PROCEDURAL DUE PROCESS

A Reference Guide to the United States Constitution

Rhonda Wasserman

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Foreword by the Honorable
Joseph F. Weis, Jr.,
United States Circuit Judge

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For Howard, who has brought much light,
love and laughter into my life

It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Hamdi v. Rumsfeld (U.S. 2004) (plurality op.)

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Series Foreword

JACK STARK

One can conceive of the United States Constitution in many ways. For example, noting the reverence in which it has been held, one can think of it as equivalent to a sacred text. Unfortunately, most of its devotees have had less knowledge and even less understanding of the document than they have had reverence for it. Sometimes it is treated as primarily a political document and on that basis has been subjected to analysis, such as Charles Beard's *An Economic Interpretation of the Constitution of the United States*. One can plausibly argue that the Constitution seems most astounding when it is seen in the light of the intellectual effort that has been associated with it. Three brief but highly intense bursts of intellectual energy produced, and established as organic law, most of the Constitution as it now exists. Two of those efforts, sustained over a long period of time, have enabled us better to understand that document.

The first burst of energy occurred at the Constitutional Convention. Although some of the delegates' business, such as the struggle between populous and nonpopulous states about their representation in Congress, was political, much of it was about fundamental issues of political theory. A few of the delegates had or later achieved international eminence for their intellects. Among them were Benjamin Franklin, Alexander Hamilton, and James Madison. Others, although less well known, had first-rate minds. That group includes George Mason and George Wythe. Many of the delegates contributed intelligently. Although the Convention's records are less than satisfactory, they indicate clearly enough that the delegates worked mightily to constitute not merely a polity but a rational polity—one that would rise to the standards envisioned by the delegates' intellectual ancestors. Their product, though brief, is amazing. William Gladstone called it "the most wonderful work ever struck off."

Despite the delegates' eminence and the Constitution's excellence as seen from our place in history, its ratification was far from certain. That state of affairs necessitated the second burst of intellectual energy associated with that document: the debate over ratification. Soon after the Convention adjourned, articles and speeches—some supporting the Constitution and some attacking it—began to proliferate. A national debate commenced, not only about the document itself, but also about the nature of the polity that ought to exist in this country. Both sides included many writers and speakers who were verbally adroit and steeped in the relevant political and philosophical literature. The result was an accumulation of material that is remarkable for both its quantity and its quality. At its apex is the *Federalist Papers,* a production of Alexander Hamilton, James Madison, and John Jay that deserves a place among the great books of Western culture.

Another burst, not as impressive as the first two but highly respectable, occurred when the Bill of Rights was proposed. Some delegates to the Constitutional Convention had vigorously asserted that such guarantees should be included in the original document. George Mason, the principal drafter of the Virginia Declaration of Rights, so held, and he walked out of the Convention when he failed to achieve his purpose. Even those who had argued that the rights in question were implicit recognized the value of adding protection of them to the Constitution. The debate was thus focused on the rights that were to be explicitly granted, not on whether any rights *ought* to be explicitly granted. Again many writers and speakers entered the fray, and again the debate was solidly grounded in theory and was conducted on a high intellectual level.

Thus, within a few years a statement of organic law and a vital coda to it had been produced. However, the meaning and effect of many of that document's provisions were far from certain; the debates on ratification of the Constitution and the Bill of Rights had demonstrated that. In addition, the document existed in a vacuum, because statutes and actions had not been assessed by its standards. The attempt to resolve these problems began after Chief Justice John Marshall, in Marbury v. Madison, asserted the right of the U.S. Supreme Court to interpret and apply the Constitution. Judicial interpretation and application of the Constitution, beginning with the first constitutional case and persisting until the most recent, is one of the sustained exertions of intellectual energy associated with the Constitution. The framers would be surprised by some of the results of those activities. References in the document to "due process," which seems to refer only to procedures, have been held also to have a substantive dimension. A right to privacy has been found lurking among the penumbras of various parts of the text. A requirement that states grant the same "privileges and immunities" to citizens of other states that they granted to their own citizens, which seemed to guarantee important rights, was not held to be particularly important. The corpus of judicial interpretations of the Constitution is now as voluminous as that document is terse.

As judicial interpretations multiplied, another layer—interpretations of interpretations—appeared, and also multiplied. This layer, the other sustained intellectual effort associated with the Constitution, consists of articles, most of them published in law reviews, and books on the Constitution. This material varies in quality and significance. Some of these works of scholarship result from meticulous examination and incisive thought. Others repeat earlier work, or apply a fine-tooth comb to matters that are too minute even for such a comb. Somewhere in that welter of tertiary material is the answer to almost every question that one could ask about constitutional law. The problem is finding the answer that one wants. The difficulty of locating useful guidance is exacerbated by the bifurcation of most constitutional scholarship into two kinds. In "Two Styles of Social Science Research," C. Wright Mills delineates macroscopic and molecular research. The former deals with huge issues, the latter with tiny issues. Virtually all of the scholarship on the Constitution is of one of those two types. Little of it is macroscopic, but that category does include some first-rate syntheses such as Jack Rakove's *Original Meanings*. Most constitutional scholarship is molecular and, again, some fine work is included in that category.

In his essay, Mills bemoans the inability of social scientists to combine the two kinds of research that he describes to create a third category that will be more generally useful. This series of books is an attempt to do for constitutional law the intellectual work that Mills proposed for social science. The author of each book has dealt carefully and at reasonable length with a topic that lies in the middle range of generality. Upon completion, this series will consist of thirty-seven books, each on a constitutional law topic. Some of the books, such as the book on freedom of the press, explicate one portion of the Constitution's text. Others, such as the volume on federalism, treat a topic that has several anchors in the Constitution. The books on constitutional history and constitutional interpretation range over the entire document, but each does so from a single perspective. Except for a very few of the books, for which special circumstances dictate minor changes in format, each book includes the same components: a brief history of the topic, a lengthy and sophisticated analysis of the current state of the law on that topic, a bibliographical essay that organizes and evaluates scholarly material in order to facilitate further research, a table of cases, and an index. The books are intellectually rigorous—in fact, authorities have written them—but, due to their clarity and to brief definitions of terms that are unfamiliar to laypersons, each is comprehensible and useful to a wide audience, one that ranges from other experts on the book's subject to intelligent non-lawyers.

In short, this series provides an extremely valuable service to the legal community and to others who are interested in constitutional law, as every citizen should be. Each book is a map of part of the U.S. Constitution. Together they map all of that document's territory that is worth mapping. When this series is complete, each

book will be a third kind of scholarly work that combines the macroscopic and the molecular. Together they will explicate all of the important constitutional topics. Anyone who wants assistance in understanding either a topic in constitutional law or the Constitution as a whole can easily find it in these books.

Foreword

THE HONORABLE JOSEPH F. WEIS, JR., UNITED STATES CIRCUIT JUDGE

Justice Holmes had a knack for expressing important legal doctrine in memorably pithy terms. One of the better examples of this ability is, typically, found in a dissenting opinion. "Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." Frank v. Mangum, 237 U.S. 309, 347 (1915).

That statement is deceptively simple and might lull the less inquisitive into feeling that further exposition would be superfluous. But subjecting that quote to the journalistic queries "who, what, when, where and why" reveals a complex, critical and fascinating area of the law.

Professor Rhonda Wasserman has devoted most of her legal career to a searching examination of the many facets of due process. In this easily readable book, she wends her way through the thicket of case law and scholarly commentary to arrive at a well-organized and informative presentation of an often misunderstood subject.

