THE OXYMORON RECONSIDERED: MYTH AND REALITY IN THE ORIGINS OF SUBSTANTIVE DUE PROCESS

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The view that the due process clauses of the Constitution impose substantive restraints on governmental power has long been a subject of contention. It has become an article of faith in some quarters that due process pertains entirely to matters of procedure. Thus, John Hart Ely maintained: "[W]e apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"[1] Other observers have also derided substantive due process as an "oxymoron."[2] Similarly, Robert H. Bork considers substantive due process to be "a momentous sham" that "has been used countless times since by judges who want to write their personal beliefs into a document."[3]

Of course, substantive due process has not been so easily banished from the constitutional dialogue as these dismissive comments suggest. As historians are well aware, federal and state courts relied on a substantive interpretation of due process in the nineteenth and early twentieth centuries to vindicate economic liberty.[4] Following the political triumph of the New Deal,

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1. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (Harvard U. Press, 1980).

2. This phrase evidently originated in an opinion by Judge Richard A. Posner. See *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (discussing "the ubiquitous oxymoron 'substantive due process.'" It has been widely employed in the scholarly literature. See, e.g., Nelson Lund, *Federalism and Civil Liberties*, 45 U. of Kansas L. Rev. 1045, 1059 (1997) (stating that "substantive due process is not based on the text of the Constitution or the intentions of those who made it").

3. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 31 (Free Press, 1990).

4. James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888-1910* at 83-

however, the Supreme Court abandoned meaningful due process review of economic and social legislation.[5] Yet, far from disappearing, substantive due process has been revamped in the late twentieth century to safeguard a variety of non-economic rights.[6] This dichotomy in the type of rights accorded due process protection is highly suspect.[7] It flies in the face of the language of the due process clauses as well as the views of the framers, and raises another set of issues. On what principled basis can one decide which rights are so basic as to warrant due process scrutiny? Some liberal scholars have endeavored to distinguish "bad" judicial solicitude for economic rights from "good" defense of personal liberties.[8] On the other hand, conservatives tend to reject outright most forms of substantive due process; this approach at least has the virtue of consistency. Justice Antonin Scalia, a critic of substantive due process in many policy areas, has sharply questioned the incoherent use of substantive due process to downgrade economic rights:

> The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicable ex-

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103 (U. of South Carolina Press, 1995); Bernard Schwartz, *A History of the Supreme Court* 179-82 (Oxford U. Press, 1993); Kermit L. Hall, *The Magic Mirror: Law in American History* 232-36 (Oxford U. Press, 1989).

5. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 126-34 (Oxford U. Press, 2d ed. 1998); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* 213-36 (Oxford U. Press, 1995).

6. Schwartz, *A History of the Supreme Court* at 337-61 (cited in note 4) (discussing the evolution of the right of privacy); William M. Wiecek, *Liberty Under Law: The Supreme Court in American Life* 177-93 (Johns Hopkins U. Press, 1988); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1223, 1297 (1995) (noting that due process clause continues "to provide not merely procedural protections, but substantive protections as well").

7. James W. Ely, Jr., *The Enigmatic Place of Property Rights in Modern Constitutional Thought*, in David J. Bodenhamer and James W. Ely, Jr., eds., *The Bill of Rights in Modern America: After 200 Years* 89-91 (Indiana U. Press, 1993). See also Gottfried Dietze, *In Defense of Property* 60 (Regnery Co., 1963, reprinted U. Press of America, 1995) (declaring that "property appears as an important right in the Constitution of the United States, a right that is definitely on a par with, if not superior to, other liberal rights"). Similarly, a prominent study of early state constitutions stated: "The first state constitutions thus clearly emphasized the individual's claim to legal protection of his property." Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 194 (U. of North Carolina Press, 1980).

8. Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* 247-72 (Oxford U. Press, 1992). See also Morton J. Horwitz, *The Jurisprudence of* Brown *and the Dilemmas of Liberalism*, 14 Harv. C.R.—C.L. L. Rev. 599 (1979).

> clusion of so-called "economic rights" (even though the Due Process Clause explicitly applies to "property") unquestionably involved policymaking rather than neutral legal analysis.[9]

Still another group of scholars, spearheaded by Richard A. Epstein and Bernard H. Siegan, has urged a renewed judicial commitment to due process protection of economic rights.[10]

It is evident that thinking about the substantive dimension of the due process requirement has fragmented. All of the participants in the debate, however, have one point in common—they draw upon the sanction of history to support their position. Unfortunately, the grasp of the historical record displayed by many observers is skimpy. Indeed, a large number of the scholars who address the concept of substantive due process seem more concerned with constructing a grand theory of constitutional law than with carefully examining the past.

Consider, for example, the analysis of the due process clauses provided by Bork. According to Bork, *Dred Scott v. Sandford* marked "the first appearance in American constitutional law of the concept of 'substantive due process.'"[11] This account is flawed in two signal respects. First, by linking a substantive reading of due process to the discredited *Dred Scott* case Bork seeks to taint all subsequent applications of the doctrine. But due process received only passing attention by Chief Justice Roger B. Taney. Indeed, a leading historian has concluded that "Taney's contribution to the development of substantive due process was therefore meager and somewhat obscure."[12] The problems with *Dred Scott* must be found elsewhere. The opinion does represent unbridled judicial activism. In *Dred Scott* the Supreme Court unnecessarily plunged into the heated debate over slavery in the federal territories by invalidating the Missouri

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9. *United States v. Carlton*, 512 U.S. 26, 41 (1994) (Scalia, J., concurring). See also Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85 (1983). This paper does not address Justice Scalia's opinion that the substantive component of due process protects only those specific rights recognized when the Bill of Rights was adopted. For Scalia's views, see generally David A. Schultz and Christopher E. Smith, *The Jurisprudential Vision of Justice Antonin Scalia* (Rowman & Littlefield, 1996).

10. See generally Bernard H. Siegan, *Economic Liberties and the Constitution* (U. of Chicago Press, 1980); Richard A. Epstein, *The Mistakes of 1937*, 11 George Mason U. L. Rev. 5 (1988); Michael J. Phillips, *Entry Restrictions in the* Lochner *Court*, 4 George Mason U. L. Rev. 405 (1996) (urging due process review of market entry restrictions); Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 Harv. L. Rev. 1363-83 (1990).

11. Bork, *The Tempting of America* at 31 (cited in note 3).

12. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* 382 (Oxford U. Press, 1978).

