation into nonadversarial alternative dispute resolution mechanisms designed to “pacify” litigants and promote out-of-court settlements. Indeed, versions of these proposals made their way into a number of state constitutions and in drafts of the Field Code in the decade preceding the Civil War.

In the antebellum period, in effect, robust adversarial proceedings were an accomplished fact in civil trials at common law but one in search of a legitimating procedural theory. “[W]hile there was a long tradition of associating the common law with English constitutional liberties . . . [this] tradition . . . tended to focus piecemeal on particular . . . institutions and devices, such as habeas corpus.” The popular explanation of the adversarial system in terms of a larger instrumental theory, one equating robust adversarial presentation of evidence itself

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English bar and among the lay public over the virtues of the adversarial system, with a focus on criminal trials).

266 Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and a Search for an Alternative to the Adversarial, 90 CORNELL L. REV. 1181, 1231–33 (2005) (identifying 1842 as the year in which the equitable inquisitorial tradition began to collapse in federal equity proceedings, although noting that American equity practice only completely assimilated to the common law adversarial system around the turn of the twentieth century).

267 The proposals centered on “tribunals of conciliation,” nonadversarial tribunals based on European models. Delegates to the 1846 New York State Constitutional Convention—“a key defining moment” in the mid century period of procedural reform, given the “leading role that New York (and its legal system) had long played in national life”—advocated a constitutional provision authorizing the establishment of these tribunals, which the New York Convention adopted (while leaving their structure to the New York legislature). Kessler, supra note 265, at 444, 446–64. Similar proposals made it into other state constitutions and drafts of the Field Code circulated in the 1840s and 1850s, and were implemented during the Reconstruction era by the Freedman’s Bureau, which, influenced by drafts of the Field Code, adopted “conciliation tribunals” for disputes between freed slaves and white landowners. Id.

268 Id. at 427, 442, 466–688.

269 As she says, while “many of the constitutive techniques of adversarial civil procedure, including, most importantly, representation by counsel and cross-examination, well predated the mid-nineteenth century (at least within the common-law courts, if not in equity), . . . individual techniques do not in themselves constitute a procedural theory.” Id. at 479–80.

270 Id. at 480.
with truth seeking and the accurate enforcement of legal rights, was a late nineteenth-century development.\textsuperscript{271}

By the 1890s the conceptual shift had taken place.\textsuperscript{272} The adversarial system was an entrenched feature of both common law and equity practice,\textsuperscript{273} reflecting a new professional orthodoxy: a robust adversarial presentation of the evidence was essential to the accurate determination and enforcement of individual rights.\textsuperscript{274} By the end of the nineteenth century, courts’ and litigants’ accounts of the value of a hearing began accordingly to de-emphasize the importance of a \textit{judicial} hearing and emphasize instead the value of a robust adversarial \textit{evidentiary} hearing that maximized the chances of determining people’s individual rights and obligations accurately.\textsuperscript{275} Decades after the Civil War, the three conceptual shifts—the rise of substantive due process, concern about the effect of remedies on rights, and the

\textsuperscript{271} As Kessler shows, that theory grew out of the countrywide debates about the virtues of conciliation courts between 1840 and 1870. \textit{Id.} at 464–78, 79 (“[I]t was in the process of opting against conciliation courts that nineteenth-century Americans opted in favor of an ideal of formal, adversarial legal process.”). And it reflected the “broader legal context”—the collapse of the old writ system, and the ensuing attempt to forge a coherent concept of substantive and procedural law as distinct systems, which “raise[d] for the first time the problem of what precise functions procedure was supposed to serve.” \textit{Id.} at 480.

\textsuperscript{272} It was not until the mid to late nineteenth century that American courts and lawyers began to conceptualize procedure as a coherent system—and to think about the defining characteristics of a good procedural system. Kessler, \textit{supra} note 265, at 481–82 (collecting linguistic evidence of the conceptual shift toward thinking about procedure in systemic terms drawn from legal authorities in the 1880s and 1890s).

\textsuperscript{273} Kessler, \textit{supra} note 266, at 1232–33 (discussing gradual shift to the adversarial model in federal equity proceedings in the post-Civil War period, which wasn’t completed until around 1912).

\textsuperscript{274} Kessler, \textit{supra} note 265, at 476–77 (in the late nineteenth century, the idea emerges that, in disputes between free people, “conflict was a value to be promoted and the judge’s role was not to exert personal influence in an attempt to generate compromise, but simply to serve as a neutral umpire, ensuring that each litigant adhered to the rules regulating combat”); \textit{Id.} at 480 (this view associated the adversarial system with accurate enforcement of individual legal rights—particularly “those rights necessary to promote a society based on both freedom and free enterprise”).

\textsuperscript{275} See, \textit{e.g.}, Rosen v. United States, 245 U.S. 467, 471 (1918) (associating a “hearing” with getting at “the truth,” which “is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case”); Twining v. New Jersey, 211 U.S. 78, 110–11 (1908) (associating the due process right to hearing with the right to be heard “upon evidence”); Laing v. Ringey, 160 U.S. 531, 538 (1896) (argument of counsel) (counsel for defendant arguing that due process requires an “opportunity to controvert the evidence on the part of the plaintiff”); McClatchy v. Superior Court of Sacramento Cnty., 51 P. 696, 698 (Cal. 1897) (associating due process right to be heard with offering “evidence” and “argument”); O’Brien v. Bonfield, 72 N.E. 1090, 1092 (Ill. 1904) (equating due process right to a hearing with the opportunity to be “heard upon all the evidence [a party] can adduce”); State v. Beach, 46 N.E. 145, 146 (Ind. 1897) (explaining that due process right to a hearing is denied when the law would “in effect, exclude the evidence of a party”).
new concept of the hearing-right as right to adversarial, and therefore (it was thought) more accurate, testing of evidence—combined to make the notion that due process guaranteed a right to present all the facts in civil cases increasingly plausible to mainstream American lawyers.  

First, at the heart of the Lochner era Court’s conception of fundamental rights were property rights, including not only rights to real property, but to intangible wealth. Damage judgments accordingly implicated the Court’s fundamental rights jurisprudence, since they deprived the defendant of a property interest, by imposing a pecuniary loss. Property, accordingly, could not be taken through an

276 The fusion is evident as early as an 1852 essay by Lysander Spooner—a then-marginal natural law theorist who was an archetypal man before his time. He believed, as the Lochner Court would hold, that a just legal process must protect fundamental common law liberties. See, e.g., SPOONER, supra note 133, at 23–26 (arguing that Magna Carta, with which he equated due process, was designed to nullify positive law that did not accord with natural “justice”). And, he argued, those fundamental rights are meaningless without reference to the evidentiary rules in which those rights are proven. As he said, “[i]f the government can dictate . . . the laws of evidence, it can not only shut out any evidence it pleases . . . but”—much as Chief Justice Marshall had done in Hamilton v. Russell, when he decreed certain evidence conclusive proof of a fraudulent conveyance—“it can require that any evidence whatever . . . be held as conclusive proof of any offence whatever.” Id. at 10. If the authority to determine the weight and sufficiency of evidence is vested in the government—by which he included not only legislatures, but the judge—“the government will determine its own powers over the people . . . and the people [will] have no liberties except such as the government sees fit to indulge them with.” Id. For Spooner, this dictated the proper allocation of institutional authority. “The authority to judge what are the powers of the government, and what the liberties of the people,” he said, “must necessarily be vested in one or the other of the parties themselves—the government, or the people.” Id. For Spooner, the choice was obvious. The jury must “judge of the existence of the law; of the true exposition of the law; of the justice of the law; . . . and of the admissibility and weight of all the evidence offered; otherwise the government will have everything its own way . . . and the trial will be, in reality, a trial by the government, and not a ‘trial by the country.’” Id.