Dispute resolution is a weighty process that cannot function effectively in the absence of a highly organized system. Granting everyone, everywhere and any time the right to be heard on any issue would create a cacophony accomplishing little but confusion and obfuscation.

When all speak at once, no one is heard. When speech rambles interminably over immaterial and irrelevant matters, the fact finder's efficiency plummets to unacceptable levels. Rules to regulate the right to be heard in the litigation milieu become not merely desirable but essential.

Modern society has more than enough experience with unproductive babble in other institutions to recognize its destructive effect in the courtroom setting. Yet,

at the same time, the fundamental right to be heard must be safeguarded zealously. Patience and understanding, not unsympathetic or excessively rigid rulings, must be the prevailing practice.

Professor Wasserman not only explains the practical importance of procedural rules but explores their constitutional basis. *Where* litigation is to be conducted invokes fairness in a constitutional dimension. Limitations on *who* may be heard are necessary so that facilities may be available to those who have immediate and pressing needs. *When* a matter is to be heard may vary from the expedited emergency proceeding to one in which years of preparation and gathering of evidence are essential.

My service as chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and of the Advisory Committee on Civil Rules has given me an intense exposure to matters affecting, and affected by, due process. That experience, in addition to years on the bench when due process is a day-to-day consideration, underlies my admiration for this excellent book that Professor Wasserman has written. It is a valuable addition to the legal literature of our time.

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I never would have been able to complete this book without the remarkable support and patience of my husband, Howard A. Stern, and the understanding of my sons, Eric, Scott and Benjamin Wasserman Stern. I am grateful to them beyond words.

Rhonda Wasserman
Pittsburgh, Pennsylvania
February 2004

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The History of Due Process

"The history of American freedom is, in no small measure, the history of procedure."[1]

The Fifth and Fourteenth Amendments to the United States Constitution bar the government from depriving any person of life, liberty or property without due process of law.[2] These Due Process Clauses afford both substantive and procedural protections. As substantive limits on governmental action, the Due Process Clauses bar the government from interfering with certain interests that are so basic, personal or fundamental that they may not be regulated by government absent a compelling interest, regardless of the procedural protections afforded (Reno v. Flores, 1993).[3] Among the interests protected are reproductive freedom (Planned Parenthood v. Casey, 1992; Roe v. Wade, 1973) and the right to raise one's children autonomously (Troxel v. Granville, 2000; Pierce v. Society of Sisters, 1925).

Our concern in this volume, of course, is with the *procedural* protections afforded by the Due Process Clauses. The terseness of the phrase "due process of law" belies an enormously powerful check on governmental power: before the government can deprive a person of a protected interest, it must provide her with notice and an opportunity to be heard, among other procedural protections. Our primary objective is to explore the content, scope and significance of these protections as well as their limits. But before we begin, let us first understand the historical context in which these clauses of the Constitution were adopted and the early understanding of the phrase "due process of law."

THE ORIGINS OF DUE PROCESS: MAGNA CARTA AND EARLY ENGLISH LAW

Although the words "due process of law" are not found in the Magna Carta, that charter is commonly viewed as the historical antecedent of the Due Process Clauses. Adopted as a personal treaty between King John and his rebellious barons in 1215, the Magna Carta protected not only the nobility but also the

freemen, stating generally that "No freeman shall be taken and imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."[4]

The key phrase "by the law of the land" is derived from the Latin, "per legem terrae." By assuring the barons and freemen a trial by their peers according to the customary laws of the kingdom, the charter barred execution before judgment and other arbitrary action by the King, at least with regard to criminal procedure.[5] According to Hermine Herta Meyer, the phrase "law of the land" required a particular proof procedure, including the compurgation oath and the ordeal.[6] Others have advocated a broader meaning, not confined to the methods of procedure, but referring instead to "the entire tone and substance of the law."[7]

As successive kings ascended to the throne, each reissued and reaffirmed the charter, sometimes with modifications.[8] The phrase "due process of law" was first introduced in a 1354 statutory reissue of the charter: "That no man of what estate or condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought to Answer by due Process of the Law" (28 Edw. III ch. 3 (1354)). Like the original Magna Carta, the 1354 statute meant that a person could be deprived of life, liberty or property only pursuant to regular court proceedings that afforded him a right to defend himself and included a proof procedure.[9] According to Meyer, the King changed the language from "law of the land" to "due process" to sanction the use of new forms of procedure in the King's Council. As revised, the charter no longer guaranteed a particular procedure, but rather "the procedure due to [a given] case pursuant to law."[10] Thus, "due process of law" meant a regular procedure for summoning people to trial and adjudicating their liability.[11]

As initially crafted, the Magna Carta constrained the King and the 1354 statute constrained the courts, but neither expressly regulated the Parliament, which, in 1215, had not yet been created.[12] By the seventeenth century, however, the great English commentator Sir Edward Coke took the position that Acts of Parliament, too, were subject to the "law of the land." For instance, in Dr. Bonham's case, Coke, then Chief Justice of the Court of Common Pleas, declared, "that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void" (Bonham's Case, C.P. 1610).[13] As we will see, this reading of the "law of the land" was later invoked by the American colonists to challenge the legality of legislation enacted by Parliament. Coke also read the phrases "law of the land" and "due process of law" synonymously,[14] a reading that was initially disputed but came to be widely accepted, especially in America (Murray's Lessee v. Hoboken Land & Improvement Co., 1856).[15]

THE COLONIAL CHARTERS AND EARLY STATE CONSTITUTIONS

The colonists who moved to America claimed for themselves the same legal protections they had enjoyed in England. Thus, the colonial charters and early laws preserved in some form or other the protections originally provided by the Magna Carta and the 1354 statute. For example, the General Laws of New-Plimouth (1671) barred deprivations of "Life, Limb, Liberty, Good name or Estate, under colour of Law," unless the person was "brought to Answer by due process thereof."[16]

In the minds of the colonists, due process meant not only procedural protections in judicial proceedings and a regular indictment and jury trial in criminal proceedings, but also a more general check against arbitrary government. As Rodney Mott put it, "It is but a small step from the view that the procedure in a civil case must be according to the law, to the conception of the law of the land as a limitation upon the impairment of vested rights or the tyrannical exercise of the police power."[17]

The colonists invoked due process and the "law of the land" language from the Magna Carta in their struggles with England leading up to the Revolutionary War. Thus, when British officials sought to enforce the Navigation Acts in Boston by means of general search warrants, a Massachusetts attorney, James Otis, argued that the court should invalidate Acts of Parliament that were contrary to the constitution of England and the "law of the land" provision of the Magna Carta. Otis relied on Lord Coke's view that the "law of the land" limited the powers of Parliament, as well as the King and his courts.[18] Likewise, in challenging the Stamp Act, the colonists argued that it violated the Magna Carta by authorizing trials of offenders in the admiralty courts without the protection of trial by jury.[19] Thus, the colonists believed that the "law of the land" constrained the legislature as well as the other branches of government.[20]

The Declaration of Independence, drafted before the war, was an "indictment of England's misdeeds," but it was not a bill of rights and contained no legal assurances of personal freedom or due process.[21] Nor did the Articles of Confederation address personal freedom, as it was accepted at the time that each state retained sovereignty, including the responsibility to protect the rights of its own citizens.[22] Thus, it was the states themselves that first adopted permanent constitutions, including bills of rights to protect the individual liberties of their citizens.[23] Several of these constitutions paraphrased or copied the Magna Carta, barring deprivations of life, liberty or property except "by the judgment of his peers or by the law of the land" (Maryland Declaration of Rights, 1776; Massachusetts Constitution, 1780; New Hampshire Constitution, 1783). By Rodney Mott's count, eight of the thirteen states had constitutions containing the equivalent of a due process clause before the Fifth Amendment was adopted, although

none of them used the words "due process of law," and none were interpreted until after the federal government was established in 1787.[24]

