PROCEDURAL DUE PROCESS: THE ORIGINAL UNDERSTANDING*

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Much of the vast literature about the history of due process discusses whether the due process clause was intended to place substantive restraints on legislation.[1] Substantive due process has been one of the most important and controversial American constitutional law doctrines. The purpose of this Article, however, is to examine that other important aspect of due process—procedure—as developed by the courts before the adoption of the fourteenth amendment.

By 1868, due process had come to connote a certain core procedural fairness when government moved against a citizen's life, liberty, or property. Due process guaranteed notice, an opportunity to be heard, and a determination by a neutral decisionmaker according to some fair and settled course of judicial proceeding. In general, the decisionmaker was expected to be a jury. These protections were given shape by early decisions of the Supreme Court and state courts interpreting the due process clause or historical antecedents.

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1. A sampling of the literature concerning the meaning of due process and whether it was intended to place substantive restraints on legislation includes: R. BERGER, GOVERNMENT BY JUDICIARY (1977); E. CORWIN, LIBERTY AGAINST GOVERNMENT 58-115 (1948); Berger, *"Law of the Land" Reconsidered*, 74 NW. U.L. REV. 1 (1979); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365 (1890); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

I

The due process clause derives from two sources of English law. One source is the famous twenty-ninth chapter of Magna Carta, which provides:

> No Freeman shall be taken, or any otherwise imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or destroyed; nor we will not [sic] pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.[2]

Conflict has swirled around the precise meaning of the *lex terrae* or "law of the land" language of chapter twenty-nine. Most commentators now seem to agree that it meant that freemen could not be taken, imprisoned, disseized or otherwise harmed except after a "judgment of the peers" or other determination applying to the whole body of English law and custom.[3] Most of the law of this early period was customary law, derived from the ancient Roman, Norman, Danish, Franconian, and especially Anglo-Saxon peoples, and the "common law" fashioned by the courts was based on this customary law.[4] Hence, "law of the land" seems to have meant, originally, the body of decisional, statutory, and especially customary law that established the manner of proceeding by the monarch against individuals.

The second source of due process language is an English statute of 1354: "That no Man of what Estate or Condition that he be, shall he put out of Land or Tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in Answer by due Process of the Law."[5] This statute, along with other fourteenth-century laws, required proper service of notice of an opportunity to answer personally before a court.[6] The "process" intended here appears to have been a precise, technical reference to the type of writ that summoned a party to appear in court.[7] Hence, process by writ was designed to secure the personal appearance of a party before a court so that party could answer in person the charges against him.

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2. The original Latin reads: "Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero jenemento fuo vel libertatibus vel liberis consuetudinibus juis aut utlagetur aut exulet aut aliquo modo destruatur nec super eum ibimus nec super eum mittemus nisi per legale judicum parium suorum vel per legem terrae." 9 Hen. 3, ch. 29 (1225).

3. *See, e.g.*, G. SAYLES, THE MEDIEVAL FOUNDATIONS OF ENGLAND 404 (1961); Berger, *supra* note 1, at 1-4; Corwin, *supra* note 1, at 368-70.

4. G. SAYLES, *supra* note 3, at 132-37, 167-91, 224-28, 232-38.

5. 28 Edw. 3 ch. 3 (1354).

6. For an extended discussion of these statutes, see Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975).

7. *Id.* at 268-72.

Sir Edward Coke identified the "law of the land" with "due process of law" in his famous *Institutes*. "[B]y the law of the land [means] by the due course and process of law," which Coke later defined as "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the Common Law."[8] Coke and other constitutionalists of the 1600s appear to have enhanced the significance of Magna Carta as a source of personal liberty in formulating their broader ideology of the common law, which they used to argue effectively against the prerogatives of the Crown.[9] Regardless of the accuracy of his historical research, Coke's interpretation is important because he influenced the framers of the early state constitutions, early constitutional commentators, and even the Supreme Court.[10]