Here, Spooner combined all three conceptual shifts: He insists on the protection of fundamental rights. And he views a right to a hearing as a right whose value lay in its truth-seeking value—its ability to accurately protect fundamental rights from erroneous deprivation—a value that could only be secured through the adversarial process. In order to protect the substance of fundamental rights, the integrity of that remedial process must be protected from the “government” (legislatures and judges), by preventing it from rationing the evidence that could be offered at trial. Spooner’s account is far cruder, and more radical, than any court has been willing to recognize. But it was nonetheless a harbinger of things to come.

277 See, e.g., Hovey v. Elliot, 167 U.S. 409, 418–19 (1897) (asserting that a default judgment in an equitable accounting dispenses with the “fundamental constitutional safeguards securing property”).

278 See, e.g., Brinkerhoff–Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930) (“The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.”); Truax v.
arbitrary civil proceeding, any more than property interests could be infringed by arbitrary legislation.

Under the substantive due process wing of the Lochner era’s due process cases, liability rules must serve a legitimate public purpose rooted in the police power, satisfy means-ends scrutiny, and satisfy the Equal Protection Clause-derived bar on “class legislation.” But even when rules governing civil liability satisfied these substantive due process standards, procedures and remedial rules, the Court held, independently effected an arbitrary infringement, or “spoliation” of the defendant’s property if they created unacceptably high risk of an erroneous liability judgment.279

Rather than engage in difficult line drawing entailed by policing the exact risk of error that amounts to a deprivation of the right, courts settled for a blanket procedural prophylaxis: an adversarial hearing in which the defendant had an

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279 Authorities recognizing that inadequate remedies for existing rights amount to an arbitrary infringement of the right include: Brinkerhoff-Faris Trust, 281 U.S. at 679, 682 (while state courts have discretion over adjective law and remedies, due process guarantees parties a “real opportunity” to establish a defense; denial of that opportunity is a “deprivation of . . . property” without due process of law); Truax, 257 U.S. at 329–30 (withdrawal of “real remedy” for unlawful invasion of property rights is “purely arbitrary or capricious”). Applied to one branch of remedial legislation—rules of evidence, particularly presumptive evidence—authorities interpreted this principle to require that rules must bear a “rational relationship” to the standard of liability. See, e.g., Bandini Petroleum Co. v. Superior Court, Los Angeles Cnty., 284 U.S. 8, 18–19 (1931) (“The State, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be prima facie evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed.”); Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910) (holding that an evidentiary presumption must have a “rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate”).
opportunity to mount a meaningful defense based on the “all of the facts”—or, more specifically, all probative facts with a bearing on liability.\textsuperscript{280} The right to present all the facts in civil proceedings was the fruit of the Court’s early efforts to work out a notion familiar to modern lawyers: fundamental rights require heightened procedural protections against their erroneous deprivation.\textsuperscript{281} \textit{Lochner}'s substantive and procedural due process cases were, in short, linked.

The Court’s approach to procedural due process, in turn, reflected the \textit{Lochner}-era Court’s characteristic historicism: The \textit{Lochner} Court, consistent with late nineteenth-century historicism, viewed historical evolution in legal practices Whiggishly—as a teleological revelation of the true principles of justice, fairness, and practical wisdom appropriate for the American people.\textsuperscript{282} History had given us the adversarial system, which had become entrenched by the late nineteenth century. Late nineteenth-century lawyers, looking back on its development, came to view particularized adversarial proceedings as the historical expression of an institution appropriate for a free people—an institution essential to accurately defining and enforcing individual rights.\textsuperscript{283} Courts, accordingly, did not need to fall back on their own fallible estimates about rules of evidence or procedures sufficient to ensure a reasonably accurate, and therefore nonarbitrary, judgment. History, and progress, had shown the way. Courts only needed to filter judicial

\textsuperscript{280} See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911) (explaining due process forbids cutting off “the right to make a full defense”); \textit{Turnipseed}, 219 U.S. at 43 (explaining that due process guarantees an opportunity to present a full defense based on “all of the facts”). For a discussion of these and other relevant Supreme Court decisions, see infra notes 293–313 and accompanying text.

\textsuperscript{281} See, e.g., Santosky v. Kramer, 455 U.S. 745, 753–54 (1982) (declaring that states must afford “fundamentally fair procedures” before depriving parents of a fundamental liberty interest in “personal choice in matters of family life”); \textit{Tijani} v. \textit{Willis}, 430 F.3d 1241, 1244 (9th Cir. 2005) (Tashima, J., concurring) (noting that “[w]hen . . . a fundamental right is at stake . . . the Supreme Court has insisted on heightened procedural protections to guard against the erroneous deprivation of that right” and discussing cases related to civil commitment proceedings).

\textsuperscript{282} Siegel, \textit{supra} note 21, at 69–71 (explaining that nineteenth-century historicists believed history revealed either “laws that were true for all people” or the “permanent principles that . . . distinguish culturally correct law and legal change from culturally incorrect change” for a particular people); \textit{id.} at 75 (explaining that for many historicists, “[c]ustomary law was a spontaneous and evolutionary expression of the nation. As with all natural and social phenomena . . . discoverable ordering principles governed its development”).

\textsuperscript{283} Kessler notes that late nineteenth-century lawyers, “seeking to promote a market economy and to affirm their national (and racial) superiority,” saw the adversarial system as the expression of the emerging values and institutions appropriate to a free people. Kessler, \textit{supra} note 265, at 479–80. In particular, they saw the adversarial hearing as an essential element of a system dedicated to protecting individual rights. The American legal profession thought that “only formal, adversarial adjudication” could “ensure the development of clear, individual rights under the law—and especially those rights necessary to promote a society based on both freedom and free enterprise.” \textit{id.} at 480.
deprivation of property through a robust adversarial process in which parties presented all the facts bearing on the defendant’s liability.

The shift was gradual. Early cases in the 1870s and 1880s showed all the marks of transitional opinions—awkwardly mouthing the old separation-of-powers conception of due process while striking out in new directions that were difficult to pin on that old concept. An illustrative example, Chicago & Alton R.R. Co. v. People ex rel. Koerner, involved an enforcement action filed by Illinois’ railroad commission, alleging a railroad had engaged in rate discrimination. The Illinois constitution authorized the state assembly to “pass laws to . . . prevent unjust discrimination.” But a state statute provided that proof of price discrimination for similar freight transported equal distances, although from different places, “makes out a case against railway companies, which they are not allowed to meet by evidence showing the reason or propriety of the discrimination.”

We might be inclined to see the case to present a straightforward interpretive question of substantive law—what did the framers of the Illinois constitution intend when they limited the legislature to prohibiting “unjust” discrimination? Did they think “unjust” discrimination included this sort of price discrimination? The Illinois Supreme Court, however, neatly dodged that question by conceptualizing the case as one out about due process restraints on the legislature’s power to restrict opportunities to present evidence.

The court’s reasoning was a mix of the old and the new. On the one hand, it raised questions about the fit between the statute and the purpose of the Illinois constitution’s “unjust discrimination” clause. A jury, it warned, might find that “a difference of price for the same distance of transportation[] is not necessarily an unjust discrimination,” since not all price discrimination necessarily injures the public. As such, the conduct on which liability hinged—simple price discrimination, an act that the court thought “may be innocent in itself”—has an insufficiently clear probative relationship to the conduct the legislature was constitutionally authorized to proscribe.