The Continental Congress did not presume to enact a bill of rights to protect citizens of the states, but it was obliged to protect the rights of those living in the territories, including the territory northwest of the Ohio River.[25] In 1787, it adopted the Northwest Ordinance, which included a full bill of rights for the inhabitants of the Northwest Territory and, borrowing language from the Magna Carta, assured that "No man shall be deprived of his liberty or property but by the Judgment of his peers or the law of the land."[26] Unfortunately, the records of the Continental Congress do not reveal the meaning that was attached to the phrase, the "law of the land."[27] The ordinance nevertheless is highly significant, for as Robert Rutland notes, "For the first time, civil rights became a factor in national legislation."[28]

THE FEDERAL CONSTITUTION AND THE FIFTH AMENDMENT

In time, the Articles of Confederation came under attack and a Constitutional Convention was called to draft a constitution that would strengthen the national government and protect private property rights against legislative attack.[29] The early debates did not focus on personal liberties, as the protection of civil rights had been a matter of state, not national, concern under the Articles and there was widespread satisfaction among the public with the protections thus afforded.[30] As the debates continued, however, and it became clear that the national government would have enormous powers under the new Constitution, a group of delegates grew concerned about potential federal interference with the rights of individual citizens. During the last week of the Convention, these delegates moved to appoint a committee to prepare a bill of rights, but the motion was defeated. Even last-ditch efforts to add specific protections in piecemeal fashion—to preserve the liberty of the press, for example—were unsuccessful.[31] No specific reference was made to a due process clause during the entire four months that the Constitutional Convention sat, which is noteworthy given the significant role that "due process" and the "law of the land" had played in England and colonial America.[32]

During the months following the close of the Convention, the Antifederalists, who opposed ratification of the Constitution, cited the lack of a bill of rights as a primary flaw. Thomas Jefferson, who was then serving as American Minister to France, added his voice to those advocating a bill of rights, while George Washington was far more skeptical.[33]

Ratification debates in the states were sometimes fierce, with vigorous arguments raised in letters, newspapers and pamphlets. Much of the debate centered on the need for a bill of rights, with the Federalists arguing that a bill of rights was unnecessary because nothing in the Constitution divested the people of the rights already secured to them by the state constitutions, and the Antifederalists coun-

tering that, in the absence of a bill of rights, freedom of religion and other personal liberties would depend "on the will and pleasure" of their rulers.[34] Although the precise contours of the Antifederalist vision of a bill of rights were vague and none of the pamphlets referred specifically to the need for a due process clause, it is clear that proponents believed that Congressional power had to be limited "by principles of liberty . . . based upon the fundamentals of the common law and Magna Carta."[35]

A compromise was reached in Massachusetts to ratify the Constitution but also to submit a set of proposed amendments to the new Congress for its consideration.[36] Other states followed suit, with New York circulating a letter to the other states suggesting another federal convention.[37] Of the seven states that submitted proposed amendments to Congress, four included the "law of the land" text from the Magna Carta.[38] Ultimately, all states but North Carolina and Rhode Island ratified the Constitution, with the widespread expectation that a bill of rights would be added.[39]

When the new Congress met in New York in April of 1789, James Madison offered a set of amendments gleaned from both the Virginia Declaration of Rights and the amendments submitted by the states, including only those proposals that he thought were likely to gain approval by Congress and the states.[40] One of his proposed amendments stated that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[41] Since the Constitution already provided that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury,"[42] it would have been "in part superfluous and inappropriate" to use the language of the Magna Carta and declare that no person shall be deprived of life, liberty or property except by the judgment of his peers or the law of the land (Murray's Lessee v. Hoboken Land & Improvement Co., 1856). Instead, Madison used the words "due process of law," which Coke had declared to be synonymous with the "law of the land."

Madison may also have chosen the phrase "due process of law" to avoid confusion. After all, the phrase "law of the land" was used in the Supremacy Clause of the Constitution.[43] Since "law" in the Supremacy Clause referred to positive enactments (i.e., the Constitution, federal statutes and treaties), while "law" in the Magna Carta's "law of the land" meant common law, it might have been confusing to employ the phrase "law of the land" in the Fifth Amendment.[44]

In all events, Madison's proposals were vetted by a committee, thoroughly reviewed by the House sitting as a committee of the whole, and ultimately forwarded (in revised form) to the Senate.[45] After some initial wrangling about whether to postpone consideration of the amendments until the next session of Congress, the Senate agreed to consider the seventeen amendments forwarded by the House. The Senate rejected several of them and consolidated the rest (including the Due Process Clause) into twelve revised amendments, which it then sent back to the House for its concurrence. After some further revisions by

a conference committee, both houses approved the twelve amendments, which ultimately were transmitted to the states.[46] With this check on federal power now in the hands of the states, North Carolina finally ratified the Constitution.[47]

As the states debated whether to ratify the amendments, two of the proposals—one regarding the apportionment of seats in the House and the other on Congressional salaries—were defeated. There was no opposition, however, to the Due Process Clause of the Fifth Amendment.[48] On December 15, 1791, more than two years after the amendments had been approved by Congress, Virginia ratified the Bill of Rights and became the last of the eleven states needed to make the amendments effective.[49]

As adopted, the Fifth Amendment to the United States Constitution followed the general organization of the eighth article of the Virginia Declaration of Rights. Both dealt largely with criminal procedure, and both promised due process in a clause that immediately followed one that barred forced self-incrimination. While the Virginia Declaration employed the time-honored "law of the land" language of the Magna Carta and the Fifth Amendment employed the phrase "due process of law," it is well-accepted that the framers, like Coke before them, read the words synonymously.[50]

Notwithstanding the Fifth Amendment's focus on criminal procedure, Rodney Mott concludes that "There is no doubt that the Fifth Amendment was expected to limit arbitrary abuses of the powers of government from whatever source abuse might come, and it is a perfectly tenable hypothesis that the due process provision was intended to serve as a general limitation to check tyranny in any kind of case in which it should arise."[51] To bolster this conclusion, Mott notes that one of the primary arguments in favor of a bill of rights had been the need to curb Congressional power. In his view, of the five amendments that possibly could be read to limit Congress, only the Due Process Clause of the Fifth Amendment was broad enough to serve as a "catch-all phrase for popular liberty."[52] While agreeing that the Due Process Clause was intended to provide general procedural protection as well as the specific "process" guarantees contained elsewhere in the Bill of Rights, William Crosskey nevertheless maintains that the Due Process Clause was not intended to authorize courts to review the substantive fairness of Congressional legislation.[53]

DUE PROCESS BEFORE THE CIVIL WAR

The elasticity and potential breadth of the words "due process of law" have provided the Supreme Court with countless opportunities for interpretation. But in the early years of our nation's history, the Due Process Clause of the Fifth Amendment was "largely irrelevant" and, in the words of Judge Easterbrook, "fell into desuetude."[54] In fact, sixty-five years passed before the United States Supreme Court first examined the Due Process Clause in Murray's Lessee v.

Hoboken Land & Improvement Co. (1856). There, an auditor for the federal treasury found that a collector of the customs for the port of New York owed over a million dollars to the government. The solicitor of the treasury issued a distress warrant as authorized by federal statute, which placed a lien on the collector's property. The collector was provided no opportunity to be heard. When the property was sold to satisfy the obligation, the collector challenged the constitutionality of the warrant and the sale thereunder, arguing that he was deprived of liberty and property without due process of law.