Compromise. The decision triggered a political firestorm, hurt the prospects for a compromise solution, and undermined the prestige of the Court. The virus of *Dred Scott*, however, was not a substantive reading of due process but a failure of judicial statesmanship. Having resolved that blacks were not citizens, Taney could have disposed of the case on jurisdictional grounds and never addressed Scott's status as a slave. Second, Bork's explanation of substantive due process totally ignores the evolution of the doctrine in the antebellum state and federal courts. This omission skews his understanding of due process and illustrates the danger of concentrating solely on the Supreme Court in assessing the course of legal history. Bork is simply wrong in identifying *Dred Scott* as the fountainhead of substantive due process.[13]

Other critics of substantive due process (even some conservative jurists and scholars) rely on the long-outdated Progressive historiographical view of the courts at the turn of the century as bastions of laissez-faire. The picture drawn by the Progressives, and historians who follow in their footsteps, too often veers into caricature.[14] Put briefly, Progressive historiography holds that judges invented a substantive reading of the due process clauses during the post-Civil War period to safeguard the interests of business from legislative regulation.[15] In so doing, judges frustrated the public will and substituted their own economic judgments for those of elected lawmakers under the guise of enforcing constitutional values. Despite a growing body of revisionist literature challenging the premise of the Progressive interpretation, the legacy of Progressive legal thought has proven remarkably durable.[16]

As might be expected, the Progressives took particular aim at substantive due process doctrines. They insisted that a substantive reading of the due process clauses subverted their origi-

13. Andrew Rutten, *Bostan, Bork, and the Jurisprudence of Limited Government*, 2 Independent Review 271, 277-79 (1997).

14. The work of the Progressive historians was informed by a critical perspective toward the Constitution as an anti-democratic document as well as a desire to encourage social and economic change by lowering constitutional barriers to legislative reform. See Richard Hofstadter, *The Progressive Historians* (Alfred A. Knopf, 1968). According to Hofstadter, Progressives began to argue that "the courts must no longer be regarded as sacrosanct, and to try to find ways of curbing their power." Id. at 202.

15. See Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States* 496-502 (Alfred A. Knopf, 1988) (picturing the emergence of substantive due process as largely a development of the late nineteenth century).

16. Horwitz, *The Transformation of American Law, 1870-1960* at 7 (cited in note 8).

nal meaning as simply a guarantee of procedural regularity. For instance, Louis B. Boudin advanced a narrow reading of due process. He maintained that the concept of due process initially operated as a restraint on the executive and judicial branches but did not limit legislative authority. Further, Boudin asserted that the due process requirement pertained only to matters of procedure.[17] Edward S. Corwin likewise declared: "All that 'due process of law' meant originally was a fair trial for accused persons . . . ."[18] Under this analysis, of course, due process would not amount to much as a limit on governmental authority.

In this paper I propose to take a fresh look at the origins of substantive due process and to offer an alternative interpretation of the due process norm. I investigate the evolution of the concept of due process as a restraint on government in American jurisprudence before the Civil War. Moreover, I argue that due process was fashioned in part to protect the rights of property owners, and that judicial decisions placing property in a subordinate constitutional category are historically unsound.

One should start this analysis by questioning common terminology. It bears emphasis that the phrase "substantive due process" is anachronistic when used to describe decisions rendered during the nineteenth and early twentieth centuries. Indeed, courts did not differentiate between procedural and substantive due process until the New Deal era.[19] The unitary understanding of due process shattered in the late 1930s, but no Supreme Court justice employed the term "substantive due process" until 1948.[20] Although I employ the term in this paper for convenience, I recognize that it is misleading and betrays a tendency to read history backward.

17. Louis B. Boudin, 2 *Government by Judiciary?* 374-96 (William Godwin, Inc., 1932).

18. Edward S. Corwin, *Court Over Constitution* 107 (Princeton U. Press, 1938). The leading study of constitutional history has adopted this viewpoint. Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, 2 *The American Constitution: Its Origins and Development* 387-88 (W.W. Norton, 7th ed. 1991) (stating that historically the due process guarantee referred to "procedures that protected persons against arbitrary punishment").

19. Wayne McCormack, *Economic Substantive Due Process and the Right to Livelihood*, 82 Ky. L.J. 397, 404 (1993-1994) ("No recognized distinction between procedural and substantive due process existed until after the New Deal eliminated the substantive protections.").

20. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting).

MAGNA CARTA

Scholars agree that the federal and state due process clauses are derived from the Magna Carta granted by King John under duress to rebellious nobles in 1215. Chapter 39 of the Magna Carta provides:

> No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by lawful judgment of his peers and by the law of the land.[21]

This chapter was designed as a guarantee against arbitrary actions by the king.[22] The clause was directed against royal authority for an obvious reason. The modern distinction between legislative and executive aspects of government had not yet emerged. In 1215 there was no Parliament or other legislative body in England, and the king exercised the law-making function.[23] Disagreements about the substantive dimensions of due process center on the meaning of the "law of the land" clause. Although a matter of some dispute among historians of early England, the expression "law of the land" is sufficiently comprehensive to include substantive law as well as procedural safeguards.[24] It was an effort to reassert customary law in the place of arbitrary royal command.[25]

Magna Carta was repeatedly reissued in later years and confirmed by King John's successors. A 1354 statute by Parliament first used the phrase "due process of law" in interpreting Chapter 39.[26] The historical debate over the meaning originally assigned to the terms "law of the land" and "due process of law" is beyond the scope of this paper. It should be stressed, however,

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21. A.E. Dick Howard, *Magna Carta Text and* Commentary 43 (U. Press of Virginia, 1964).

22. A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 6-7 (U. Press of Virginia, 1968). See generally J. C. Holt, *The Making of Magna Carta* (U. Press of Virginia, 1965).

23. Rodney L. Mott, *Due Process of Law* 42-44 (Bobbs-Merrill Co., 1926).

24. Id. at 74-86. See also Dietze, *In Defense of Property* at 54 (cited in note 7) ("... Magna Carta abounds with statements securing property rights."); Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* 11 (Penn. State U. Press, 1996) ("Beginning with the Magna Carta, therefore, the substantive law imposed limits on the king's power to deprive a freeman [of] life, liberty and property.").

25. Charles H. McIlwain, *Due Process of Law in Magna Carta*, 14 Colum. L. Rev. 27, 49-51 (1914) (asserting that the "law of the land" clause intended to restore substantive customary law).

26. Faith Thompson, *Magna Carta: Its Role in the Making of the English Constitution, 1300-1629* at 86-93 (U. of Minnesota Press, 1948).

that there is early support for the view that these expressions were 1) essentially synonymous, and 2) embraced a substantive as well as a procedural component.[27]

Although Magna Carta remained a symbol of the rule of law, it did not loom large in English law during the Tudor period. Sir Edward Coke played a vital role in the seventeenth century revival of Magna Carta as a means to check the Stuart monarchs. Since Coke's writing was highly influential in colonial America, his interpretation of Chapter 39 warrants special attention. Coke first maintained that "law of the land" and "due process of law" had the same meaning. More important for our purpose, Coke implied that the "law of the land" constituted a substantive limitation on the power of government. Much of Coke's analysis of Chapter 39 dealt with procedural safeguards, but he also discussed substantive restraints.[28] For instance, Coke observed that "monopolies are against this great charter, because they are against the liberty and freedome of the subject, and against the law of the land."[29] Clearly, then, Coke's conception of the "law of the land" was not confined to procedural matters. Whether Coke correctly interpreted Chapter 39 is a matter of historical debate, but the crucial point is that his views were widely accepted as authoritative and markedly influenced constitutional development in the American colonies.[30] As John Phillip Reid explained: "What was important about Magna Carta in the eighteenth century was not what it said but what it had come to mean."[31]

27. William Holdsworth, 1 *A History of English Law* 60-63 (4th ed. 1927); Keynes, *Liberty, Property, and Privacy* at 11-12 (cited in note 24); Frank R. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* 5-7 (Carolina Academic Press, 1986). But see Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am. J. of Leg. Hist. 265 (1975) (arguing that "the law of the land" and "due process of law" were not equivalent expressions, and that due process did not play an important role in the development of English law).

28. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wisc. L. Rev. 941, 958-960.

29. Edward Coke, 1 *Second Part of the Institutes of the Laws of England* 47 (E. and R. Brooke, 1797). See generally Strong, *Substantive Due Process* at 15-18 (cited in note 27).

30. Mott, *Due Process of Law* at 88-90 (cited in note 23); Howard, *The Road from Runnymede* at 118-25 (cited in note 22); W.J. Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 Cornell L. Rev. 561, 562 (1954).

31. John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Legislate* 178 (U. of Wisconsin Press, 1991).

COLONIAL BACKGROUND

The colonists in the seventeenth century looked to Magna Carta as a protection of their liberties, and often enacted some version of Chapter 39 into their laws. A 1639 Maryland Act declared that inhabitants "shall have all their rights and liberties according to the great Charter of England."[32] Likewise, the *Laws and Liberties* of Massachusetts (1648) stated that "no mans goods or estate shall be taken away from him . . . unless it be by the vertue or equity of some expresse law of the Country."[33] Other colonies followed suit, adopting some variation of the "law of the land" clause as part of their fundamental law. This is not to suggest that the colonists had any common understanding as to the precise nature of the rights protected by such language. As Rodney L. Mott noted:

> It is evident that the colonists looked upon due process of law as a guarantee which had a wide, varied, and indefinite content. At no time was there any serious attempt to define it, and it is noteworthy that they should seize upon these particular words under such diverse circumstances . . . but it is certain that many of them realized that it had a much wider import than merely guaranteeing proper procedure in criminal cases.[34]

Indeed, from time to time colonists relied on "law of the land" arguments in an attempt to restrain royal governors and local assemblies. By the start of the Revolutionary era, the colonists pressed the argument that Magna Carta represented a statement of fundamental rights that even Parliament could not abridge.[35]

William Blackstone, writing on the eve of the American Revolution, did much to amplify thinking about the "law of the land" provision. He discussed this language in terms of both procedure and substance. More particularly, Blackstone linked Chapter 39 with substantive protection of the rights of property owners. He observed:

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32. As quoted in Howard, *The Road from Runnymede* at 54 (cited in note 22). See generally Joseph H. Smith, *The Foundations of Law in Maryland, 1634-1715*, in George A. Billias, ed., *Law and Authority in Colonial America* 92-108 (Barre Publishers, 1965).

33. *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts*, Reprint of the 1648 Edition in the Huntington Library 1 (Harvard U. Press, 1929).

34. Mott, *Due Process of Law* at 123 (cited in note 23).

35. Riggs, 1990 Wisc. L. Rev. at 969-71 (cited in note 28).

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. The original of private property is probably founded in nature, as will be more fully explained in the second book of the ensuing commentaries: but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.[36]

By way of explanation, Blackstone then stated that either taking private property for public use without payment of compensation or taxation without consent would violate the "law of the land."[37] Obviously these examples go well beyond procedural requirements, and represent substantive limits on the power of government. "To the extent that Blackstone's *Commentaries* influenced legal and political thought in America," Robert E. Riggs has aptly commented, "it would have encouraged a broad reading of the concept."[38]

Additionally, it bears emphasis that when Blackstone wrote, Parliamentary sovereignty had been recently established in England. If Magna Carta was treated solely as a restriction on the royal prerogative, it would necessarily lose much modern significance. Although Blackstone spoke in terms of the absolute power of Parliament, his analysis of the fundamental rights secured by the "law of the land" only makes sense if binding on Parliament.[39] Whatever the ambiguities of the situation in England, moreover, by the Revolutionary era the American colo-

36. William Blackstone, 1 *Commentaries on the Laws of England* 134 (London, 1765-1769, reprinted U. of Chicago Press, 1979).

37. Id. at 135-36.

38. Riggs, 1990 Wisc. L. Rev. at 972 (cited in note 28).

39. Blackstone's stress on the absolute power of Parliament is seemingly in potential conflict with his discussion of individual rights. Blackstone, 1 *Commentaries* at 156 (cited in note 36) ("[Parliament] can, in short, do every thing that is not naturally impossible .... True it is, that what they do, no authority upon earth can undo."). Blackstone may not, however, have been fully consistent. He also declared that statutes contrary to the law of nature were invalid. Id. at 40-41.

nists were fashioning constitutional theories to limit Parliament. Reid's analysis is instructive:

> For Sir Edward Coke and his fellow members of the Commons of 1628, property and security were both defined in terms of what the *king* constitutionally could not do. For the Americans of a century and a half later, property and liberty were defined in terms of what *Parliament* constitutionally could not do.[40]

The newly independent Americans emphatically rejected the English notion of legislative supremacy in favor of a limited government. They adhered to the older tradition, exemplified by Magna Carta, that legitimate government was restrained by respect for fundamental rights. Reflecting this heritage, the Bill of Rights, including the due process clause, was clearly intended to bind the legislative branch.[41] Discussing the rights of individuals, Madison revealingly stated in 1800: "The legislature, no less than the executive, is under limitations of power.... Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition."[42] Despite this record, some scholars continue to insist that due process properly has no application to legislative action.[43] In contrast, I contend that the archaic English understanding of Magna Carta as a restraint on only the Crown was abandoned in colonial America before the Revolution, and fails to prove that due process was not binding on legislatures in the American constitutional framework.

Given the high standing of the principles set forth in Magna Carta during the Revolutionary debates, it was hardly a surprise that language derived from Chapter 39 was incorporated into most of the initial state constitutions. To be sure, there was a wide range of phrasing in the different constitutions. Yet several states, including Massachusetts, Maryland, and North Carolina, adopted wording that closely approximated the text of Chapter 39.[44] A protection against deprivation of liberty or property ex-

40. John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* 45 (U. of Wisconsin Press, 1986).

41. Douglas Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 Tex. L. Rev. 875, 892 (1982) ("The great innovation of American bills of rights was that they restrained legislative power, and there is no reason to believe that due process clauses were not part of that innovation.").

42. As quoted in Riggs, 1990 Wisc. L. Rev. at 1001 n.280 (cited in note 28).

43. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 193-200 (Harvard U. Press, 1977).

44. See, e.g., Maryland Declaration of Rights, art. XXI (1776); North Carolina

cept by the "law of the land" also appeared in the Northwest Ordinance of 1787, included among a number of substantive and procedural guarantees for inhabitants of the Northwest Territory.[45]

James Madison, of course, selected the phrase "due process of law" in drafting the Fifth Amendment. The reasons for Madison's change in wording are unclear, [46] but one scholar has suggested that he chose due process language to secure "more encompassing protection of personal liberty."[47] The history of framing and debating the Bill of Rights is remarkably skimpy, and a good deal must rest upon historical conjecture. Since the view that "due process of law" and "law of the land" had the same meaning was broadly shared, it seems unlikely that Madison envisioned any departure from the general understanding of this concept. Indeed, in drafting the Bill of Rights Madison harbored no plan to fashion new rights or depart from settled norms. He intended to formulate a document which reflected a consensus about widely held values. As Madison explained to Thomas Jefferson, "Every thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided."[48] It thus seems appropriate to conclude that Madison used "due process of law" in light of its historical association with the substantive dimensions of the "law of the land" clause.