Yet, rather than treat the risk of inaccuracy as one of fit between the “proof” made conclusive and the Illinois constitution’s “unjust discrimination” provision—an issue we, today, would say sounds in substantive due process—the court conceptualized it as a problem that implicated procedural due process, namely a right to a meaningful hearing. Echoing the reasoning of the old cases, the statute, said the court, was in effect a legislative judgment or decree: it “impose[d] . . . forfeiture of the franchise, which would often be equivalent to a fine millions of dollars” by treating the mere fact of discrimination as “conclusive evidence” that the discrimination was “unjust,” as the states constitution requires. As a result it

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284 67 Ill. 11 (1873).
285 Id. at 23.
286 Id. at 24–25.
287 Id. at 25.
288 Id. at 24.
289 Id.
amounts to an “ex parte trial” that deprived the defendant of a “right . . . to offer what evidence it can by way of explanation.”

In doing so, though, the court also exhibited a new conception of the right to a hearing. Due process requires a hearing not simply because of the structural value of independent judicial judgment about the weight and sufficiency of adjudicative facts, implied the court, but because testing all the evidence through adversarial presentation reduces the risk that “innocent” defendants will be subjected to extraordinary penalties. The right to a hearing is no longer simply a right to a hearing before the right institution and therefore a restraint with most of its bite on legislature. It is also a right to a proceeding with safeguards against an “arbitrary” adjudication—that is, with safeguards that police against unacceptably large risks of inaccuracy. It was a right, the court’s logic implied, that restrained judges, too.

At the same time, the decision had overtones of the fundamental rights jurisprudence to come. While the court never said so explicitly, its pointed reference to the size and extent of the penalty underscored its concern that the defendant not be deprived of an important property interest without the procedural safeguards (specifically, opportunities for presenting evidence) necessary to ensure a suitably accurate, and therefore non-arbitrary, determination of guilt.

Jump forward nearly thirty years. In a series of decisions beginning in the first decade of the twentieth century, in years following Lochner, and extending until the very closing years of the Lochner era, the Supreme Court adopted and refined the logic of Chicago & Alton Railroad. In cases where fundamental private rights, including property interests threatened in a civil suit, were at stake, the Court held that due process permits deprivation of those interests only through a full adversarial, evidentiary hearing—one that gave the defendant an opportunity to present any evidence bearing on the merits of his defenses.

The first move came in Hovey v. Elliot. There, the Court overturned a default judgment entered against a defendant for contempt in a strongly worded

\[\text{\textsuperscript{290} Id. at 26. The court also held that the due process clause, which guarantees a “right . . . to appear and defend in person,” is violated by the “operation of a law that substantially condemns without a trial.” Id. at 24. Furthermore, due process requires affording a company the opportunity “to offer what evidence it can by way of explanation.” Id. at 26. Similarly, the court explained that the statute envisions an “ex parte trial” by barring the defendant from “meet[ing] by evidence” the charges against them. Id. at 23–24.}\]

\[\text{\textsuperscript{291} Id. at 24, 27 (explaining that by “debaring the companies from all right of explanation,” and “taking . . . the privilege of showing the actual innocence or propriety” of the discrimination, the statute risks imposing liability on “an act that might be shown to be perfectly innocent”).}\]

\[\text{\textsuperscript{292} Id. at 27 (characterizing the imposition of liability as “arbitrary” because liability is conclusively presumed “from the proof of an act that might be shown to be perfectly innocent”).}\]

\[\text{\textsuperscript{293} Id. at 24 (emphasizing that the forfeiture of the franchise is equivalent to a fine of millions of dollars).}\]

\[\text{\textsuperscript{294} 167 U.S. 409 (1897).}\]
opinion. The default judgment, the Court said, “violate[d] the fundamental constitutional safeguards securing property.” Due process requires a hearing—in the form of a “trial”—before property of one person can be given to another. And “what plainer illustration could there be of taking property of one and giving it to another without hearing,” than a civil judgment “decree[ing]” the defendants liable to the plaintiff without “consider[ing] the merits of [defendants’] defence?” A decade later, in Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed, and Lindsley v. Natural Carbonic Gas Co., the Court elaborated that a fair hearing requires an opportunity to raise a “full defense” in an evidentiary hearing that gives “the party affected a reasonable opportunity to submit . . . all of the facts bearing upon the issue” of his liability.

Due process required a “reasonable opportunity to “submit . . . all of the facts bearing” on a legal defense. But in Heiner v. Donnan the Court added that procedures rationing the defendant’s opportunity to present all probative evidence bearing on a defense were categorically unreasonable. Heiner arose out of Congress’s effort to streamline enforcement of the federal estate tax, which applied to gifts made in contemplation of death. When the Internal Revenue Service complained that it was difficult to determine “whether a particular transfer was or was not made in contemplation of death,” Congress created a conclusive presumption: gifts made within two years of the death of a decedent qualified.

295 Id. at 419.
296 Id. at 418 (stating that due process requires a court to “render judgment only after trial”).
297 Id. at 419, 446 (explaining that due process forbids “rendering a decree by refusing to permit a defendant to be heard in his defence or to consider the merits of a sufficient defence”).
298 219 U.S. 35 (1910).
299 220 U.S. 61 (1911).
300 Lindsley, 220 U.S. at 82 (emphasis added); Turnipseed, 219 U.S. at 43 (emphasis added).
301 Lindsley, 220 U.S. at 82 (explaining that due process requires an opportunity to present a “full defense” based on the “all of the facts bearing upon the issue”); Turnipseed, 219 U.S. at 43; see also Bandini Petroleum Co. v. Superior Court Los Angeles Cnty., Cal., 284 U.S. 8, 19 (1931) (explaining that due process requires “a reasonable opportunity to present the pertinent facts in his defense”); Jones v. Union Guano Co., 264 U.S. 171, 175 (1924) (stating that a party has a right “to try his action on the real facts”); Luria v. United States, 231 U.S. 9, 26 (1913) (due process protects a party’s right to “present his defense to the main fact thus presumed”); see also Phillips v. Ballinger, 37 App. D.C. 46, 51–52 (1911) (“Due process of law, in a case like the present, is had when full opportunity is presented to introduce all the evidence and arguments which the party interested deems important, and to be confronted with witnesses against him, he having had notice of the question at issue.”).
302 285 U.S. 312 (1932).
303 Id. at 312–14.
304 Id. at 313.
305 Revenue Act of 1926, ch. 27, § 302(c), 44 Stat. 9, 70 (1925).
The respondents, executors of an estate subject to IRS enforcement proceedings, claimed the presumption violated due process.

The Court agreed in a decision by Justice Sutherland that emphasized procedural, not substantive due process. Indeed, to connect the case with procedural due process cases like *Turnipseed*, the Court felt compelled to emphasize that “the conclusive presumption created by the statute” is a rule of evidence, not a rule of substantive law.306 “A rebuttable presumption,” said the Court, “clearly is a rule of evidence which has the effect of shifting the burden of proof . . . and it is hard to see how a statutory . . . presumption is turned from a rule of evidence into a rule of substantive law as the result of . . . making it conclusive. In both cases it is a substitute for proof.”307 And, citing *Turnipseed*,308 the Court concluded the presumption deprives a defendant of due process because it deprives him of a fair opportunity to “prove the facts of his case”309 by offering into evidence “every fact and circumstance tending” to support his legal defense—here, “to show the real motive of the donor.”310 Imposing liability on such terms amounts to an arbitrary taking, a “spoliation,” of the defendant’s property.311

Throughout this period, the Court maintained a high degree of continuity with the specific holdings of nineteenth-century cases, by recognizing that the legislature had a significant degree of flexibility to regulate the rules of evidence and the substantive defenses to which defendants are entitled. It might adjust burdens of proof, by legislating rebuttable presumptions, so long as the presumptions bore a rational connection to the ultimate fact proved.312 It might alter rules governing admissibility, based on suitably reasoned judgments about the evidence’s probative value.313 It might eliminate traditional legal defenses entirely, like the defense of contributory negligence or assumption of risk.314 These were the