In addressing this challenge, the Court first noted the Fifth Amendment's opacity: "The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process." Notwithstanding the text's terseness, the Court had no trouble inferring that the Fifth Amendment Due Process Clause restrained Congress as well as the executive and judicial branches of government; Congress was not "free to make any process 'due process of law,' by its mere will" (Murray's Lessee v. Hoboken Land & Improvement Co., 1856).[55]

In assessing whether a process enacted by Congress constituted "due process," the Court applied a two-part analysis. First, it looked to those "settled usages and modes of proceeding" under English law that were adaptable to American civic life, and second, the Court "examine[d] the constitution itself, to see whether this process be in conflict with any of its provisions" (Murray's Lessee v. Hoboken Land & Improvement Co., 1856). Thus due process was defined in terms of historically accepted practice (except as modified by the Constitution itself).[56]

Applying this historical analysis, the Court noted that while due process of law generally implied "regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings," among other protections, England had long treated those owing debts to the Crown more summarily than ordinary debtors. In fact, "'the law of the land' authorized the employment of auditors, and an inquisition without notice" to ascertain the existence and amount of debts to the Crown. In light of this history and the states' nearly universal use of distress warrants to collect taxes before adoption of the federal Constitution, the Court concluded that the proceedings comported with due process (Murray's Lessee v. Hoboken Land & Improvement Co., 1856).

Murray's Lessee is noteworthy not only for its historical analysis, but also for its recognition that due process applies beyond the criminal procedure context to protect private property rights. In Charles Miller's words, "it is this side of due process/law-of-the-land, the side of property rights and, to a considerable degree, natural rights, which is the genuine American 'contribution' to the due process tradition."[57] Put differently, *Murray's Lessee* foreshadowed the "due process revolution" of the 1960s, which recognized that government benefits, employment and other forms of largess are protected by due process.[58]

During the mid-nineteenth century, social reform movements, including the temperance and abolitionist movements, attempted to infuse due process with greater substantive content.[59] Although these efforts are beyond the scope of this volume, one pre-Civil War substantive due process case, Wynehamer v. People (N.Y. 1856), foreshadows another important development in procedural due process. In *Wynehamer*, a man was convicted of selling intoxicating liquors in violation of a state temperance law. On appeal, the New York Court of Appeals concluded that intoxicating liquors were property and held that the law violated the state Due Process Clause. In striking down the law, the court made clear that it is a judicial function, not a legislative function, to determine what process is due:

> To say . . . that "the law of the land," or "due process of law," may mean the very act of legislation which deprives citizens of his rights, privileges or property, leads to a simple absurdity. The constitution would then mean, that no person shall be deprived of his property or rights, unless the legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away (Wynehamer v. People, N.Y. 1856).

Thus, *Wynehamer* not only reinforces the conclusion that due process restrains the legislature, but it also foreshadows the Supreme Court's later conclusion that the scope of procedural protections required by due process is a federal constitutional matter, which state legislatures cannot limit by enacting summary procedures to govern the deprivation of state-created rights (Cleveland Bd. of Educ. v. Loudermill, 1985; Vitek v. Jones, 1980).[60]

ADOPTION OF THE FOURTEENTH AMENDMENT

The earliest drafts of the Fourteenth Amendment were introduced in Congress in December 1865, eight months after the end of Civil War and just days before the Thirteenth Amendment was ratified. The Fourteenth Amendment was intended to insulate from constitutional challenge the far-reaching legislative program of the Thirty-ninth Congress, embodied in the Civil Rights and Freedmen's Bureau Acts, and to enshrine their protections in the Constitution itself so that a later Congress could not eliminate them.[61] While earlier drafts of the Fourteenth Amendment would have granted Congress *affirmative* power to enact legislation to ensure equal enjoyment of civil rights (e.g., "Congress shall have power . . . ."),[62] in its final form, the Fourteenth Amendment used *negative* language:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws (U.S. Const. amend. XIV, § 1).

While the drafters may have changed the affirmative language to the negative to appease those concerned about states' rights,[63] they also may have changed it to ensure that protection of civil rights would not depend upon which party held a majority of the seats in Congress, but rather would be built into the Constitution itself.[64]

The Due Process Clause of the Fourteenth Amendment was the least discussed provision in the amendment.[65] Understandably, the primary focus of the framers was on equality under the law. In fact, while all drafts of the amendment included an Equal Protection Clause of some kind, no Due Process Clause was proposed until April 1866, a full four months after the original proposal for a Fourteenth Amendment was offered.[66] Even in explaining the relevance of the Due Process Clause to the Senate, Jacob Howard of Michigan emphasized its role in "protect[ing] the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."[67] Likewise, in explaining the amendment to the House of Representatives, Thaddeus Stevens emphasized the goal of equality, but in doing so, mentioned the judicial protections to be afforded to blacks:

> Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. . . . Now color disqualifies a man from testifying in courts, or being tried in the same way as white men.[68]

This language suggests that the framers of the Fourteenth Amendment intended to ensure that blacks would have the same access as whites to state judicial proceedings under the same rules.[69]

By failing to specify particular procedural safeguards in the Fourteenth Amendment itself—such as the Fifth Amendment presentment or indictment requirement—the framers may have intended to leave the states "free to make their own procedural rules with the sole obligation that they had to be the same for every person."[70] As the Supreme Court of Wisconsin put it in 1872,

> the object of [the Fourteenth] [A]mendment was to protect [blacks] especially from any arbitrary exercise of the powers of the state governments, and to secure for [them] equal and impartial justice in the administration of the law, civil and criminal. But its design was not to confine the states to a particular mode of procedure in judicial proceedings . . . (Rowan v. State, Wis. 1872).

This conclusion was reaffirmed by the United States Supreme Court, which noted that due process in the Fourteenth Amendment refers to the "law of the land in each State" and that "[e]ach State prescribes its own modes of judicial proceeding" (Hurtado v. California, 1884; Missouri v. Lewis, 1879; see also Walker v. Sauvinet, 1875).

PROCEDURAL DUE PROCESS IN THE POST-CIVIL WAR PERIOD

Although there had been few challenges to federal governmental action brought under the Due Process Clause of the Fifth Amendment before the Fourteenth Amendment was ratified, many suits were filed to challenge state action under the Due Process Clause of the Fourteenth Amendment. The Supreme Court soon recognized that if it could define all those state actions that would violate due process and distinguish all those that would not, "no more useful construction could be furnished by this or any other court to any part of the fundamental law" (Davidson v. New Orleans, 1877). But the Court declined to attempt to craft such a definition: "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded" (Davidson v. New Orleans, 1877).

The Supreme Court's first opportunity to interpret the Fourteenth Amendment came in the Slaughter-House Cases (1873). There, a group of butchers challenged the constitutionality of a Louisiana statute that granted a monopoly to a newly-chartered slaughterhouse and ordered the closing of all other slaughterhouses in New Orleans. The case is best known for its distinction between state and federal citizenship and its much-criticized holding that the Privileges and Immunities Clause of the Fourteenth Amendment does not protect the fundamental rights of all citizens in a free society, but only those rights that "owe their existence to the Federal government, its national character, its Constitution, or its laws" (Slaughter-House Cases, 1873). But Justice Bradley's dissenting opinion invoked the Due Process Clause of the Fourteenth Amendment, both harking back to the Magna Carta and foreshadowing the later expansion of protected liberty and property rights. "In my view," Bradley wrote,

> a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property (Slaughter-House Cases, 1873, Bradley, J., dissenting).[71]

If a majority of the Court paid short shrift to the Due Process Clause in the Slaughter-House Cases (1873), it gave it greater attention a decade later in its first significant procedural due process decision following enactment of the Fourteenth Amendment, Hurtado v. California (1884). There, the state of California charged Joseph Hurtado with murder. Rather than convene a grand jury to indict him, the district attorney filed an information against him pursuant to state law. An information is a formal criminal charge made without a grand jury indictment.[72] Upon conviction and imposition of a death sentence, Hurtado argued that

due process required an indictment or presentment by a grand jury and that the procedure employed violated the Fourteenth Amendment.