The provision contained in the South Carolina Constitution of 1778 was typical: "That no freeman of this State be taken or imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, exiled or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or by the law

8. E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 46, 50 (3d ed. 1669). It now seems clear that "by the law of the land" did not have precisely the same meaning, originally, as "by due process of law" under early English law. "By the law of the land" seems to have been a somewhat ambiguous phrase that connoted generally the whole body of English law and custom governing procedure and over whose meaning Englishmen argued for centuries. By contrast, "due process of law" always seems to have been used to describe the method of summoning parties to court. *See generally* Jurow, *supra* note 6. *See also* Corwin, *supra* note 1, at 368-69. *But see* G. SAYLES, *supra* note 3, at 404: " 'By the law of the and' is another way of saying 'by due process of law' and allows for local variation in practice."; Shattuck, *supra* note 1, at 368 (footnote omitted): "[I]t is well settled that 'due process of law' and 'law of the and' are identical in meaning."

9. Magna Carta heralded a new age in the struggle between the Crown and the opposition parliamentarians and lawyers because "it put down in black and white the fundamental medieval doctrine of kingship . . . that the King existed to promote the welfare of his subjects and that, if he abused his power, he forfeited his authority and position." G. SAYLES, *supra* note 3, at 407. Later, "Sir Edward Coke and others developed a whole field of antiquarian research [from which 'emerged a broader ideology of the common law'] which they used to buttress the concept of the balanced constitution, using—or abusing—the myth of Magna Carta as the foundation stone." L. STONE, THE CAUSES OF THE ENGLISH REVOLUTION 1529-1642, at 104 (1972). As Sayles comments:

> [T]he myth was greater than the reality in the conditions of a later age and, however much reduced to a caricature of its real self, the Great Charter was at least as powerful a weapon in the hands of the parliamentarians as it was to those who forged it.

G. SAYLES, *supra* note 3, at 399.

10. As noted by Corwin, *supra* note 1, at 368, Coke's interpretation influenced, among others, Kent, Story, and Cooley. *See e.g.*, 2 J. KENT, COMMENTARIES ON AMERICAN LAW 13 (12th ed. 1873); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 692 (5th ed. 1891). Even the Supreme Court was convinced of Coke's interpretation. "The 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. Lord Coke, in his commentary on those words . . . says they mean due process of law." Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (citation omitted).

of the land."[11] None of the early state constitutions contained a due process clause.[12] Following the adoption of the fifth amendment, which was based in part on the state constitutional provisions,[13] some states inserted similar due process language in their constitutions. The provision contained in the New York Constitution of 1821 was representative: "No person shall be . . . deprived of life, liberty, or property without due process of law."[14]

II

Before the adoption of the fourteenth amendment, the Supreme Court had decided only two cases relating to procedure under the fifth amendment due process clause: *Murray's Lessee v. Hoboken Land and Improvement Company*[15] and *Bank of Columbia v. Okely*.[16] Only *Murray's Lessee* contained an extensive discussion of the meaning of due process. Several other Supreme Court cases of this period discussed elements of procedural due process in connection with dispositions of real and personal property interests: *Vanhorne's Lessee v. Dorrance*,[17] *Wilkinson v. Leland*,[18] and *Baldwin v. Hale*.[19]

Murray's Lessee, decided in 1856, contained the Supreme Court's first extensive discussion of the meaning of due process. In *Murray's Lessee*, judgment creditors brought suit against a customs collector who, according to the Treasury Department, owed the government about $1.3 million dollars in custom collections. The Solicitor of the Treasury, acting pursuant to statute, issued a distress warrant and then seized the collector's property. The question before the Court was whether the seizure deprived the collector of his liberty and property without due process of law. The Court held unanimously that the government's actions did not violate the fifth amendment, even though the distress warrant gave the collector only notice of the purpose of the deprivation and the collector received no opportunity for a hearing.

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11. *Constitution of South Carolina—1778*, reprinted in 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 3248, 3257 (F. Thorpe ed. 1909) [hereinafter THORPE].