In unpacking the notion of due process, it is important to consider one piece of evidence often cited for the proposition that due process was confined to judicial procedure. A number of scholars have pointed to Alexander Hamilton's February 6, 1787 remarks to the New York Assembly as demonstrating the contemporary understanding of due process.[49] The legislature was considering a bill to prevent privateers from holding any

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Declaration of Rights, art. XII (1776); Massachusetts Declaration of Right, art. XII (1780).

45. Riggs, 1990 Wisc. L. Rev. at 976 (cited in note 28); Keynes, *Liberty, Property, and Privacy* at 15-16 (cited in note 24). See also *Reed v. Wright*, 2 G. Greene 15, 21-23 (Iowa 1849) (discussing Northwest Ordinance's "law of the land" clause in terms of Magna Carta).

46. Riggs, 1990 Wisc. L. Rev. at 991 (cited in note 28).

47. Stuart Leibiger, *James Madison and Amendments to the Constitution, 1787-1789: 'Parchment Barriers'*, 59 J. of Southern History 441, 461 (1993).

48. Robert A. Rutland and Charles F. Hobson, eds., 12 *Papers of James Madison* 272 (U. Press of Virginia, 1979).

49. Easterbrook, 1982 Sup. Ct. Rev. at 98 n.35 (cited in note 9); Berger, *Government by Judiciary* at 196 (cited in note 43).

public office. Speaking in opposition to the measure, Hamilton observed:

> In one article of [the New York Constitution], it is said no man shall be disfranchised or deprived of any right he enjoys under the constitution, but by the *law of the land*, or the judgment of his peers. Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words *"due process"* have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.
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> Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?[50]

Upon a quick reading Hamilton appears to treat due process as simply a matter of procedure. But there is room to doubt that these comments by Hamilton support the conclusions that due process was so limited.

First, it is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations about Hamilton's thinking, much less for conclusions about the dominant opinion of the founding generation. Second, and more telling, Hamilton's statement intimates that the proposed legislation would in fact violate due process. In other words, Hamilton is asserting that due process limits the power of the legislature to deprive former privateers of their rights. His speech thus lends support for the view that due process placed substantive restraints on legislative power.[51]

Given the paucity of debate over the Bill of Rights and the meaning of due process in the 1790s, historical inquiry cannot

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50. Harold C. Syrett, ed., 4 *The Papers of Alexander Hamilton* 35-36 (Columbia U. Press, 1962).

51. Laycock, 60 Tex. L. Rev. at 890-91 (cited in note 41); Riggs, 1990 Wisc. L. Rev. at 989-90 (cited in note 28).

reveal with certainty the scope of the due process clause in the minds of the framers and ratifiers. Nonetheless, I fail to see how American statesmen accustomed to viewing due process through the lens of Coke and Blackstone could have failed to understand due process as encompassing substantive as well as procedural terms. To my mind, the most persuasive hypothesis holds 1) that the language "law of the land" or "due process of law" connoted substantive guarantees of fundamental rights against government, and 2) that due process rights in the American constitutional context applied against the legislative branch.[52]

Of course, actual practice should tell us more about due process than theorizing from meager historical evidence. A study of how American courts in the early republic treated due process claims offers an opportunity to test my hypothesis. We should then consider how American courts interpreted due process in the period before the Civil War.

DUE PROCESS IN ANTEBELLUM JURISPRUDENCE

My goal in this section is to trace the evolution of the due process norm as a limit on legislative power in the antebellum era. Although I will discuss a few federal court decisions, the focus will be on state constitutional law. Before the Civil War, the understanding of due process developed more fully in the state courts because they heard a larger number of cases which raised the issue.

The work of Edward S. Corwin has long influenced the historical understanding of due process in the antebellum period.[53] Indeed, Corwin is often cited for the proposition that due process did not place any restriction on legislative power.[54] In large part because of Corwin's efforts, the antebellum heritage of due process as a guarantee of substantive rights has been almost erased from American constitutional history. Yet I argue that Corwin's scholarship will not stand the scrutiny of critical ex-

52. The Supreme Court affirmed that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government . . ." in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855).

53. Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366-85, 460-79 (1911). For a similar analysis of antebellum due process see Lowell J. Howe, *The Meaning of 'Due Process of Law' Prior to the Adoption of the Fourteenth Amendment*, 18 California L. Rev. 583 (1930).

54. John Hart Ely, *Democracy and Distrust* at 189-90 n.13 (cited in note 1); Boudin, 2 *Government By Judiciary* at 376-77 (cited in note 17); Easterbrook, 1982 Sup. Ct. Rev. at 95 n.27 (cited in note 9).

amination. Writing in 1911, Corwin downplayed due process because judicial protection of the rights of property owners did not fit with the Progressive ideology favoring governmental regulation of the economy.[55] Hence, Corwin strived to place a narrow construction on state court cases interpreting law of the land or due process clauses, and to dismiss decisions invoking substantive due process as anomalous.[56]

In analyzing the growth of substantive due process, it is helpful to keep two points in mind. First, the concept of judicial review in antebellum America was in an embryonic stage and a subject of controversy. As a result, judicial review was used sparingly by courts before the Civil War.[57] Second, both state and federal courts took the position that law of the land clauses in state constitutions were synonymous with due process. In its initial interpretation of the due process clause of the Fifth Amendment, the Supreme Court declared that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta*."[58] Numerous state decisions, as well as leading commentators such as James Kent, expressed the same view.[59]

Courts in North Carolina were the first to give sustained attention to the meaning of due process. As early as 1794 the Superior Court was called upon to construe the law of the land clause in the North Carolina Constitution.[60] At issue was the validity of a statute authorizing the Attorney General to take judgments against receivers of public money for delinquent

55. For the Progressive confidence in regulatory solutions, see Hall, *The Magic Mirror* at 196-97 (cited in note 4); William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* at 14, 106-09 (Princeton U. Press, 1994); Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 Iowa L.Rev. 149-60 (1995).

56. See Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L. & Hist. Rev. 293, 325 n.135 (1985) (observing that "Corwin dismisses far too casually the degree to which antebellum lawyers and jurists had come to accept what we would recognize as a 'substantive' notion of due process."); Glen O. Robinson, *Evolving Conceptions of 'Property' And 'Liberty' in Due Process Jurisprudence*, in Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* 84 (State U. of New York Press, 1989) (noting that Corwin's "more general inference that state courts repudiated the use of due process clauses to impose *substantive* restraints on legislation is not supported by a careful reading of the cases.").

57. See Don E. Fehrenbacher, *Constitutions and Constitutionalism in the Slaveholding South* 20-22 (U. of Georgia Press, 1989).

58. *Murray's Lessee*, 59 U.S. at 276.

59. James Kent, 2 *Commentaries on American Law* 10 (O. Halsted, 1827). E.g., *Rhinehart v. Schuyler*, 7 Ill. 473, 519 (1845); *Brown v. Hummel*, 6 Pa. 86, 91 (1847).