The Supreme Court began with the proposition that "when the same phrase ['due process'] was employed in the Fourteenth Amendment to restrain the action of the states, it was used in the same sense and with no greater extent" than in the Fifth Amendment (Hurtado v. California, 1884). Since the Fifth Amendment contained a separate provision regarding the grand jury, the Court concluded that the Due Process Clause did not itself require grand juries. Likewise, "if in the adoption of [the Fourteenth] [A]mendment it had been part of its purpose to perpetuate the institution of the grand jury in all the states, it would have embodied, as did the fifth amendment, express declarations to that effect" (Hurtado v. California, 1884). Thus, the Court concluded that the Fourteenth Amendment Due Process Clause did not require grand juries in state criminal proceedings. Harlan in dissent and Crosskey in commentary sharply criticize *Hurtado*'s paradoxical principle: that "every element of 'process' that was prescribed in the Constitution was to be excluded as an element of 'due'—that is to say, 'appropriate'—'process of law' thereunder."[73]

In addition to resolving the precise issue before it, the *Hurtado* Court offered further insight into the general meaning of due process. First, notwithstanding its earlier emphasis on tradition, the Court clarified that new procedures that were not part of the inherited common law might nevertheless qualify as due process. In parsing its prior interpretation of "due process" in *Murray's Lessee*, the Court gleaned "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country; but it by no means follows, that nothing else can be due process of law" (Hurtado v. California, 1884). If only pedigree qualified law as due process, the law would be "incapable of progress or improvement." Citing the common law's "flexibility and capacity for growth and adaptation" as its "peculiar boast and excellence," the Court declined to conclude that the phrase "due process of law" had a "fixed, definite and technical meaning" (Hurtado v. California, 1884). Thus, in the words of J. Roland Pennock, under *Hurtado*, "historical precedent was no longer a necessary condition of due process."[74] In its place, the Court considered the fundamental fairness of a challenged procedure.

Second, the *Hurtado* Court clarified that not every legislative act qualified as "law" or "due process of law." Rather, due process referred to "the general law," not "a special rule for a particular person or a particular case . . ." and "exclud[ed], as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation" (Hurtado v. California, 1884).

Third, the Court reiterated that each state had authority to prescribe "its own modes of judicial proceeding." Due process in the Fourteenth Amendment did not require the states to adopt particular modes of procedure, but instead "refers to that law of the land *in each state*, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ." (Hurtado v. California, 1884 (emphasis added); see also Rogers v. Peck, 1905). This language is reminiscent of the framers' statements that the Fourteenth Amendment Due Process Clause was intended to ensure equal access to state judicial proceedings, rather than to require the states to afford particular procedural protections.

There is a tension, however, between *Hurtado*'s conclusion that the Due Process Clause left the states free to prescribe their own procedures, and the earlier understanding that due process and the "law of the land" limited the legislature as well as the judiciary and the executive. Ralph Whitten argues that "the pre-fourteenth amendment context . . . possesses a much higher degree of reliability in establishing the meaning of due process of law" and rejects the proposition that the Due Process Clause was "designed *only* as a direction to the states to give everyone access to judicial processes under the same rules."[75] Instead, he posits that while the framers and ratifiers of the Fourteenth Amendment intended the Due Process Clause to assure all persons equal access to judicial proceedings and to bar state courts from departing from legally prescribed procedures in specific cases, these were not the *only* meanings of due process.[76]

The Supreme Court's decision in Pennoyer v. Neff (1877) is consistent with Whitten's reading and demonstrates that the post-Civil War Court did not repudiate the earlier understanding that due process restricted the legislature. In fact, *Pennoyer* concluded that the Due Process Clause of the Fourteenth Amendment *did* limit the freedom of the states to craft their own procedures, at least with regard to state court jurisdiction (or the authority of a court to compel a defendant to appear and defend in its courts).

To understand *Pennoyer*, we must first understand the flexibility regarding jurisdiction that state courts enjoyed before *Pennoyer*. The Fifth Amendment restrained only the federal government, not the states (Barron v. Baltimore, 1833; Withers v. Buckley, 1858; Twining v. New Jersey, 1908), so it did not inhibit state courts from rendering judgments against defendants who had not been personally served with process or otherwise brought within a court's jurisdiction.[77] And since the states retained sovereignty, they were treated as independent governments at liberty to prescribe their own methods of judicial process (Thompson v. Whitman, 1873). Thus, in the years before the Fourteenth Amendment was adopted, judgments rendered by state courts without proper notice or service of process were binding in the rendering state and were not subject to collateral attack there or elsewhere on due process grounds (Lafayette Ins. Co. v. French, 1856).

This did not mean that state court judgments rendered without notice or service of process were impervious to challenge, however. Under international law at the time the Union was formed, a judgment rendered against a defendant in one state who had not been served with process was void in other states (D'Arcy v. Ketchum, 1851). While the Full Faith and Credit Clause of the Constitution and its implementing statute required courts to recognize judgments rendered elsewhere if the defendant had "full notice" of the action (Mills v. Duryee, 1813), these provisions were not intended to overthrow the international law rule regarding the effect of judgments rendered without jurisdiction. Thus, judgments rendered without jurisdiction or notice were not entitled to full faith and credit in other states (Thompson v. Whitman, 1873; Lafayette Ins. Co. v. French, 1856; D'Arcy v. Ketchum, 1851).[78] In this context, the Supreme Court held that judgments rendered without service of process or notice were contrary to an "immutable principle of natural justice" or the "general law of the land" (Hollingsworth v. Barbour, 1830); "a nullity" (Webster v. Reid, 1851; Shriver Junior's Lessee v. Lynn, 1844); "coram non judice[79] and void" (Boswell's Lessee v. Otis, 1850); or "mere abuse" (D'Arcy v. Ketchum, 1851). Thus, before the adoption of the Fourteenth Amendment Due Process Clause, courts invoked international law, natural law and general principles of justice to bar enforcement of state court judgments rendered without jurisdiction.[80]

But this protection was afforded only outside the rendering state. In other words, no constitutional provision yet barred states from *rendering* judgments without jurisdiction and enforcing them intraterritorially. Although one state court concluded that international law principles applied internally and barred a state legislature from authorizing its courts to bind nonresidents who were not served personally (Beard v. Beard, Ind. 1863), no other state case expressed a similar view, and Whitten offers evidence to suggest that *Beard* would not have been followed in most other states.[81]

Once the Fourteenth Amendment was adopted, however, the Supreme Court quickly recognized that "the validity of [state court] judgments may be *directly* questioned, and their enforcement *in the State* resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law" (Pennoyer v. Neff, 1877 (emphasis added)). Not only did the Supreme Court view the Due Process Clause as providing a vehicle for challenging jurisdiction in both the rendering and enforcing states, but it interpreted the words "due process of law" to require that the defendant "be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance" (Pennoyer v. Neff, 1877).[82] In other words, the Fourteenth Amendment Due Process Clause was read to limit a state court's territorial jurisdiction and, by requiring in-state service of process in *in personam* cases, to ensure that defendants received notice and an opportunity to be heard before a binding judgment was rendered against

them. Since these limitations and requirements applied even if state legislation purported to authorize broader jurisdiction, *Pennoyer* reaffirmed the pre-Fourteenth Amendment understanding that due process restricts the legislature.