307 *Id.* at 329.
308 *Id.*
309 *Id.* (explaining that “if a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of law”).
310 *Id.* at 327 (stating that the presumption is arbitrary because it “excludes consideration of every fact and circumstance tending to show the real motive of the donor”); *see also id.* at 329 (stating that “a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.” (emphasis added)).
311 *Id.* at 327 (asserting that an exaction under these rules “is not taxation but spoliation”).
312 *See*, e.g., *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).
313 *See* West v. *Louisiana*, 194 U.S. 258, 263–64 (1904) (explaining that states have wide latitude to adopt “reasonable” rules on admissibility, so long as they do not “substantially affect” the rights of the accused party).
314 *See*, e.g., *Ariz. Employers’ Liability Cases*, 250 U.S. 400, 421 (1919) (holding that common law defenses, like contributory negligence, “are not placed, by the Fourteenth Amendment, beyond the reach of the State’s power to alter them, as rules of future conduct
kind of “reasonable” regulations of opportunities to present evidence that
Turnipseed greenlighted. But within the universe of probative evidence bearing on
defenses that remain legally available, it simply could not bar, or ration, a
defendant’s opportunity to present all the probative evidence—“every fact and
circumstance”—bearing on those defenses.

B. Lochner Overthrown

1. The Demise of the Lochnerian Right to a Hearing

The Lochner era came to an end in the late 1930s in West Coast Hotel v.
Parrish315 and United States v. Carolene Products Co.316—decided just five years
after Heiner.317 While the post-New Deal Court did not, ultimately, repudiate the
view that due process protects certain “fundamental” rights, West Coast Hotel
repudiated the Lochner Court’s distinctive notion that economic interests are
among those rights.318 Yet, it was a concern for the fundamental safeguards
securing property that drove the Court’s reasoning in Turnipseed and Heiner.319 As
a result, after West Coast Hotel, the future prospects of the Lochner era’s
procedural due process cases (at least in civil cases) seemed gloomy. It would be
strange, after all, to deny courts acting with the scope of their delegated authority
over evidence and procedure the same flexibility the post-New Deal Court’s
and tests of responsibility, through legislation designed to promote the general welfare”
(emphasis added)).

315 300 U.S. 379 (1937).
316 304 U.S. 144 (1938).
317 West-Coast Hotel, 300 U.S. at 379; Carolene Products, 304 U.S. at 152 & n.4.
318 The post-Carolene Products Court has recognized a number of fundamental
(noneconomic) liberty interests, including family and sexual privacy, but it has never
recognized fundamental “property” interests. See, e.g., Ronald J. Krotoszynski, Jr.,
Fundamental Property Rights, 85 GEO. L.J. 555, 555 (1997) (“The Supreme Court’s
modern substantive due process jurisprudence, which protects ‘fundamental’ liberty
interests . . . has never been formally extended to encompass ‘fundamental’ property
rights.”). Perhaps it may sweep too broadly to say that the modern category of fundamental
rights categorically excludes any interests in “property.” See id. at 556 (“The most obvious
explanation would be that property rights are simply less important than liberty interests
and therefore are never ‘fundamental.’ However, the Supreme Court has never suggested
that this is so, and, if it were, the Court’s most recent Takings Clause decisions would not
make overall doctrinal sense.”). At a minimum, though, intangible corporate property
interests in accumulated wealth (cash) implicated by civil liability judgments are clearly
concurring in judgment and dissenting in part) (asserting that statutes imposing monetary
liability implicate “the deferential standard of review applied in substantive due process
challenges to economic legislation” and violate due process “only under the most egregious
of circumstances”).
319 See supra notes 298–313 and accompanying text.
substantive due process cases granted legislatures when property interests and other economic interests are at stake.

It’s hard to identify exactly when the Court first hinted at a break with cases like *Turnipseed* and *Heiner*, but a fair candidate is a foundational case in the post-New Deal Court’s procedural due process jurisprudence: *Hansberry v. Lee*,\(^\text{320}\) decided only eight years after *Heiner* but on the other side of the New Deal constitutional revolution.\(^\text{321}\) *Hansberry*, of course, stands for the proposition that due process requires adequate—meaning conflict-free—representation of class members.\(^\text{322}\) It says nothing about the right to present “all the facts” before one can be deprived of property. But that is the point. Based on the arguments presented, and the facts of the case, the Court might have done so, but it declined. *Hansberry*, as a result, might be seen as a silent, but significant, first step toward repudiating the *Lochner*-era understanding of procedural due process.

*Hansberry* involved a collateral attack on an Illinois class judgment upholding the validity of a racially restrictive covenant in Washington Park, a neighborhood adjacent to the University of Chicago’s Hyde Park enclave. In a prior lawsuit, *Burke v. Kleiman*,\(^\text{323}\) one Washington Park resident, purporting to represent the other residents, sued to enjoin a neighbor from renting a room to an African American family. The suit ended in a judgment upholding the covenant and enjoining the defendant from continuing the rental arrangement.\(^\text{324}\)

Washington Park residents sued years later to prevent Hansberry from buying a house in the neighborhood, relying on the restrictive covenant.\(^\text{325}\) Hansberry fought back, arguing that terms governing the covenant’s enforceability had not been satisfied. The plaintiffs countered that whether the agreement was effective was subject to *res judicata* as a result of the *Burke* judgment.\(^\text{326}\)

One of *Hansberry*’s counterarguments was a familiar one: that he was not adequately represented by the class representative, whose interest—in enforcing the covenant!—was diametrically opposed to his.\(^\text{327}\) But alongside this sensible argument, the NAACP sounded older, *Lochner*-era themes, which commentators have universally forgotten, or ignored.

The *Lochner*-esque argument rested on a singular fact about the *Burke* suit—it had not involved a presentation of all the facts bearing on the enforceability of the covenant. To be valid, the covenant must have obtained signatures of owners whose property accounted for 95 percent of the development.\(^\text{328}\) Rather than establish this fact in an adversarial proceeding after a fact-intensive presentation of

\(^\text{320}\) 311 U.S. 32 (1940).
\(^\text{321}\) See id.
\(^\text{322}\) Id. at 42–44.
\(^\text{323}\) 277 Ill. App. 519 (1934).
\(^\text{324}\) Id. at 521.
\(^\text{325}\) Hansberry, 311 U.S. at 37.
\(^\text{326}\) Id. at 38.
\(^\text{328}\) See id. at 35.
proof, the parties to the *Burke* suit had simply stipulated that the requisite number of signatures had been obtained.\(^{329}\) Instead, the *Burke* suit was litigated entirely on a collateral question: whether conditions in the neighborhood (namely its racial mix) had changed to such a degree that enforcement of the covenant would work a hardship on residents.\(^{330}\)

We are inclined to see this problem either in the terms of issue, rather than claim preclusion—that is, the “judgment” respecting the number of signatures cannot be given issue preclusive effect because the issue had not been actually litigated (a defense, incidentally, unhelpful in *Hansberry*, a suit exposed to the separate defense of claim preclusion) or as further evidence of compromised representation. But *Hansberry* presented the problem, in part, in terms reminiscent of the *Lochner* Court’s procedural due process cases. At stake was Hansberry’s personal right to buy property, a fundamental interest.\(^{331}\) He could not be deprived of that right through judicial decree without requisite procedural protections—namely an adversarial hearing that provided a meaningful opportunity to present all probative evidence in defense of his property rights.\(^{332}\) Where, as here, the class suit was litigated based on a stipulated presumption that the covenant had obtained the requisite signatures, it could not, consistent with due process, be given preclusive effect when absentees present strong evidence that the stipulation was factually unfounded.\(^{333}\) Doing otherwise would deprive him, and other similarly situated class members, of a meaningful opportunity to make a full defense against the enforcement of the covenant based on all the facts, and amount to an “arbitrary” confiscation, or spoliation, of their property interests.\(^{334}\)

In effect, the NAACP invited the Court to extend the logic of its procedural due process cases into the law of former adjudication—by recognizing that where a fundamental property right is at stake, concern for ensuring against inaccurate

\(^{329}\) *Burke*, 277 Ill. App. at 522 (noting the terms of the stipulation).

