

“OH LORD, PLEASE DON’T LET ME BE
MISUNDERSTOOD!”¹ : REDISCOVERING THE *MATHEWS V.*
ELDRIDGE AND *PENN CENTRAL* FRAMEWORKS

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ABSTRACT

Mathews v. Eldridge, which addresses the procedures that must be provided for deprivations of life, liberty, or property under the Due Process Clauses, and *Penn Central Transportation Co. v. City of New York*, which guides inquiry into when governmental regulations rise to the level of takings of property that require just compensation, are decisions with near-canonical status. *Mathews* and *Penn Central* have some noteworthy parallels. Each decision is widely regarded as prescribing a three-factor test for resolving questions that arise under its respective domain. Each decision is almost universally decried as unworkable, incomplete, subjective, and incapable of consistent application. And each decision is, we think, largely misunderstood.

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This Article is the synthesis of three related projects: Professor Lawson’s long-standing musings and recent research about the origins and nature of the *Mathews* and *Penn Central* frameworks; a seminar paper written by Katie Ferguson comparing and contrasting the three-factor tests that have come to be associated with *Mathews* and *Penn Central*; and a seminar paper written by Guillermo Montero that sought to reformulate and defend the *Penn Central* framework against some of the most extreme criticisms that have been brought against it. Although this Article addresses topics well beyond the scope of Mr. Montero’s paper, Ms. Ferguson and I acknowledge that his paper was the true genesis of the enterprise. Almost certainly, this Article would not have been conceived without his effort.

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¹ THE ANIMALS, *Don’t Let Me Be Misunderstood, on ANIMAL TRACKS* (Columbia Records 1965).

In this article, we demonstrate that neither the *Mathews* nor *Penn Central* decisions actually set forth tests—much less three-factor tests—for resolving issues. Rather, each decision had the far more modest, but nonetheless important, goal of providing a common language for lawyers and judges to employ when conducting inquiries about constitutional procedures or regulatory takings, both of which are doctrinally oriented around a search for basic fairness. The decisions do no more, and no less, than to provide a framework within which issues of fairness can be explored and discussed through the formal, stylized channels of an adversarial legal system. We show that the so-called *Mathews* test was not the creation of the Supreme Court; it was constructed by the Solicitor General's office, and endorsed by the AFL-CIO as amicus for Eldridge, as a way of focusing attention on key features of procedural fairness that had specific relevance to the facts in *Mathews*. The *Penn Central* Court similarly gave no indication that it was prescribing any kind of decision-making methodology, and it identified only two basic factors—the impact on property owners and the character of the governmental action—that bore on the regulatory takings inquiry. Subsequent decisions and commentators have often treated these frameworks as actual vehicles for decision-making, but that is neither sensible nor faithful to the frameworks' original conceptions. Once *Mathews* and *Penn Central* are properly understood as vehicles for shaping dialogue about fundamental fairness, they make a good measure of jurisprudential sense, especially if the *Penn Central* framework in particular is reconstructed to conform more closely to its original model. Accordingly, we propose some modest clarifications to the *Penn Central* framework that better allow it to serve its true conversation-shaping function.