Even as the Supreme Court's attention shifted to substantive due process at the turn of the century,[83] it continued to view limitations on jurisdiction, notice and the opportunity to be heard as central to the meaning of procedural due process. In Twining v. New Jersey (1908), for example, the Court reiterated that due process demands that the rendering court have jurisdiction over the parties and that the parties receive notice and an opportunity to be heard. The Court viewed these "fundamental conditions" as "universally prescribed in all systems of law established by civilized countries . . ." (Twining v. New Jersey, 1908). Elaborating on these general requirements, the Court added that as long as

> a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with (Twining v. New Jersey, 1908; see also Hooker v. Los Angeles, 1903; Hagar v. Reclamation Dist., 1884).[84]

In the years since *Twining*, the Court has emphasized history less and fairness more in defining due process. If *Murray* defined due process exclusively in terms of historical practice, and *Hurtado* concluded that historical practice was no longer a necessary condition of due process (a practice not recognized at common law might nevertheless satisfy due process), then Powell v. Alabama (1932) no longer considered historical practice to constitute even a sufficient condition.[85] In other words, even a practice that was *accepted* at common law would violate the Due Process Clause if it violated "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (Powell v. Alabama, 1932, quoting Hebert v. Louisiana, 1926). Even though the *Powell* Court conceded that at common law and at the time the Constitution was adopted, a person charged with a felony was not entitled to the assistance of counsel, the Court nevertheless held that the Due Process Clause guaranteed criminal defendants access to appointed counsel because "the right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel" (Powell v. Alabama, 1932). Although some have bemoaned the Court's move from history toward a "rather freewheeling search for procedures seen as fundamental by modern judges,"[86] the Court itself has maintained that "'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage" (Shaffer v. Heitner, 1977).

NOTES

1. Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., in a separate opinion).

2. The Fifth Amendment Due Process Clause, which regulates the federal government, provides: "[N]or shall any person . . . be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendment Due Process Clause, which regulates the states and their political subdivisions, provides: "[N]or shall any State deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. The Fifth Amendment is written in the passive voice, while the Fourteenth Amendment is written in the active voice. Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition, in* Nomos XVIII: Due Process 45 n.53 (J. Roland Pennock & John W. Chapman eds., 1977).

3. Substantive due process also bars interference with non-fundamental interests unless a "reasonable justification in the service of a legitimate governmental objective" is established. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

4. Magna Carta art. XXXIX (1215), *quoted in* Rodney L. Mott, Due Process of Law § 1, at 3 (1973). For different translations of the same chapter of the Magna Carta, see The Essential Bill of Rights: Original Arguments and Fundamental Documents 14 (Gordon Lloyd & Margie Lloyd eds., 1998) and Joseph Story, Commentaries on the Constitution of the United States § 923, at 656 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833).

There is some disagreement about whether the requirements of a jury trial and application of "the law of the land" were conjunctive or disjunctive. Mott concludes that the better translation of the original Latin is "and," but recognizes that the American constitutions followed Coke's translation, which read the word disjunctively. *See* Mott, *supra*, § 1, at 3 n.8. *See also id.* § 13; William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 381–83 (2d ed. 1914); Hermine Herta Meyer, The History and Meaning of the Fourteenth Amendment: Judicial Erosion of the Constitution Through the Misuse of the Fourteenth Amendment 128 (1977); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part Two)*, 14 Creighton L. Rev. 735, 745 (1981) (hereinafter Whitten Part II).

5. McKechnie, *supra* note 4, at 376–81 & 382 n.2; Mott, *supra* note 4, § 1; Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 95.

6. Meyer, *supra* note 4, at 128–30. *See also* McKechnie, *supra* note 4, at 379 & n.5.

7. McKechnie, *supra* note 4, at 380 & n.1. *See also* Hugh Evander Willis, *Due Process of Law Under the United States Constitution*, 74 U. Pa. L. Rev. 331, 333 (1926).

8. In the reissue of 1225, the Magna Carta was reduced from sixty-three to thirty-seven chapters, and the "law of the land" clause was moved from chapter 39 to chapter 29. Miller, *supra* note 2, at 5.

9. Meyer, *supra* note 4, at 135.

10. *Id.*

11. Easterbrook, *supra* note 5, at 95–96; Whitten Part II, *supra* note 4, at 742–44; Mott, *supra* note 4, § 26; Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 197 (1977).

12. Easterbrook, *supra* note 5, at 96; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315, 320 (1999); Davidson v. New Orleans, 96 U.S. 97, 101, 102 (1877).

13. For a more thorough treatment of Coke's statement in Bonham's case, see John V. Orth, Due Process of Law: A Brief History 18–32 (2003). Many have argued that any Act of Parliament constitutes due process of law. *See, e.g.*, Lowell J. Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 Cal. L. Rev. 583, 586 (1930); Willis, *supra* note 7, at 334; Hurtado v. California, 110 U.S. 516, 531 (1884).

14. 2 Edward Coke, The Institutes of the Laws of England 50 (photo. reprint 1986) (Butler & Hargrave eds., 1797) (stating that, "the words, by the law of the land, are rendred without due proces of law").

15. Whitten Part II, *supra* note 4, at 768; Berger, *supra* note 11, at 196. *Cf.* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 368 (1911) (concluding that Coke misled generations of commentators); Meyer, *supra* note 4, at 138–40 (similar); 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 1103 (1953) (similar).

16. See The Essential Bill of Rights, *supra* note 4, and The Complete Bill of Rights: The Drafts, Debates, Sources and Origins (Neil H. Cogan, ed., 1997) for the texts of the colonial charters and early laws. *See also* Meyer, *supra* note 4, at 140–46 (discussing colonial charters and laws and state constitutions).

17. Mott, *supra* note 4, § 47, at 123. *Cf.* Whitten Part II, *supra* note 4, at 754, 770.

18. Mott, *supra* note 4, § 48.

19. *Id.* § 51; *see also* Miller, *supra* note 2, at 7.

20. Mott, *supra* note 4, § 54; Whitten Part II, *supra* note 4, at 770–71. *But see* Berger, *supra* note 11, at 194 (stating that due process "quite plainly . . . *did not mean*, in either 1789 or 1866 . . . judicial power to override legislation on substantive or policy grounds"); Corwin, *supra* note 15, at 373.

21. Mott, *supra* note 4, § 5, at 13; Robert Allen Rutland, The Birth of the Bill of Rights: 1776–1791, at 41 (1955).

22. Rutland, *supra* note 21, at 78–79, 100, 107.

23. Mott, *supra* note 4, § 54; Rutland, *supra* note 21, at 41.

24. Mott, *supra* note 4, §§ 7, 9–10, & 54. For a comprehensive discussion of the state constitutions and the different phraseologies used to assure due process, *see id.* §§ 9–11, 67–72; *see also* Easterbrook, *supra* note 5, at 96; Miller, *supra* note 2, at 8–9; Whitten Part II, *supra* note 4, at 748–54.

25. Rutland, *supra* note 21, at 100.

26. Ordinance of 1787, *quoted in* Rutland, *supra* note 21, at 103.

27. Mott, *supra* note 4, § 55.

28. Rutland, *supra* note 21, at 104–05.

29. Corwin, *supra* note 15, at 374–75.

30. Rutland, *supra* note 21, at 107–08.

31. *Id.* at 113–25; Mott, *supra* note 4, § 56.