\(^{330}\) *Id.* at 521 (characterizing defendant’s argument).

\(^{331}\) See, e.g., Brief of Petitioner, supra note 327, at 53–54, 58–59 (arguing the right to own, “use,” and otherwise “deal” in property is a “fundamental right[] as a citizen of the United States”); Reply Brief of Petitioner at 15, *Hansberry* v. *Lee*, 311 U.S. 32 (1940) (No. 40-29) (noting that a “long line of decisions in this Court” extended due process to secure the “protection of other than real property rights,” including the right to “do business” in property).

\(^{332}\) Reply Brief of Petitioner, supra note 331, at 12–15 (contending that Hansberry’s right to own and deal in property is a due-process protected property interest and that taking that interest without, among other protections, a meaningful opportunity to be heard in defense based on all the facts amounts to a spoliation, or arbitrary infringement, of his property rights).

\(^{333}\) Brief of Petitioner, supra note 327, at 36–37 (arguing that where the record shows “innumerable instances . . . where the individual purported parties signatory could have made substantial defenses,” application of the doctrine of res judicata deprives them of a right to present a defense and, therefore, violates their due process rights); see Reply Brief of Petitioner, supra note 331, at 14–15 (giving the prior judgment preclusive effect amounts to a spoliation, or “arbitrary” deprivation, of their property rights).

\(^{334}\) Reply Brief of Petitioner, supra note 331, at 14–15.
judgments trump considerations of finality when the property right hadn’t been litigated in a prior, fact-intensive proceeding. The argument, though, was thinly sketched by Hansberry’s lawyers, who struggled to connect the case to the old property-right cases without directly invoking the *Lochner* era’s economic liberties jurisprudence.\(^{335}\)

The *Hansberry* Court ignored this argument without comment—a hint, perhaps, at a shift away from the *Lochner* era’s approach to procedural due

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\(^{335}\) For example, Hansberry’s lawyers tried to link claim to older cases that limited representative actions to “joint” rather than “personal” rights: “personal” rights aren’t susceptible of representation, the argument went, and therefore the representatives can’t waive defenses relating to the personal right. Brief of Petitioner, *supra* note 327, at 38 (explaining that various state law defenses to the covenant’s enforcement are “personal to each signor” and cannot be represented in a class proceeding); see also Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconcepting the History of Adjudicative Representation*, 70 B.U. L. Rev. 213 (1990) (reviewing Stephen C. Yezell, *From Medieval Group Litigation to the Modern Class Action* (1987)) (discussing the old distinction between representation of personal and joint or common rights). As the respondents noted, though, the Supreme Court had held that preclusive effect of a judgment was a matter for state law, and Illinois, in turn, had not recognized the personal rights limitation on representative actions, holding instead that representative actions were proper when claims were too numerous to efficiently litigate separately; it had, for good measure, extended broad preclusive effect to representative actions, including to stipulations and consent decrees entered into by class representatives. *See* Brief of Respondents at 23–26, 28–29, 31, *Hansberry v. Lee*, 311 U.S. 32 (1940) (No. 40–29) (collecting cases).

In their reply brief, the petitioners invoked precedent that anticipated the modern rule in *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867 (1984), that class proceedings preclude only “common” claims, but not individual ones—an argument that, however, wasn’t applicable to the failure of the covenant’s condition precedent, which raised a question common to all property owners covered by the covenant. *See* Brief of Petitioner, *supra* note 327, at 38–39 (noting the defense-based failure of the condition precedent was shared by all class members).

And so the reply brief also sounded a more general theme reminiscent of *Lochner*-era cases like *Heiner* and *Turnipseed*: it (1) reiterated that the state decree implicated fundamental rights to deal in property and, therefore, implicated the due process clause’s core protections, *see* Reply Brief of Petitioner, *supra* note 331, at 15, and (2) emphasized that, before being deprived of that right, they must have a meaningful opportunity “to defend, and to be heard,” including a meaningful opportunity to present a full defense, based on all the facts. *See* *id.* at 12–13 (arguing that giving the *Burke* decree’s stipulation preclusive effect deprives them of that right’); *id.* at 14–15 (arguing that giving the state decree preclusive effect amounts to an arbitrary spoliation of their property interests and therefore violates the Fourteenth Amendment’s due process clause).

The closest the petitioner came to explicitly invoking the *Lochner* line of economic liberties cases, though, is in the reply brief’s pointed invocation (without citation) of the “long line of decisions in this Court” extending due process protections to rights “other than real property rights” and its cite to *Brinkerhoff-Faris* (the lone right to a meaningful defense decision of the *Lochner* era authored not by the “Four Horsemen,” or the old Fuller Court libertarians, but by a progressive—Justice Brandeis). *Id.* at 12, 15.
process. That demise of Lochnerian procedural due process would become explicit three decades later in a widely misunderstood case: *Weinberger v. Salfi*.336

_Salfi_ followed hard upon two earlier (and, today, much maligned) 1970s decisions, *Stanley v. Illinois*338 and _Cleveland Board of Education v. LaFleur_,339 in which a Brennan-lead Court had revived _Heiner_ to strike down conclusive presumptions that restricted parties’ ability to prove their rights in state administrative proceedings affecting core privacy interests.340 In each, the state defended the presumption as a means of ensuring a tolerably accurate, yet “speed[y] and efficient,” resolution of most underlying claims.341 In each, the Court analyzed the constitutionality of the presumption in procedural due process terms that anticipated _Mathews v. Eldridge_’s weighing method of scrutiny.342 That is, the Court weighed the interests of the party threatened with deprivation, the error-risks of applying the presumption, and state interests in administrative efficiency.343 And in each case, the Court concluded, the need to safeguard the important interests of the party disadvantaged by the presumption from an erroneous deprivation outweighed the state’s concerns in administrative efficiency.344

In *Weinberger v. Salfi*,345 however, the Court drew a line in the sand. The respondent in _Salfi_, the surviving spouse of a deceased wage earner, claimed an entitlement to her husband’s social security benefits. A statutory provision, however, defined “wives” entitled to survivorship benefits to include only those spouses who had a marital relationship with the deceased wage earner for over nine months before the wage earner’s death.346 The government characterized this provision as a conclusive presumption that marriages entered into less than nine months before the spouse’s death were “sham[s]” designed to obtain social

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337 See, e.g., Easterbrook, _supra_ note 12, at 113 (referring to the Court’s “late, unlamented flurry of [1970s-era] irrebuttable presumption cases”).
340 _Stanley_, 405 U.S. at 657–58; _LaFleur_, 414 U.S. at 645–647.
341 _Stanley_, 405 U.S. at 656 (noting the state defended the presumption based on administrative efficiency); see also _LaFleur_, 414 U.S. at 646–67.
343 424 U.S. 319, 334–45 (1976); see also Michael H. v. Gerald D., 491 U.S. 110, 153 & n.10 (1989) (Brennan, J., dissenting) (noting that cases like _Stanley_ had analyzed irrebuttable presumptions through the lens of procedural, not substantive, due process).
344 _Stanley_, 405 U.S. at 656–57 (“The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency . . . [W]hen, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.”); _LaFleur_, 414 U.S. at 646–67.
345 422 U.S. 749 (1975).
security benefits. The presumption, said the government, was a sensible prophylactic rule: it did a reasonable job of filtering sham relationships, avoided the enormous “expense and other difficulties of individual determinations” in a massive program the size of social security, and “protect[ed] large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages.”