12. Easterbrook, *supra* note 1, at 96. *See also generally* THORPE, *supra* note 11.

13. *See Murray's Lessee*, 59 U.S. at 276; Warren, *supra* note 1, at 440.

14. 5 THORPE, *supra* note 11, at 7, 2639, 2648. For a discussion of some of the early state constitutional due process provisions, see Williams, *"Liberty" In the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. COLO. L. REV. 117, 121-24 (1981).

15. 59 U.S. (18 How.) 272 (1856).

16. 17 U.S. (4 Wheat.) 235 (1819).

17. 2 U.S. (2 Dall.) 304 (1795).

18. 27 U.S. (2 Pet.) 627 (1829).

19. 68 U.S. (1 Wall.) 223 (1864).

Justice Curtis's scholarly opinion traced the origin of due process to Magna Carta. Relying on Coke's authority, he stated that "the words, 'due process of law,' were undoubtedly intended to convey the same meaning as . . . 'by the law of the land.' "[20] Justice Curtis explained that the constitutions of the early states (which, he noted, were adopted before the federal Constitution) followed the language of Magna Carta more closely and generally contained the language "but by the judgment of his peers, or the law of the land." Justice Curtis acknowledged that the Constitution did not specify what constitutes due process. However,

> [i]t is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process "due process of law," by its mere will.[21]

To determine whether a proceeding is consistent with due process, Justice Curtis set forth a two-step inquiry. First, the Constitution must be examined to determine whether the process at issue conflicts with any constitutional provision. If there is no textual conflict, "those settled usages and modes of proceeding existing in the common and statute law of England" must next be examined.[22] Since the process at issue did not violate a specific constitutional provision, the Court examined English law under the second step of the inquiry. English law, along with that of many states, authorized the type of summary, *ex parte* procedure employed by the Solicitor of the Treasury to collect the proceeds owed the government. This procedure "varied widely from the usual course of the common law on other subjects," and the Court attributed the variation to the crucial difference between debts due the government, especially from revenue raising activities, and debts due private parties.[23]

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20. 59 U.S. (18 How.) at 276.

21. *Id.*

22. *Id.* at 277.

23. *Id.* at 278. In explaining the difference in procedures applicable to the collection of public and private debts, the Court stressed the government's need to collect revenues: "Imperative necessity has forced a distinction between [public tax] claims and all others, which has sometimes been carried out by summary methods of proceedings, and sometimes by systems of fines and penalties, but always in some way observed and yielded to." *Id.* at 282. For a discussion of *Murray's Lessee* and the history of the summary, *ex parte* procedure authorized by English and American law for the collection of tax debts, see Kirst, *Administrative Penalties and the Civil Jury: the Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1300-05 (1978). The finding that federal and state governments can resort to summary procedures in order to assure effective collection of taxes and public revenues has been confirmed consistently. *See, e.g.*, Phillips v. Commissioner, 283 U.S. 589 (1931) (approving provisions of the Revenue Act of 1926 authorizing the summary collection of taxes); Scottish Union & Nat'l Ins. Co. v. Bowland, 196 U.S. 611 (1905) (upholding a state's *ex parte* seizure of property from a tax delinquent); Springer v. United States, 102 U.S. 586 (1880)

In explaining the Court's findings, Justice Curtis articulated two core principles of procedural due process. First, Justice Curtis described due process as that which "generally implies and includes *actor* [plaintiff], *reus* [defendant], *judex* [judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings." Second, Justice Curtis noted that the foregoing description of due process "is not universally true," as there may be cases, like the summary process at issue, where the interest at stake merits less protection than the full procedural safeguards covered by due process.[24] Even in its first extensive discussion of due process, the Court implicitly recognized that due process is a flexible concept.