32. Mott, *supra* note 4, § 56 (citing James Madison's record of the debates which can be found in The Records of the Federal Convention of 1787 (Max Farrand, ed., 1966)).

33. Rutland, *supra* note 21, at 124, 128–30, 133–34.

34. *Id.* at 126–89 (for discussion of ratification debates) & 137 (quoting Philadelphia Indep. Gazetteer, Nov. 1, 1787). *See also* Mott, *supra* note 4, § 58.

35. Mott, *supra* note 4, § 57.

36. Rutland, *supra* note 21, at 146.

37. *Id.* at 180–81.

38. Mott, *supra* note 4, § 58.

39. Rutland, *supra* note 21, at 181, 187–89.

40. *Id.* at 202, 206.

41. Mott, *supra* note 4, § 60 & n.46.

42. U.S. Const. art. III, § 2.

43. U.S. Const. art. VI (stating that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land").

44. Miller, *supra* note 2, at 10–11. *See also* Bernard H. Siegan, Property Rights: From Magna Carta to the Fourteenth Amendment 107 (2001).

45. Rutland, *supra* note 21, at 207–09.

46. *Id.* at 211–15; Mott, *supra* note 4, § 60.

47. Rutland, *supra* note 21, at 215–16.

48. Mott, *supra* note 4, §§ 61 & 62 & n.66; Rutland, *supra* note 21, at 216–17.

49. Rutland, *supra* note 21, at 217.

50. An early commentary on the Constitution, written by Justice Joseph Story, noted that the words "by the law of the land" in the Magna Carta "mean by due process of law. . . ." Story, *supra* note 4, § 932.

51. Mott, *supra* note 4, § 62, at 159. *Cf.* 2 Crosskey, *supra* note 15, at 1104–07, 1137 (concluding that the Due Process Clause of the Fifth Amendment commanded "appropriate" legal process); Miller, *supra* note 2, at 11 (concluding that "it is difficult to construe [the Due Process Clause of the Fifth Amendment's] general terms with the generality many people . . . have accorded it").

52. Mott, *supra* note 4, § 62.

53. 2 Crosskey, *supra* note 15, at 1102–16, 1137.

54. Easterbrook, *supra* note 5, at 99.

55. This conclusion was consistent with conclusions of state courts interpreting state constitutional Due Process Clauses. *See, e.g.,* Wynehamer v. People, 13 N.Y. 378, 392 (1856) (concluding that state constitutional due process clauses "are imposed by the people as restraints upon the power of the legislature"); *see also* Hoke v. Henderson, 15 N.C. 1, 15–16 (1833) (interpreting "law of the land" clause).

56. J. Roland Pennock, *Introduction*, *in* Nomos XVIII: Due Process xvii (J. Roland Pennock & John W. Chapman eds., 1977); 2 Crosskey, *supra* note 15, at 1108–09; Easterbrook, *supra* note 5, at 102.

57. Miller, *supra* note 2, at 13.

58. *See infra* Chapter 2 at text accompanying notes 31 to 44.

59. For example, the abolitionists argued that the Due Process Clause "granted slaves their physical liberty, or at least protected the children of slaves in their natural-born liberty," while the slave owners argued that slaves were property and slave owners had a protected liberty interest in traveling north with their "property." Miller, *supra* note 2, at 14–16. The Supreme Court accepted the slave owners' argument in Dred Scott v. Sandford,

60 U.S. (19 How.) 393, 450 (1856), which decision was repudiated by the Civil War amendments.

60. *See infra* Chapter 2 at text accompanying notes 46 to 49. *See also* Howe, *supra* note 13, at 602–04; Miller, *supra* note 2, at 14.

61. Jacobus tenBroek, The Antislavery Origins of the Fourteenth Amendment 183–87, 209 (1951); Horace Edgar Flack, The Adoption of the Fourteenth Amendment 94 (1908); Mott, *supra* note 4, § 63.

62. Flack, *supra* note 61, at 56–65 (quoting earlier drafts of the Fourteenth Amendment); tenBroek, *supra* note 61, at 187–89 (same).

63. Flack, *supra* note 61, at 57–69; tenBroek, *supra* note 61, at 200–01.

64. tenBroek, *supra* note 61, at 200–16, 220–21.

65. Mott, *supra* note 4, § 65; Berger, *supra* note 11, at 201.

66. Whitten Part II, *supra* note 4, at 805; Mott, *supra* note 4, § 63; tenBroek, *supra* note 61, at 187–90.

67. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

68. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866).

69. Berger, *supra* note 11, at 211–13.

70. Meyer, *supra* note 4, at 126–27.

71. *See also* Miller, *supra* note 2, at 17–18; 2 Crosskey, *supra* note 15, at 1119–30, 1135.

72. Black's Law Dictionary 783 (7th ed. 1999).

73. 2 Crosskey, *supra* note 15, at 1140; *see id.* at 1136–41.

74. Pennock, *supra* note 56, at xvii; *see also* Miller, *supra* note 2, at 18.

75. Whitten Part II, *supra* note 4, at 816.

76. *Id.* at 816–17; *see also id.* at 809–17.

77. The Due Process Clause of the Fifth Amendment had been invoked to bar judgments rendered by territorial courts without service of process or notice. Webster v. Reid, 52 U.S. (11 How.) 437, 450 (1851). Interestingly, while counsel in *Webster* invoked due process to bolster the argument that a judgment rendered without service of process or notice was void, the Supreme Court did not explicitly mention due process to support its conclusion that "[n]o person is required to answer in a suit on whom process has not been served, or whose property has not been attached." *Id.* at 459–60. Likewise, while the Supreme Court held that judgments rendered by federal courts without notice or personal service of process upon the defendant were "absolutely void" and "contrary to the first principles of justice," Harris v. Hardeman, 55 U.S. (14 How.) 334, 339–40 (1853), it did not invoke the Fifth Amendment Due Process Clause to support this conclusion.

78. For a comprehensive review of the original meaning of the Full Faith and Credit Clause in Article IV, § 1, and the implementing legislation enacted by Congress in 1790, *see* Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 Creighton L. Rev. 499 (1981).

79. Coram non judice means "[o]utside the presence of a judge" or "[b]efore a judge or court that is not the proper one or that cannot take legal cognizance of the matter." Black's Law Dictionary 338 (7th ed. 1999).

80. The Full Faith and Credit Clause did not affirmatively limit state court jurisdiction. *See* Patrick J. Borchers, *Jurisdictional Pragmatism*: International Shoe's *Half-Buried*

Legacy, 28 U.C. Davis L. Rev. 561, 566 (1995) (hereinafter Borchers, *Jurisdictional Pragmatism*).

81. Whitten Part II, *supra* note 4, at 800. *See also* Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From* Pennoyer *to* Burnham *and Back Again*, 24 U.C. Davis L. Rev. 19, 32 (1990) (concluding that in intrastate cases, "the sole question was whether the court rendering the judgment followed the applicable state statutes") (hereinafter Borchers, *Death of Constitutional Law*); Roger H. Transgrud, *The Federal Common Law of Personal Jurisdiction*, 57 Geo. Wash. L. Rev. 849, 877–78 (1989) (discussing *Beard*).