Relying on Stanley and LaFleur, Salfi in turn claimed the “sham marriage” presumption deprived her of a fair hearing, because it denied her a right to rebut the presumption with particularized proof. The Court disagreed. In cases like Stanley, said the Court, the challenged presumption limited parties’ ability to resist a deprivation of fundamental liberty interests—to “conceive and to raise one’s children” or to exercise “personal choice in matters of marriage and family life.” The force of these decisions, emphasized the Court, was limited to cases implicating these fundamental interests (interests, it said, “far more precious . . . than property rights.”) By contrast, Salfi asserted an interest in welfare benefits that, said the Court, was not constitutionally protected. Therefore, Salfi had no basis for claiming any procedural due process protections.

Because Salfi treated a right to welfare benefits as a constitutionally unprotected interest, the Court didn’t need to engage in procedural due process balancing. But the fact the Court considered the nature of the interest in the first place implied rather strongly that it thought irrebuttable presumptions require a procedural due process evaluation when the presumption does affect constitutionally protected interests. Moreover, the Court’s emphasis that Stanley and LaFleur had involved deprivations of fundamental interests “far more precious . . . than property rights” had clear implications. In this case, even assuming welfare benefits could be considered constitutionally protected property, the government’s interest in administrative efficiency would easily outweigh the welfare beneficiary’s interest in the protection afforded by a maximally fact-intensive investigation.

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347 See Salfi, 422 U.S. at 767–68.
348 Id. at 777, 781–82.
349 Id. at 771–72.
350 Id. at 771 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
351 Id. at 771 (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974)).
352 Id. (quoting Stanley, 405 U.S. at 651).
353 After reviewing cases like Stanley and LaFleur, it emphasized the fundamental nature of the interests at stake in each and then concluded that “[u]nlike the claims involved in Stanley and LaFleur, a noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status.” Id. at 771–72.
354 Id. at 771 (quoting Stanley, 405 U.S. at 651).
355 Cf. id. at 804–05 (Brennan, J., dissenting) (criticizing the majority’s view that efficiency outweighs “the individual’s interest in proving that the facts presumed are not true as to him”).
Having dispatched plaintiff’s procedural due process claim, the Court noted the plaintiff’s only remaining constitutional claim is that the presumption is not “rationally related to a legitimate legislative objective” and then proceeded to analyze the presumption as though it were a rule of substantive law, employing rational basis scrutiny. The Court found it did in fact satisfy rational basis scrutiny: “Congress can rationally conclude . . . that the difficulties of individual determinations” outweigh whatever gains in accuracy “they might be expected to produce.” Analyzed either from a procedural or a substantive due process standpoint, the presumption didn’t offend due process.

_Salfi_ also (gratuitously) emphasized its reasoning applied not only to presumptions in cases involving claims for welfare benefits, but also to those that limit a defendant’s ability to prove defenses in civil suits—proceedings, in other words, affecting the kind of traditional property interests in intangible wealth that the _Lochner_ Court had once viewed as fundamental, but that _Salfi_ emphasized were _not_ fundamental. Extending a _Heiner_-like protection against the use of presumptions that streamline civil litigation, by rationing opportunities to present particularized proof, throws a monkey wrench in the regulation of the economy, the Court warned. Therefore, it warred with the modern construction of the Fifth and Fourteenth Amendment, which permits wide regulatory latitude in just that area.

By suggesting its analysis applied to presumptions in ordinary civil litigation, _Salfi_ sounded the death knell of the old _Lochner_-era conception of procedural due process. It strongly implied that where the interest at stake is a simple economic or property interest—as where a civil defendant is contesting civil liability—restricting opportunities for presenting particularized proof in defense of that lower-priority interest comports with due process so long as the evidence given legal effect has at least some rational probative relationship to standards of liability, and limiting the availability of particularized hearings serves important public interests, by reducing onerous litigation costs, promoting more consistent outcomes, or ensuring effective deterrence.

2. _Scalia_ Sows Confusion

Unfortunately, _Salfi_’s significance is sometimes misunderstood, thanks in large part to Justice Scalia’s narrow reinterpretation of the conclusive presumption

356 _Id._ at 772.
357 _Id._ at 785.
358 See _supra_ notes 350–55 and accompanying text.
359 _Salfi_, 422 U.S. at 772, 773 (explaining that “extend[ing] . . . _Stanley_. . . and _LaFleur_ to the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments,” including those “arising from legislative efforts to regulate private business enterprises”).
cases as pure substantive due process cases in his plurality opinion in *Michael H v. Gerald D* a decade later—an opinion that only the Chief Justice joined in full.

Irrebuttable presumptions, as noted earlier, fall within the nether zone of rules that reasonable people might classify as either substantive or procedural. Throughout the nineteenth century and into the *Lochner* era, courts conceptualized presumptions as procedural rules—that is, rules regulating the opportunity to present evidence. Today, however, courts view irrebuttable presumptions as rules defining parties’ substantive rights.

Justice Scalia shares this modern bias. Irrebuttable presumptions, he declared in *Michael H*, are simply general statutory classifications—rules that define substantive rights and reflect substantive policies. According to Scalia, irrebuttable presumption cases like *Salfi* “must ultimately be analyzed as calling into question not the adequacy of procedures but—like our cases involving classifications framed in other terms—the adequacy of the ‘fit’ between the classification and the policy that the classification serves.”

Scalia is right about many things, but he was wrong here. The *Stanley* Court had clearly treated the presumption there as a procedural due process problem, as the Court reaffirmed in the decade after it (and *Salfi*) were decided. Though it is true that part of the *Salfi* Court’s opinion analyzed the presumption at issue there in rational-basis terms (and found the presumption survived rational-basis scrutiny), Scalia ignored that it did so only after rejecting *Salfi*’s procedural due process argument on the merits, based on the nature of the interest at stake, implying, in turn, that the *Salfi* Court thought irrebuttable presumptions do require procedural due process analysis when they affect constitutionally protected interests.

Scalia’s view of *Salfi* was, at least at the time, idiosyncratic. The majority of justices in *Michael H* agreed *Salfi* and its precursors like *Stanley* and *LaFleur* addressed a problem with procedural due process dimensions. As Justice

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361 See supra notes 131–47 and accompanying text.
362 See supra notes 131–47 and accompanying text.
363 491 U.S. at 119–21.
364 Id. at 121.
366 *Michael H.*, 491 U.S. at 144 (Brennan, J., dissenting) (“[T]he Court fit the complaint in *Salfi* into the [substantive rather than procedural due process] category on the ground that the challenged law did not deprive anyone of a constitutionally protected interest. . . . Today’s plurality, in contrast, classifies this case as one invoking substantive due process before it considers the nature of the interest at stake.”).
Brennan put it, in cases like *Stanley* and *Salfi*, the State, by “declar[ing] a certain fact relevant, indeed controlling,” even as it “den[ies] a particular class of litigants a hearing to establish that fact” presents “precisely [the sort of issue that concerns] procedural due process.” Unfortunately, Scalia’s reading has won the day. Today, *Salfi* is remembered as a case that decided that legislatively mandated irrebuttable presumptions are substantive rules that should be analyzed under the substantive strain of the Court’s due process jurisprudence.

In some class actions that are the focus of this Article, the import of *Salfi* (even interpreted in the narrow and misleading way Scalia suggests) is clear: Some trial courts seem to conceive of the presumptions they adopt as interpretations of parties’ substantive rights. Consider, for example, a case in which a court rules that the underlying substantive law allows courts to irrebuttably presume reliance based on proof of uniform written misrepresentations of a product’s merits in cases involving mass injuries. In these cases, Scalia’s interpretation of *Salfi* tells us that the interpretation (assuming it is consistent with legislative intent) passes muster if it satisfies rational basis scrutiny—that is, if it’s rational to think the presumption’s over- or underinclusiveness is justified in order to conserve on the excessive cost and unpredictability of particularized evidentiary hearings.