Bank of Columbia v. Okely was the only other Supreme Court case relating to procedure decided under the due process clause before the fourteenth amendment.[25] In *Okely*, the Court held that a statute that granted a bank a summary process by execution against debtors, who consented to the process in writing, did not violate the seventh amendment guarantee of a right to a jury trial or the due process clause. The Court's opinion, by Justice Johnson, did not discuss extensively the meaning of due process, stating only that:

> As to the words from Magna Charta . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.[26]

(approving an *ex parte* seizure of property from a delinquent taxpayer). These cases are collected and discussed in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 546 n.17 (1978).

24. 59 U.S. (18 How.) at 280 (emphasis in original) (*citing* Hoke v. Henderson, 15 N.C. (4 Der.) 1 (1833), *rev'd*, Mial v. Ellington, 134 N.C. 131, 47 S.E. 961 (1903); Taylor v. Porter, 4 Hill (N.Y.) 140 (1843); Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260 (1829). For a discussion of these cases, see *infra* text accompanying notes 59-66, 73-85).

25. One other Supreme Court case was decided under the due process clause before the adoption of the fourteenth amendment: the now infamous decision of Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, the Supreme Court invalidated the Missouri Compromise, which banned slavery from specified northern portions of United States territory for, among other reasons, violating the due process clause of the fifth amendment. The Supreme Court, in an opinion by Chief Justice Taney, based its decision on substantive due process grounds:

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

Id. at 450. This Article will not discuss *Dred Scott*, and other important substantive due process decisions, but will instead focus on the growth of procedural due process law. For a review of *Dred Scott* and the development of substantive due process law, see E. CORWIN, *supra* note 1, at 58-168; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 331-59 (3d ed. 1986); Corwin, *supra* note 1.

26. 17 U.S. (4 Wheat.) at 244.

Three other Supreme Court decisions of the pre-fourteenth amendment period discussed root procedural due process concepts in the context of deciding property issues. In *Vanhorne's Lessee v. Dorrance*, the Court held that a state legislature "had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation."[27] Rather, the state's right of eminent domain cannot be exercised "without . . . [the owner's] consent, without a hearing, [and] without notice," but must comport with essential due process norms by securing the owner's participation in determining compensation for the taking.[28] According to the Court, only compensation fixed by a jury or by the owners or his representative's agreement with the state would assure adequately the owner's participation in the proceeding. This jury determination is a "constitutional guard upon property, and a necessary check to legislative authority," since the jury will decide only "after hearing the proofs and allegations of the parties."[29]

In *Wilkinson v. Leland*, the Supreme Court relied on Magna Carta and other basic English law to pronounce:

> In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away *without trial, without notice, and without offense.*[30]

The general rule concerning transfers of property required due notice to the parties in interest, followed by a hearing and a judicial decree affirming the transfer. Rhode Island made an exception for the sale of a decedent's property in order to satisfy debts of the estate.[31] While "it certainly would be wise and convenient to give

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27. 2 U.S. (2 Dall.) at 310.

28. *Id.* at 315-16.

29. *Id.* at 315.

30. 27 U.S. (2 Pet.) at 657 (emphasis added).

31. *Id.* at 658-60. The Court based its ruling expressly on Rhode Island law, finding that:

> By the laws of Rhode Island . . . the real estate of testators and intestaters stands chargeable with the payment of their debts, upon a deficiency of assets of personal estate. The deficiency being once ascertained in the probate court, a license is granted by the proper judicial tribunal, upon the petition of the executor or administrator, to sell so much of the real estate as may be necessary to pay the debts and incidental charges. The manner in which the sale is made is prescribed by the general laws. In . . . Rhode Island, the license to sell is granted . . . *without notice* to the heirs or devisees . . . .

Id. at 658-59 (emphasis in original). Contemporary Rhode Island law, as well as that of other states, now requires that notice of a sale of a decedent's land to satisfy estate debts must be provided to interested parties, including heirs and devisees. *See* R.I. GEN. LAWS §§ 33-12-4 & 33-12-8 (1984).