82. The state court judgment in issue in *Pennoyer* had been entered two years before the ratification of the Fourteenth Amendment, so the Court's due process analysis was dictum. *See* Borchers, *Death of Constitutional Law*, *supra* note 81, at 37–38 (citations omitted); John B. Oakley, *The Pitfalls of "Hit and Run" History: A Critique of Professor Borchers's "Limited View" of* Pennoyer v. Neff, 28 U.C. Davis L. Rev. 591, 632 (1995). The reading proffered in the text—that *Pennoyer* intended the Due Process Clause to provide both a vehicle for challenging a state court's exercise of jurisdiction as well as the content of the jurisdictional rules to be applied—has been referred to as the "expansive" view of *Pennoyer*. Borchers, *Death of Constitutional Law*, *supra* note 81, at 38–39. Borchers posits a more limited reading of *Pennoyer*, pursuant to which the Due Process Clause would provide a vehicle for challenging jurisdiction in all cases, but not the content of the jurisdictional rules to be applied. *Id.* at 40 (under this view, Field "intended for defendants to have at least one chance to ensure that a state followed its own rules of jurisdiction, whatever those rules might be"); *see also* Borchers, *Jurisdictional Pragmatism*, *supra* note 80, at 569. For a scathing critique of the limited view, *see* Oakley, *supra*, at 616–85.

83. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897); *see also* Easterbrook, *supra* note 5, at 104.

84. Crosskey concludes that the *Twining* opinion "undoubtedly discloses the Supreme Court at its worst." 2 Crosskey, *supra* note 15, at 1141; *see id.* at 1141–46 (criticizing *Twining*).

85. Pennock, *supra* note 56, at xvii & xxxi n.5; *see also* Easterbrook, *supra* note 5, at 106 (noting *Powell*'s reliance on cases that "give no support to judicial augmentation of historically recognized procedures").

86. Easterbrook, *supra* note 5, at 107.

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Preliminaries

"Appearances in the dark are apt to look different in the light of day."[1]

Before we begin our analysis of the procedural protections afforded by the Due Process Clauses, we must examine four critical preliminary issues. First, we must consider who qualifies as a "person" protected by due process. Do the Fifth and Fourteenth Amendments protect only individuals or are noncorporeal entities—like corporations, unions, and even governments themselves—also protected? Are *all* individuals considered "persons" within the meaning of the Due Process Clauses or are only American citizens or those admitted for permanent residence protected? Second, since the Due Process Clauses protect persons from only governmental, not private, action, we must next consider who qualifies as a "state" or "government" actor. Put differently, when are private parties sufficiently involved in governmental action to qualify as state actors for constitutional purposes? Third, we must define the interests protected by the Due Process Clauses. Does the word "property" entail anything more than real estate? Is tangible personal property protected? What about non-tangible interests, like employment and reputation? And how broadly are the words "life" and "liberty" read? Finally, we must consider the state of mind that the governmental actor must possess at the time she deprives a person of a protected interest to trigger due process protection. If a state actor's mere negligence causes a person to lose a protected interest, has there been a "deprivation" for due process purposes, or must the state actor actually *intend* to deprive her of a protected interest to trigger due process protection? If negligent acts do not satisfy the state-of-mind requirement, how about grossly negligent or reckless acts? It is to these critically important preliminary issues that we now turn.

"PERSONS" PROTECTED BY DUE PROCESS

Webster's Dictionary defines a "person" as "a human being, whether man, woman or child."[2] Taken at face value, this definition suggests that aliens clandestinely

seeking entry into the United States and even enemy combatants are persons, but that corporations, labor unions and school boards are not. As we will see, the Supreme Court's interpretation of the word "person" in the Due Process Clauses varies significantly from this commonsense definition of the word.

Individuals

Assuming for now that American citizens are "persons" within the meaning of the Due Process Clauses, one must ask whether noncitizens, such as aliens living in the United States and those who have not yet entered the country, also are entitled to due process protections. As early as 1886 (only eleven years after Congress enacted the first immigration law), the Supreme Court stated that the provisions of the Fourteenth Amendment are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality" (Yick Wo v. Hopkins, 1886). Consistent with this statement, the Court has long held that due process protects aliens within this country (Terrace v. Thompson, 1923; Wong Wing v. United States, 1896; Yick Wo v. Hopkins, 1886), even if they are here illegally (Zadvydas v. Davis, 2001; The Japanese Immigrant Case, 1903; Plyler v. Doe, 1982).[3] For example, the Court has recognized that resident aliens cannot be deported without a fair hearing consistent with due process (Wong Yang Sung v. McGrath, 1950; United States *ex rel.* Vajtauer v. Comm'r of Immigr., 1927).

In its most recent decision addressing the due process rights of aliens in the immigration context, the Supreme Court reiterated that "the Fifth Amendment entitles aliens to due process of law in deportation proceedings," but it also emphasized that "Congress may make rules as to aliens that would be unacceptable if applied to citizens" (Demore v. Kim, 2003). Upholding a law that requires the detention of criminal aliens pending removal proceedings—even when the individuals have not been shown to be flight risks or dangerous—the Court concluded that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal" (Demore v. Kim, 2003). Thus, the conclusion that illegal aliens qualify as "persons" protected by due process does not necessarily mean that they are entitled to the same protections as citizens.[4]

Moreover, the Court has long distinguished between the rights of aliens who have gained entry into the country and those who have not (Landon v. Plasencia, 1982; Kwong Hai Chew v. Colding, 1953). Noncitizens seeking initial entry into the United States have not been treated as "persons" within the meaning of the Fifth Amendment and therefore have no right to due process (Shaughnessy v. United States *ex rel.* Mezei, 1953; United States *ex rel.* Knauff v. Shaughnessy, 1950; Detroit Free Press v. Ashcroft, 6th Cir. 2002 (dicta)). Put differently, "What-

ever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" (United States *ex rel.* Knauff v. Shaughnessy, 1950).[5]

Likewise, few, if any, constitutional protections are afforded to enemy aliens whose countries are at war with the United States. In Johnson v. Eisentrager (1950), for example, the Supreme Court concluded that nonresident enemy aliens are not "persons" within the meaning of the Fifth Amendment.[6] Even resident aliens, if they are citizens of a country at war with the United States, may be deported without notice or an opportunity to be heard on the issue of their dangerousness (Ludecke v. Watkins, 1948). Likewise, unlawful combatants, including "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property," can be tried by military commissions for offenses against the law of war without the Fifth and Sixth Amendment guarantees of trial by jury, even if they are American citizens (Ex Parte Quirin, 1942).[7] Thus, without stating that resident enemy aliens and unlawful combatants are not "persons" within the meaning of the Fifth Amendment, the Supreme Court has concluded that they are not entitled to standard Fifth Amendment protections in these contexts.[8]

The extent to which those at war with the United States are protected by due process is a critical issue today, as the United States continues to wage the "war on terrorism" begun in the aftermath of the tragic events of September 11, 2001. Given the ever-changing military target—al Qaeda, the Taliban in Afghanistan, the Baathist regime in Iraq—it is more difficult in this war than in past wars to determine whether a person qualifies as an enemy combatant.[9] In a recent trilogy of cases, the Supreme Court has clarified to some extent the rights of those the government detains as enemy combatants. First, detainees being held within the United States or on an American military base over which the United States has complete jurisdiction and control, such as Guantanamo Bay, may challenge their classification as enemy combatants and the legality of their confinement in federal court. Put differently, the federal district courts have jurisdiction to hear petitions for writs of habeas corpus filed both by American citizens detained as enemy combatants within the United States (Hamdi v. Rumsfeld, 2004; Rumsfeld v. Padilla, 2004)[10] and by aliens captured abroad in connection with hostilities and detained on the American naval base at Guantanamo Bay (Rasul v. Bush, 2004).[11] Second, and more important for our purposes, the Supreme Court has clarified that American citizens detained as enemy combatants within the United States are entitled to certain due process protections: "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" (Hamdi v. Rumsfeld, 2004, plurality op.). In addition, a citizen challenging classification as an enemy combatant