60. *State v. ____*, 1 Haywood 38 (N.C. 1794).

payments without giving notice. Judge John Williams declared the act to be unconstitutional. He reasoned that the law of the land clause meant "according to the course of the common law."[61] Since the common law required notice and an opportunity for the defendant to offer a defense, the legislature was not at liberty to substitute a summary proceeding. Attorney General John Haywood, however, insisted that the law of the land clause did not restrain the legislature, and simply required "a law for the people of North Carolina, made or adopted by themselves by the intervention of their own Legislature."[62] Haywood expressed concern that to interpret the clause to incorporate common law principles would contradict the spirit of republican government and hamper legislative authority to change the law. This argument framed the basic question: Does every piece of properly enacted legislation satisfy the law of the land requirement? Judge Williams lost the first round, when a divided bench upheld the act following re-argument.

Yet only a few years later the highest court in North Carolina accepted Williams's contention and recognized that the law of the land clause placed substantive limits on law-making. In 1789 the legislature granted all property "that has heretofore, or shall hereafter escheat" to the trustees of the University of North Carolina. Thereafter the legislature repealed this measure and directed that all escheated property which the trustees had not already sold should revert to the state. In the leading case of *Trustees of the University of North Carolina v. Foy and Bishop*,[63] the trustees brought an action of ejectment to recover possession of a tract of land which escheated before enactment of the repeal act. The case turned upon whether the trustees were constitutionally divested of title by the later statute. The court brushed aside the argument that the law of the land did not impose any restrictions on the legislature. Next, the court defined the scope of the clause as applied to the present controversy:

> It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or property, unless by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legisla-

61. Id. at 39.
62. Id. at 43.
63. 5 N.C. 58 (1805).

> ture as are consistent with the constitution—and although the Trustees are a corporation established for public purposes, yet their property is as completely beyond the control of the Legislature, as the property of individuals or that of any other corporation.[64]

Note that the Court blended substantive and procedural elements in concluding that the legislature could not at its pleasure revoke grants of land already vested in the trustees. In addition to requiring a trial by jury, the law of the land clause was interpreted to establish common law principles as a constitutional norm which confined legislative authority. Thus, in *Foy and Bishop* the law of the land clause was read to invalidate legislation which alienated property from one person or group of persons to another.

This line of North Carolina cases reached a culmination in *Hoke v. Henderson.*[65] The case arose when the legislature altered the mode of selecting court clerks. Under laws of 1777 and 1806 judges appointed the clerks, who held office during good behavior. In 1832 lawmakers provided that clerks of court should be elected by popular vote for a term of four years. The effect of the statute was to displace the existing clerks. Plaintiff Hoke asserted that he was entitled to the office of clerk by virtue of election, but his claim was contested by the incumbent clerk. Rejecting the plaintiff's contention, the Supreme Court of North Carolina, in a unanimous opinion by Chief Justice Thomas Ruffin, held that the 1832 act unconstitutionally deprived the incumbent clerk of a property interest in his public office. Ruffin concluded that a law which transferred the property right of one person to another, or which punished persons without trial, had simply the form of law and was not "one of those *laws of the land*, by which alone a freeman can be *deprived* of his *property.*"[66] He clearly treated the law of the land clause as a restriction on legislative authority. Indeed, Ruffin opined that "public liberty requires that private property should be protected even from the government itself."[67]

64. Id. at 88. A similar result pertained in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 50-51 (1815), a case which arose out of Virginia's effort to confiscate certain property held by the Episcopal Church. The Supreme Court invalidated the divestment statutes as "utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

65. 15 N.C. 1 (1833).

66. Id. at 15 (emphasis in original).

67. Id. at 12.

As the view that due process entailed some legal norms beyond the reach of the legislature gained ground with American courts, judges began to grapple with the extent to which due process safeguarded the liberty and property interests of individuals. Courts early proscribed legislation which had the effect of divesting an owner of property and transferring it to another. In *Bowman v. Middleton*,[68] for instance, the South Carolina Court of Common Pleas passed upon the validity of an 1712 act which resolved a title dispute arising from overlapping land grants. The statute confirmed the title of the heirs of the second grantee, effectively transferring ownership of the tract in question. Although the measure was enacted long before South Carolina became independent and adopted a state constitution, the court struck down the legislation. In so doing the Court observed:

> [T]he plaintiffs could claim no title under the act in question, as it was against common right, as well as against magna charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question. That the act was, therefore, ipso facto, void.[69]

Even in the absence of express constitutional language, the Court applied principles derived from Magna Carta to limit the power of the legislature to interfere with property ownership.

Similarly, the Tennessee Supreme Court of Errors and Appeals, interpreting the law of the land provision in the state constitution, commented:

> Property in possession by this clause is secured to the owner, so that it cannot be taken from him but by due course of law in a court regularly constituted and proceeding by the standing rules of law; not by act of Assembly, depriving the owner of it for the benefit of some other individual.[70]

The same principle was adopted in *Taylor v. Porter*.[71] Under a New York statute the Town of Milton highway commissioners authorized the defendants to lay out a private road through the plaintiff's land to reach the public highway. Al-

68. 1 Bay 252 (S.C. 1792).
69. Id. at 254-55.
70. *Townsend v. Townsend*, 7 Tenn. 1, 17 (1821).
71. 4 Hill 140 (N.Y. 1843).

though the statute provided for compensation, the plaintiff brought an action for trespass. The Supreme Court of New York invalidated the statute as a deprivation of property in contravention of the law of the land and due process clauses in the New York Constitution of 1821. Explaining that liberty and property were at the heart of the social order, the Court explained: "The words 'by the law of the land' . . . do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory . . . ."[72] Both that language and the due process clause necessitated a judicial determination that an owner had either forfeited title or that someone had superior title as a prerequisite to a change in ownership. Lawmakers, the court added, could no more transfer the property of one person to another than they could put an individual in prison "by mere legislation." In short, the court raised a barrier to legislative divestiture of ownership in favor of other individuals, even with compensation.

A similar measure authorizing the establishment of private roads was struck down by the Supreme Court of Alabama in *Sadler v. Langham.*[73] Although the court relied primarily on the public use doctrine as a restraint on eminent domain, it significantly observed: "Without intending, at this time, to define the full meaning of the constitutional phrase, due course of law, it evidently does not mean a transfer of property by mere legislative edict, from one person to another."[74]

As these cases demonstrate, the due process requirement prevented legislative interference with individual titles to land.[75] This principle found expression in the frequently repeated maxim that statutes taking the property of A and transferring it to B constituted a deprivation of property without due process.[76]

72. Id. at 145.

73. 34 Ala. 311 (1859).

74. Id. at 329.

75. The thesis that due process protected liberty and property against arbitrary exercises of legislative power was developed in *The Security of Private Property*, 1 American Law Magazine 318, 334-47 (1843).

76. See John V. Orth, *Taking From A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 Const. Comm. 337 (1997). See, e.g., *Bank of the State v. Cooper*, 10 Tenn. 599, 606 (1831); *Taylor*, 4 Hill. at 146-47 (cited in note 71). The due process clause of the Fourteenth Amendment was likewise interpreted to embrace this principle. *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403, 417 (1896) ("The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."). A plurality of the Supreme Court has recently cited the shifting paradigm with approval.

Justice Joseph Story explained in *Wilkinson v. Leland*: "We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union."[77] This conclusion rested on the premise that individuals have certain rights, such as property ownership, which lawmakers cannot infringe regardless of any procedural considerations.