491 U.S. at 153 (Brennan, J., dissenting). *Salfi*, Justice Brennan emphasized, did not hold “that a challenge to a conclusive presumption must rest on substantive rather than procedural due process”; it applied rational basis scrutiny to the presumption only after concluding that the presumption did not violate procedural due process. *Id.* As Rhonda Wasserman notes, Brennan, Marshall, Blackmun, White, and Stevens also agreed that at least in cases implicating important liberty interests, procedural due process entitled parties to the presentation of particularized probative evidence. *See Wasserman, supra*, at 85–87.

While the majority in *Michael H* agreed on these points, they disagreed about how to apply them. Four, led by Justice Brennan, dissented, asserting that the conclusive presumption at issue in the case had denied the petitioner a fair hearing. *See* 491 U.S. at 153 (Brennan, J., joined by Marshall and Blackmun, J.J., dissenting) (characterizing irrebuttable presumptions as procedural due process problem); *id.* at 157, 160–61, 163 (White, J., joined by Brennan, J., dissenting) (arguing the presumption denied the petitioner procedural protection due before depriving him of a fundamental liberty interest, by denying him an opportunity to rebut the presumption). One of the five, Justice Stevens, decided that the statute at issue, properly interpreted, didn’t preclude the petitioner from presenting evidence to establish the liberty interest he was seeking to enforce. *See id.* at 134–35 (Stevens, J., concurring) (“I recognize that my colleagues have interpreted [the statute] as creating an absolute bar that would prevent a California trial judge from regarding the natural father as either a ‘parent’ within the meaning of the first sentence of § 4601 or as ‘any other person’ within the meaning of the second sentence. That is . . . an unnatural reading of the statute’s plain language . . . .”).

368 *Id.* at 153 & n.10 (Brennan, J., dissenting) (noting that “[t]he plurality’s bald statement that the holding in *Stanley* did not rely on procedure due process is therefore incorrect,” and noting, too, that *Salfi* dismissed the relevance of cases like *Stanley* only after concluding the statute in *Salfi* did not implicate a significant interest).

But in a variety of other class cases, courts are not clearly purporting to issue a substantive ruling. Instead, they seem to assume they are exercising discretion, delegated to them by Congress, to ration defendants’ procedural opportunities to rebut proof of their liability. This is certainly the case in suits adopting sampling or formulaic methods of proof. Courts do not seem to characterize sampling or formulaic proof as changes in the parties’ legal rights. Instead, they seem to characterize their decisions procedurally—as modification of the parties’ opportunities to present proof of those rights in order to accommodate plaintiff’s use of the class device.

True, sampling and formulaic proof both employ irrebuttable presumptions. Sampling employs an irrebuttable presumption that class members suffered an injury equivalent to the average claim in a test sample, while formulaic proof employs an irrebuttable presumption that the proof identifies real victims of discrimination. But it is not a presumption that applies generally, as a new rule creating new substantive rights does. The irrebuttable presumption arises because, for reasons of economy and equity, the court has exercised its discretion to forbid defendants from rebutting that proof with the particularized evidence they would be entitled to present in a nonaggregated proceeding.

If we take these decisions on their own terms—as procedural and not substantive decisions—those who uncritically accept Scalia’s narrow interpretation of Salfi risk missing Salfi’s import. When a defendant’s interest is in keeping its property—in avoiding civil liability—Salfi implies that limitations on the defendant’s opportunity for a particularized hearing also comport with procedural due process so long as the insuperable difficulty of “individualized determinations” would impose enormous costs of the legal system and hamstring the deterrence objectives of the law, and so long as the evidence used to establish liability is roughly accurate.

Salfi, in effect, anticipates the same conclusions a host of lower courts have reached when considering restrictions on class defendants’ opportunities under Mathews and Doe, decided after Salfi. Namely, where defendants’ sole interest is in avoiding or limiting damages, “adversarial resolution of each class member’s claim would pose insurmountable practical hurdles” for plaintiffs and impose enormous ancillary costs on courts, and evidentiary shortcuts are tolerably accurate in the run of cases, limitations on defendants opportunities to present individualized evidence “[do] not violate due process.”

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370 See supra Part I.A.
371 See supra notes 42–58 and accompanying text.
372 See supra notes 42–58 and accompanying text.
373 See supra note 42 and accompanying text.
374 See, e.g., Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137, 176–77 (N.D. Cal. 2004) (characterizing the decision to adopt formulaic proof as a pragmatic response to the realities of class litigation—a form of “rough justice”); see also supra notes 38–58 and accompanying text.
375 Hilao v. Estate of Marcos, 103 F.3d 767, 786–87 (9th Cir. 1996).
3. The Early Tradition Restored

Uncritical acceptance of Scalia’s myopic (if fashionable) view of irrebuttable presumptions, it bears (re)emphasizing, also risks blinding us to the significance of the historical record. Much of the evidence about the original understanding of due process developed here is drawn from a long skein of cases, dating from the earliest years after the framing, dealing with the due process implications of conclusive, or irrebuttable, presumptions—the most thoroughgoing restraint on opportunities to present proof possible. As we have seen, lawyers of the period conceived of these presumptions, in procedural and evidentiary, not substantive, terms, as rules denying defendants opportunities to present probative proof, rather than rules defining substantive rights. And, pre-Lochner, courts thought that sort of limit—when adopted as a matter of independent judicial discretion, in the service of equity and convenience—didn’t violate defendants’ procedural due process rights.

If we want to understand how the nineteenth-century legal community understood what constitutes due process, we have to look at these cases through their eyes, not Justice Scalia’s. And when we do, it is evident that the post-New Deal procedural due process cases and the older understanding converge.

At the beginning of the Court’s long effort to work out the content of “due process,” Chief Justice Marshall in Hamilton v. Russell had barred fact-intensive investigations of conveyances by debtors, by adopting a conclusive presumption that conveying title to property without relinquishing possession is conclusive evidence of fraud. And he had done so for many of the reasons the Burger Court would uphold the conclusive presumption challenged in Salfi. The presumption in Hamilton also reflected sensible effort to conserve on litigation costs, promote predictability, and in doing so, forestall efforts to manipulate legal proceedings to effectuate a “sham” or fraud on the legal system.

In line with the antebellum conception of due process, Marshall had not seemed to think that rationing parties’ opportunities for proving their claims or defenses based on these considerations violated parties’ constitutional rights. The Burger Court did not see any problem with similar restrictions on proof, either. Despite a gulf of two centuries, the pragmatic reasoning that led the old Marshall Court and the modern Burger Court to these parallel conclusions was fundamentally the same.

Salfi departed from antebellum cases in a nuanced way: its belief that judicial approval of a presumption of fact is guided by a (loose) constitutional requirement that the presumption reflect a sensible weighing of litigants’ interests,
administrative efficiency, and public policy (requirements later formalized in Mathews and Doehr). The old antebellum cases, in contrast, had thought due process required nothing more than independent judicial sanction and confirmation of the weight and effect of specific evidence.\footnote{Hurtado v. California, 110 U.S. 516, 532–37 (1884) (summarizing antebellum due process jurisprudence).}

Nuances aside, the approaches are fundamentally similar. Due process does not impose any firm restrictions on alterations in the type or quantity of evidence presented in ordinary civil proceedings. Everything, in practice, turns on a judicial judgment, guided by dictates of “good sense, equity, and convenience.” In \textit{Salfi}, the essentials of the old antebellum due process tradition had been, quietly, restored.