In a closely related development, courts by the end of the eighteenth century employed the due process guarantee to curtail the taking of property for public use without the payment of compensation. During the colonial era lawmakers had generally, but not invariably, respected the common law right to compensation when property was appropriated for public use.[78] The takings clause of the Fifth Amendment, however, like the other provisions of the Bill of Rights, was not applicable to the states before the adoption of the Fourteenth Amendment.[79] Moreover, some initial state constitutions did not contain a takings clause. In such jurisdictions the authority of the state to appropriate property without any indemnity was called into question.

At issue in *Lindsay v. Commissioners*[80] was the power of city commissioners to open a street in Charleston across the complainant's land. On a motion for a writ of prohibition to restrain the commissioners, the city attorney conceded that the legislature could not lawfully transfer private property from one person to another. But he sought to distinguish the power to lay out roads for public use, and insisted that such exercise of eminent domain did not require compensation. Two judges agreed with this argument, taking the position that opening roads was an inherent aspect of sovereignty paramount to any private rights. More interesting for our purposes, however, was that two judges maintained that compensation was constitutionally mandated by the due process standard. Pointing to the law of the land clause in the South Carolina Constitution, Judge Thomas Waties emphasized that the law of the land did not mean any act that the legislature might pass. Rather, he asserted that this clause re-

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Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) (quoting Justice Samuel Chase in *Calder v. Bull*, 3 U.S. (3 Dallas) 386 (1798)).

77. 27 U.S. (2 Peters) 627, 658 (1829).

78. James W. Ely, Jr., *"That due satisfaction may be made": the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. of Leg. Hist. 1 (1992).

79. *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833).

80. 2 Bay (S.C. 1796) 38.

ferred to "*the ancient common law of the land.*"[81] Judge Waties therefore concluded that this language established as a constitutional right the common law principle that owners were entitled to compensation when their property was taken. He added that "the right of property is held under the constitution, and not at the will of the legislature."[82]

Lindsay was inconclusive because the court was equally divided, but the opinion by Judge Waties treated the law of the land clause as placing substantive limitations on the legislature. It marked an important step toward the view that confiscation of property without compensation was a violation of due process. Other courts soon built upon Waties's insight, holding that it was beyond legislative competence to change or abolish vested property rights unless an indemnity was paid.

The most prominent decision in this regard was *Gardner v. Village of Newburgh*.[83] Anxious to establish a water supply, the Village of Newburgh planned to divert a stream away from the plaintiff's farm. The governing statute made no provision for compensation, and the plaintiff sued for an injunction to prevent the diversion. Chancellor James Kent ruled that a riparian owner was entitled to use a watercourse flowing through his property. Kent then declared that an owner could not be deprived of property except by due process of law, which he described as "an ancient and fundamental maxim of common right to be found in *Magna Charta* . . ." and incorporated into New York's statutory bill of rights.[84] He continued that payment of "a fair compensation" was an indispensable element in the exercise of eminent domain. In reaching this conclusion Kent relied upon "natural equity" and English common law. He cited the explicit takings clause in the Fifth Amendment and other state constitutions as declarations of "this great and sacred principle of private right."[85]

Other state courts echoed Kent's views, holding or strongly intimating that due process curtailed legislative authority by preventing uncompensated confiscation of property. Some examples may be instructive. In 1834 the Supreme Court of New Hampshire, citing *Gardner*, declared that the state bill of rights

81. Id. at 59.
82. Id.
83. 7 Am. Dec. 526 (N.Y. Ch. 1816).
84. Id. at 528.
85. Id. at 529-30.

"has always been understood necessarily to include, as a matter of right, and as one of the first principles of justice, the further limitation, that in case his property is taken without his consent, due compensation must be provided."[86] Three years later the Supreme Court of North Carolina analyzed the delegation of eminent domain to railroad companies. Discussing the import of the law of the land clause in the state constitution, Judge Ruffin observed: "it may also be true that the clause under consideration is restrictive of the right of the public to the use of private property, and impliedly forbids it, without compensation."[87] The Court stopped short of "a positive opinion" because the statute at issue provided for compensation. Yet Ruffin clearly treated compensation as a constitutional norm, and went on to state that it was "not deemed probable . . . that the legislature will at any time take the property of the citizen for public use" without an indemnity.[88]

The Supreme Court of Georgia followed suit in *Parham v. Justices of the Inferior Court of Decatur County*.[89] Under a state statute a landowner was only entitled to compensation when a road was opened through enclosed property. There was no provision for compensation when a roadway was laid out across unenclosed or wild land. The court viewed Magna Carta as part of the law of the state. It interpreted the law of the land clause as affirming the common law rule that the legislature must award compensation when exercising eminent domain. Indeed, the court noted that legislative authority was limited by the state and federal constitutions, and "by certain great fundamental principles not embodied in either."[90] Since the right of compensation was deemed to be one of these fundamental principles, the court enjoined the opening of the road over unenclosed land until an indemnity was paid. In a telling comment, the court observed: "The sacredness of private property ought not to be confided to the uncertain virtue of those who govern."[91]

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86. *Proprietors of the Piscataqua Bridge v. New Hampshire Bridge*, 7 N.H. 35, 66 (1834).

87. *Raleigh and Gaston Rail Road Co. v. Davis*, 19 N.C. 451, 461 (1837).

88. Id. at 461.

89. 9 Ga. 341 (1851).

90. Id. at 355.

91. Id. at 348. This antebellum line of cases foreshadowed the decision in *Chicago, Burlington and Quincy Railroad Co. v. Chicago*, 166 U.S. 226 (1897) that just compensation for property taken for public use was an essential element of due process as guaranteed by the Fourteenth Amendment. In reaching this conclusion Justice John M. Harlan cited *Parham* and *Gardner*. See generally James W. Ely, Jr., *The Fuller Court and Takings Jurisprudence*, 2 J. of Sup. Ct. Hist. 120 (1996).

As antebellum state courts were interpreting due process to restrain arbitrary deprivations of property, they also developed another substantive limit on legislative power—that due process mandated general, not special, laws.[92] According to Blackstone, a law was "something permanent, uniform, and universal."[93] It followed that particular legislation aimed at individuals or small groups was suspect because such laws were not general in application.

The Tennessee Supreme Court articulated this view in the important and widely cited case of *Vanzant v. Waddel*.[94] The matter before the court was legislation prescribing the manner in which note holders could recover judgments against certain state-chartered banks. In the course of his decision sustaining the validity of the measure, Judge John Catron considered at length the constitutional requirement for general laws:

> That a partial law, tending directly or indirectly to deprive a corporation or an individual of rights to property, or to the equal benefits of the general and public laws of the land, is unconstitutional and void, we do not doubt. *** Our constitution, art. 11, sec. 8, declares, "That no free man shall be deprived of his life, liberty or property, but by the judgment of his peers, *or the law of the land*." The clause "law of the land," means a general and public law, equally binding upon every member of the community.
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> * * *
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> The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or "land," under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies, would be governed by one rule, and the mass of the community who made the law, by another. The idea of a people through their representatives, making laws whereby are swept away the life, liberty and property of *one* or a *few* citizens, by which neither the representatives nor their other constituents are willing to be

92. The development of equal treatment as an element of antebellum due process jurisprudence is examined in Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Power Jurisprudence* 50-55 (Duke U. Press, 1993).

93. Blackstone, 1 *Commentaries* at 44 (cited in note 36).

94. 10 Tenn. 260 (1829).

> bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions which is, and for centuries has been, the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation, was the reason of its adoption as part of our constitution.[95]

This passage reflected the central tenet of Jacksonian Democracy—equal rights for all, special privileges for none. Catron perceived that the property and liberty of individuals were threatened by governmental favoritism or hostility. The remedy for this evil was to insist that legislators act through general laws binding on the whole community. In this manner, Catron sought to safeguard the rights of individuals by requiring that laws be generally applicable and not single out politically vulnerable groups for disparate treatment.

The Tennessee Supreme Court further amplified its analysis of the law of the land clause in *Bank of the State v. Cooper.*[96] The judges, each writing a separate opinion, struck down a statute that created a special tribunal to resolve suits against officers of the state bank. Although the judges found several constitutional infirmities, they focused much of their attention on the need to protect individuals from legislative abuse. Speaking of the law of the land clause, Judge Nathan Green asked:

> Does it not seem conclusive then, that this provision was intended to restrain the legislature from enacting any law affecting injuriously the rights of any citizen, unless at the same time, the rights of all others in similar circumstances were equally affected by it. If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others. Here is the importance of the provision, and the great security it affords.[97]

A number of other state courts during the antebellum era also invoked the concept of due process to condemn partial or class legislation, that is, laws which conferred special benefits or imposed unique burdens rather than promoting the broad public

95. Id. at 269-71.
96. 10 Tenn. 599 (1831).
97. Id. at 606-607.

good. For instance, the Supreme Court of Texas asserted: "'laws of the land' . . . are now, in their most usual acceptation, regarded as general public laws, binding all the members of the community under similar circumstances, and not partial or private laws, affecting the rights of private individuals, or classes of individuals."[98] By establishing equal treatment as a constitutional norm, this line of cases curtailed the power of legislatures to enact laws which aided one class of individuals. Michael Les Benedict has cogently pointed out that "antebellum American law was suffused with the principle that special legislation was illegitimate, and that conviction had already been linked to the fundamental maxim that no person could be deprived of property but by due process of law or by the laws of the land."[99] Thus, if an exercise of legislative authority was not general in application then it failed to satisfy due process.

For this constitutional norm to have any effect, however, courts had to see through the ostensible rationale for legislation. Due process, in other words, called for careful judicial scrutiny of the purpose of legislation and the means employed to achieve stated objectives.

DUE PROCESS AND REGULATION

As different elements of substantive due process review evolved before the Civil War, the antebellum prohibition movement posed new legal issues and set the stage for courts to enlarge due process protection of property ownership. By the mid-1850s a number of states turned to legal means in an effort to eliminate alcohol from American society.[100] In 1855, for example, the New York legislature declared alcoholic beverages to be a nuisance, restricted possession of alcohol, made it unlawful to sell liquor, and authorized summary destruction of such beverages. In the landmark case of *Wynehamer v. People*[101] the defendant was convicted and fined for selling liquor in violation of the statute. Previously, courts had found due process violations where laws deprived individuals of property or took it for public use without compensation. In contrast, *Wynehamer* involved a

98. *Janes v. Reynold's Administration*, 2 Tex. 250, 252 (1847).

99. Benedict, 3 L. & Hist. Rev. at 326 (cited in note 56).

100. Ian R. Tyrrell, *Sobering Up: From Temperance to Prohibition in Antebellum American, 1800-1860* at 252-60 (Greenwood Press, 1979); Thomas R. Pegram, *Battling Demon Rum: The Struggle for a Dry America, 1800-1933* at 38-42 (Ivan R. Dee, 1998).

101. 13 N.Y. 378 (1856).

general regulatory measure which attempted to suppress a particular type of property to achieve the social goals of alleviating intemperance and pauperism.

A divided court in *Wynehamer* found that the act constituted a deprivation of property without due process with respect to liquor already owned when the measure took effect. The judges each wrote separate opinions, and several provided a searching analysis of the meaning of due process. Rather than treat the opinions individually, I shall set forth the main points advanced by the judges in the majority. They first emphasized that alcoholic beverages had long been regarded as property, and represented an important article of commerce. Next the judges defined property expansively. Ownership of property entailed more than physical possession of an object. As Judge Alexander S. Johnson explained:

> Property is the right of any person to possess, use, enjoy and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it. [citation omitted] A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession. Whatever subverts his rights, in regard to it, annihilates his property in it. It follows, that a law which should provide in regard to any article in which a right of property is recognized, that it should neither be sold or used, nor kept in any place whatsoever within this state, would fall directly within the letter of the constitutional inhibition; as it would in the most effectual manner possible deprive the owner of his property, without the interposition of any court or the use of any process whatever.[102]

Judge George F. Comstock similarly declared that he could not find "any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."[103] It was then an easy step to conclude that legislation which banned the sale of liquor effectively destroyed its value.

The majority traced the due process concept to Magna Carta. Whereas in Great Britain the principles of Magna Carta restrained only the Crown, Judge Comstock pointed out: "With us they are imposed by the people as restraints upon the power

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102. Id. at 433-34.
103. Id. at 396.

of the legislature."[104] He emphatically rejected the notion that due process of law was satisfied by any duly enacted legislation. Rather, Judge Comstock maintained:

> The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be *created* by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the "law of the land," and "due process of law," within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a preexisting cause, appointing judicial and executive agencies to execute its will. Property is placed by the constitution in the same category with liberty and life.[105]

Two points made by Comstock bear emphasis. Under his analysis, the legislature could not eliminate existing property rights by a general law abolishing a particular type of property. Moreover, consistent with the views of the framers, he equated constitutional protection of property and liberty.

Of course, the judges in the majority were careful to point out that lawmakers were empowered to attack "the evils of drunkenness" by appropriate regulation. "All regulations of trade, with a view to the public interests, may more or less impair the value of property," Judge Johnson stated, "but they do not come within the constitutional inhibition, unless they virtually take away and destroy those rights in which property consists . . . ."[106] In short, general regulations might so limit the enjoyment of property as to effectuate a deprivation of property without due process. This approach necessitated judicial scrutiny as to the degree of regulation and its impact on individual

104. Id. at 392. Other courts also stressed that due process safeguarded liberty as well as property. *Taylor*, 4 Hill. at 147.

105. *Wynehamer*, 13 N.Y. at 393.

106. Id. at 435.

owners. There was no easy formula for determining a violation of due process. Judge Comstock tellingly observed "that between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation."[107] The majority was persuaded that this line was crossed by a law which in effect compelled the destruction of already acquired property rights in liquor. Several judges suggested, however, that the legislature could prohibit future importation or manufacture of alcoholic beverages.

Three judges dissented, arguing that the conviction of the defendant should be affirmed. They adopted a narrow view of property for purposes of due process analysis. Thus, Judge Thomas A. Johnson asserted that the due process clause did not apply where the value of property was diminished by regulation. Deprivation of property, he declared, was confined to the divestment of legal title and not to restrictions on trade.[108] Therefore, nothing in the state constitution prevented the legislature from outlawing traffic in liquor.

The *Wynehamer* case was the most significant invocation of the substantive component of due process by a state court in the antebellum era. "This decision," according to one authority, "was recognized as epoch-making almost as soon as it was rendered."[109] For the first time a court invalidated a far-reaching regulatory statute on due process grounds. To be sure, most antebellum courts sustained prohibition statutes in the face of due process challenges.[110] Yet the underlying principle in *Wynehamer* that due process entailed substantive limits on legislative power gained ground on the eve of the Civil War.

Critics of substantive due process have had a difficult time dealing with *Wynehamer*. Some, such as Bork and Frank H. Easterbrook, simply ignore it. Corwin and Lowell L. Howe have endeavored to dismiss the case as singular, but they are guilty of overarguing the evidence.[111] The fact that most state courts upheld prohibition statutes does not demonstrate that they rejected

107. Id. at 399.

108. Id. at 466-68.

109. Mott, *Due Process of Law* at 318 (cited in note 23). Mott also observed that the "modern concept of due process of law may be said to have had its origin" in *Wynehamer*. Id. at 317.

110. Id. at 319-26; Tyrrell, *Sobering Up* at 290-92 (cited in note 100) (discussing the impact of court decisions on prohibition laws).

111. Corwin, 24 Harv. L. Rev. at 471-75 (cited in note 53); Howe, 18 Calif. L. Rev. at 600-07 (cited in note 53).

the use of due process to impose substantive restraints on law-making.

THE COOLEY SYNTHESIS

As this historical review chronicles, antebellum state courts relied on due process to curtail governmental power in a variety of situations. Earl M. Maltz has aptly concluded: "A substantial number of states... also imbued their respective due process clauses with a substantive content."[112] My argument is not that all judges accepted the emerging notion of substantive due process. Some continued to view due process solely in procedural terms.[113] The key point, however, is that before the Civil War many courts were fashioning substantive protections from the due process concept. It remained only for a theorist to weave together the diverse strands of the evolving substantive due process and present the doctrine in a compelling fashion.

Thomas M. Cooley, the most influential constitutional writer of the late nineteenth century, embraced a substantive understanding of due process in his landmark work, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union.*[114] A Jacksonian Democrat, Cooley linked the Jacksonian principles of equal rights and hostility to special economic privileges with due process protection of property rights. He explained that due process was intended to safeguard individuals from the arbitrary exercise of governmental power. Declaring that the language "law of the land" and "due process of law," found in state constitutions, had the same meaning, Cooley analyzed at length due process pro-

112. Earl M. Maltz, *Fourteenth Amendment Concepts in the Antebellum Era*, 32 Am. J. of Leg. Hist. 305, 317 (1988). See also Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. Rev. 1165, 1184-86 (1991).

113. E.g., *Brown v Hummel*, 6 Pa. 86, 91 (1847) (holding that person could not be deprived of property by legislative action without trial by due course of law); *Fisher v McGirr*, 67 Mass. 1, 36-41 (1854) (equating due process with procedural safeguards); *Rhinehart v Schuyler*, 7 Ill. 473, 518-21 (1845) (law of land clause in state constitution construed to mean that criminal trials should be conducted according to common law); Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* 261-65 (Harvard U. Press, 1957) (asserting that Chief Justice Shaw rejected a substantive interpretation of due process); Howard, *The Road from Runnymede* at 305 (cited in note 22) (observing that antebellum courts "typically had in mind procedural requirements that legislatures were obliged to honor").

114. (Little, Brown and Co., 1868).

tection of property rights. He maintained that "a legislative enactment is not necessarily the law of the land."[115]

This interpretation raised the question of what criteria should be employed as a constitutional benchmark when legislation was challenged on due process grounds. As Cooley saw it:

> When the government, through its established agencies, interferes with the title to one's property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system of law, and not by any rules that pertain to forms of procedure merely.... Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.[116]

Cooley obviously believed that due process meant more than proper procedure. A valid statute had to be congruent with the fundamental values inherent in the American constitutional system.

Drawing upon the evolving due process jurisprudence in the state courts, Cooley identified several due process restraints on legislative authority. He noted the necessity to pay compensation when property was taken for public use, and flatly declared that "there is no rule or principle known to our system" under which property could be transferred from one private party to another.[117] Cooley took particular aim at class legislation. He urged governance by generally applicable rules as a constitutional maxim, and decried special favors to individuals or groups. Thus, Cooley observed:

> Equality of rights, privileges, and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions imposed in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against

115. Id. at 354.
116. Id. at 356.
117. Id. at 357.

> persons or classes are still more so, and as a rule of construction are always to be leaned against as probably not contemplated or designed.[118]

These comments should not be confused with current equal protection clause analysis. Rather, Cooley maintained that legislation must be evenhanded and not favor one group at the expense of others.

Cooley did much to shape the intellectual and legal environment of late nineteenth century America. Although a treatment of his influence is beyond the scope of this paper, Cooley was instrumental in paving the way for a broad interpretation of the due process clause of the Fourteenth Amendment.[119] He also helped to focus substantive due process review on the evils of class legislation as a threat to constitutional liberty. Cooley, then, provided a vital link between the antebellum notion of substantive due process and the development of this doctrine in the late nineteenth century.

DUE PROCESS IN ANTEBELLUM CONSTITUTIONAL HISTORY

Historians have tended to ignore the evolution of substantive due process before the Civil War, or to dismiss it as inconsequential. I suggest that this approach is untenable, and badly distorts our comprehension of evolving conceptions of due process. Critics, from Corwin to Bork, appear to have been animated by their disagreement with particular applications of the doctrine. They naturally downplayed evidence showing the long lineage of the substantive reading of due process, and wrongly accused judges of simply inventing the doctrine as a vehicle to impose their own views of public policy.

An examination of the record establishes that antebellum courts, drawing upon an understanding of due process as having both substantive and procedural content, began to fashion several tenets which limited legislative authority:

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118. Id. at 393.

119. Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* 18-41 (Princeton U. Press, 1942); Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon Upon American Constitutional Law* (U. of California Press, 1954).

1) That the vested property interests of one person could not be transferred to another, even upon payment of compensation;

2) That, despite the absence of an express just compensation provision in some state constitutions, private property could not be taken for public use without compensation;

3) That legislation must be public in nature and confer benefits and burdens equally.

In other words, courts before the Civil War were increasingly seeing due process as a substantive protection for vested property rights and as a guarantee against class legislation. Due process, then, helped mark the bounds of legitimate government.

Even recognizing the historical basis for substantive due process, other issues remain to be addressed. How does one determine the appropriate standard by which to ascertain whether legislation violates due process? How are "liberty" and "property" defined for purposes of due process protection?[120] The antebellum cases contain the seeds of an answer to these questions, but the courts had little occasion to explore these issues in depth. It should be clear, however, that antebellum courts did not just concoct the doctrine of substantive due process out of the air. Instead, they drew upon a heritage of liberty firmly fixed in the matrix of American legal thought.[121]

120. Robinson, *Evolving Conceptions of 'Property' and 'Liberty,'* at 84-85 (cited in note 56).

121. Archibald Cox, *The Court and the Constitution* 122 (Houghton Mifflin Co., 1987) (rejecting the position that due process only entailed fair procedures, and stating: "American jurists, with a few exceptions, have always accepted the view that the concept of due process of law, like the words 'the law of the land' in Magna Carta, puts some liberties and some property interests beyond the power of government . . . ."). See also Keynes, *Liberty, Property, and Privacy* at 24-30 (cited in note 24).