\textbf{CONCLUSION:

APPRASING CLASS ACTION DEFENDANTS’ NEW LOCHNERISM}

The Due Process Clause, says Wal-Mart, guarantees a right to defend against civil claims with “any relevant rebuttal evidence they choose,”\footnote{See supra note 4 and accompanying text.} But for most of our history, courts have thought otherwise.\footnote{See supra Part III.} The common law imposed a variety of limits on parties’ ability to present probative evidence to economize on the cost and unpredictability of jury fact-finding.\footnote{See supra Part III.A.} And, not surprisingly, after ratification, American courts—the inheritors of that tradition—did not construe the Due Process Clause to require a maximally fact-intensive evidentiary hearing. They treated it as a structural right to adjudication by the right institution—an independent judiciary.\footnote{See supra Part III.B.} The idea that due process might bar courts from doing what they had always done—refine, and sometimes restrict, opportunities to present probative evidence in common law fashion in the service of equity and convenience—never seemed to have occurred to them.

Class action defendants bid to revive a different, brief-lived understanding from the \textit{Lochner} era. Due process, the \textit{Lochner} Court thought, guarantees a full-throated adversarial evidentiary hearing, in which each side has an opportunity to present “every fact and circumstance”—or “any relevant . . . evidence they choose,” as Wal-Mart says—bearing on liability.\footnote{See supra note 4 and accompanying text.} Class defendants agree.

Given its continuing status as an antiprecedent, \textit{Lochner} is never a great recommendation for any construction of the Due Process Clause. And that’s doubly true here. The \textit{Lochner}-era Court’s protection of a right to present “all the facts” was intertwined with the notion, deeply anathema to the post-New Deal due process framework, that property rights are fundamental and therefore deserve the type of heightened procedural safeguards that today we reserve for certain kinds of
important liberty interests.\footnote{See supra Part IV.A.} Lochner-era cases like *Turnipseed* or *Heiner* are, to put it bluntly, relics of assumptions whose rejection lies at the foundation of post-New Deal constitutionalism.\footnote{See Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459–63 (2001).} It’s not surprising that post-New Deal courts have turned their back on them.

But *Lochner* is not just an inconvenient pedigree as a matter of recent precedent. The history developed here undermines the claims of class action defendants who want to invoke originalism as a trump against recent precedent.

We’ve seen that historical practice can be useful to originalists in three ways. Some think that a long tradition of early historical construction of open-ended constitutional clauses, like the Due Process Clauses, is powerful evidence of their proper construction because the early construction reveals the kind of principle that the people who ratified the clause most likely intended to enact.\footnote{See supra Part II.B.} Others think a long tradition of early historical practice liquidates ambiguity in a clause’s text by “fixing” the proper meaning of the clause.\footnote{See supra Part II.B.} Still others think that while vague and abstract clauses delegate a degree of interpretive discretion to judges, long traditions are presumptive evidence of wise constructions.\footnote{See supra Part II.B.}

Yet under any of these approaches to constitutional construction, the *Lochner* era view that civil defendants have a right to present “all the facts” has a weak claim to guide us. Its approach is a departure from the historical understanding of the Due Process Clause that grew in the wake of the Fifth Amendment’s ratification and persisted for much of the first century of American due process jurisprudence.\footnote{See supra Part III, IV.} As a result, the *Lochner*-era understanding is not very good evidence of the principles the Fifth Amendment’s framers thought they were enacting. Nor is it compelling for those who think, consistent with common theories of constitutional construction held by the Framers, that early practice fixes the construction of ambiguous clauses. Either way, the older, century-long tradition that *Lochner* supplanted has a much stronger claim to guide construction.

The long chain of antebellum cases also raises some doubts about the *Lochner*-era understanding as evidence of the meaning of the *Fourteenth Amendment’s* Due Process Clause. After all, given the early tradition of interpretation—which persisted up until the ratification of the Civil Rights Amendments—there’s no compelling reason to think many Reconstruction era lawyers would have thought due process protects a right to present all the facts in civil cases. True, some of the conceptual shifts (e.g., changes in the way lawyers conceived of the relationship between rights and remedies and changing notions about the value of a hearing) that lead to *Lochner*-era cases like *Turnipseed* have their first glimmerings in the years around the Reconstruction era. But those shifts ripened and bore doctrinal fruit a generation later. Based on the state of the law at
the time the Fourteenth Amendment was ratified, many Reconstruction lawyers were instead more likely to have thought as we do: that there is no vested constitutional right to rules of evidence. For them, as for us, those rules were committed to reasoned judicial discretion in light of the spirit and guiding principles of the common law of evidence—accuracy, convenience, utility, and public policy.

Even if we concede the meaning of the Fourteenth Amendment’s Due Process Clause is, like the Fifth’s, ambiguous and calls for construction, the history presented in this Article matters. If, as many originalists think, long traditions have the best claim to guide construction of due process because the test of time is evidence of wise constructions, then the very long, robust and irrepressible practice of tolerating judicial alteration of opportunities to present all probative evidence in civil cases, in the service of convenience, utility, and public policy, has a powerful claim to guide construction of both the Fifth and Fourteenth Amendment’s Due Process Clauses.

The history of the Due Process Clause in effect confirms our common wisdom. Selecting fair procedures requires a hazardous and uncertain trade-off between “risk reduction and available resources, just as any substantive right against risk imposition does,” and it’s far from clear that that balance always favors a full-throated adversarial proceeding that lets in “all the facts.” Indeed, it’s not clear adversarial proceedings are best even if accuracy were the only measure of fair procedure: “Today,” as Robert Bone says, “we are acutely aware of the limitations of trial-like procedures [as a truth-seeking mechanism], especially in the strategic environment of litigation.” Given that selecting “fair” procedures is fraught with trade-offs and uncertainty, constitutionalizing the features of an ideal, full-throated adversarial hearing in civil cases without regard to experience and context, including cost, is unwise. Our traditions, which—the Lochner era aside—treat many choices in the realm of civil procedure and evidence as a subconstitutional matter left to judicial or legislative choice, bear that judgment out.

This is not to say that due process doesn’t include some, albeit uncontroversial, fixed content. The original understanding requires a deprivation of core private rights through a judicial hearing. Since 1791, the core hearing right has been understood to require (1) some opportunity to participate—personally or through an adequate representative—in the judicial proceeding that affects your rights, (2) fair notice, (3) an unbiased judge exercising independent judgment about adjudicative facts and unsettled parts of the law, and (4) a determination of

394 COOLEY, supra note 133, at 367.
396 Id. at 1016.
397 Id. at 1017 (“[F]ew people, if any, would think that reducing the risk of error is always important enough to justify substantial social investments . . . .”).
liability according to governing rules of law and procedures commanded by a legislature.

But to the extent that the legislature has given courts authority to alter and modify preexisting rules governing the weight and sufficiency of evidence, it doesn’t limit their ability on to ration opportunities for proof based on a reasoned trade-off between accuracy and efficiency.

This is not to say that class action defendants’ arguments might not have some merit on other grounds. Even if due process does not require federal courts to provide class defendants an opportunity to present individualized evidence, Congress might. But, what if it’s not clear what Congress wants? Should federal courts, take it on themselves to adjust parties’ opportunities to prove their claims or defenses in the service of efficiency or deterrence? Or should they wait for further, clearer legislative guidance? Lurking behind class defendants’ due process arguments is a difficult question about the exact responsibility that Congress ought to have for the choice about how class claims can be proven.

That’s a question for another article. But, as this Article should make clear, it’s an important question precisely because the Constitution doesn’t specify the exact level of opportunities parties should have to prove their civil claims and defenses. The Constitution leaves the answer to that question up to us.