In a sense, the question of whether notice needed to be rendered to the heirs or devisees

notice, where extraordinary efforts of legislation are resorted to, which touch private rights," the Court sanctioned the sale of decedent's land without any notice to heirs or devisees under color of Rhode Island law, although it "presumed, after the lapse of more than thirty years, and the acquiescence of the parties for the same period, that such notice was actually given."[32]

In *Baldwin v. Hale*, the final case of this period, the Supreme Court, in an opinion by Justice Clifford concerning the jurisdiction of one state's bankruptcy court over an out-of-state claimant, pronounced the fundamental due process principle: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense."[33] The further development of procedural due process in the pre-fourteenth amendment period occurred in the state courts.

III

The state courts, primarily, developed procedural due process before the adoption of the fourteenth amendment. The explanation for this phenomenon, apparently, is the relative frequency of state, as compared to federal, legislation restricting individual rights.[34] State governments were far more active in curtailing personal liberty and property rights. Since the federal courts generally refrained from reviewing such state legislation,[35] the state courts stepped in to protect individual liberties and fill the gap left by the federal courts' relative inactivity in the area.[36]

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in *Wilkinson* was wholly of technical importance since "more debts were due in Rhode Island than the whole value for which all the estate there was sold." 27 U.S. (2 Pet.) at 659.

32. *Id.* at 660.

33. 68 U.S. (1 Wall.) at 233.

34. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 25, at 331-35. *But see* Easterbrook, *supra* note 1, at 99: "The Due Process Clause escaped the Court's notice for the same reason it escaped the Framers': it stated an uncontroversial principle that was expected to be trivial."

35. Other than the specific constitutional provisions of article I, section 10, clause 1, which include prohibitions against bills of attainder, ex post facto laws, and the "impairing (of) the obligation of contracts," the federal courts had few bases on which to control state legislation prior to the adoption of the fourteenth amendment. Consequently, the federal courts had little opportunity to invalidate state legislation on account of a violation of, or inconsistency with, federal law. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 25, at 333-35.

36. Throughout history, state courts have often enforced constitutional rights in the face of the federal courts' withdrawal from or relative inactivity in a particular area. For example, when the Supreme Court seemed to abandon judicial control of economic legislation, *see, e.g.*, Day-Brite Lighting v. Missouri, 342 U.S. 421 (1952) (sustaining Missouri statute providing that an employee could absent himself from his employment without loss of

Some of the earliest cases decided under the law of the land clause concerned takings of private property from owners previously vested with title. Generally, courts held that there could be no deprivation of 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 Legislature as are consistent with the constitution."[37] In the early decision of *Bayard v. Singleton*, the North Carolina Supreme Court held that property confiscated from a British alien during the Revolutionary War could be validly vested in a United States citizen, observing:

> That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all. . . .[38]

Similarly clear due process tenets arose in *Bowman v. Middleton*, where the South Carolina court invalidated a transfer of land accomplished pursuant to a legislative act, concluding that

> 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.[39]

The South Carolina court in *Zylstra v. Corporation of Charleston*,[40] also interpreted the law of the land clause to preserve the common law trial by jury. In *Zylstra*, the court invalidated an ordinance that prohibited the keeping of a tallow-chandlers shop (soap

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pay for up to four hours on election day for the purpose of voting), state supreme courts relied on state constitutional provisions to enforce desired objectives, *see, e.g.*, Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955) (refusing to follow Day-Brite and invalidating, instead, a similar law under the due process clause of the state constitution). *Compare also* Williamson v. Lee Optical, 348 U.S. 483 (1955) (upholding Oklahoma law that prohibited the fitting of lenses to a face or the duplication or replacement of frame lenses or other optical appliances by persons other than licensed optometrists or ophthalmologists) *with* Blumenthal v. Board of Medical Examiners, 57 Cal. 2d 228, 368 P.2d 101, 18 Cal. Rptr. 501 (1962) (invalidating California law requiring that applicant opticians have five years prior experience as prerequisite to obtaining of license as a dispensing optician). More recently, the Vermont Supreme Court has signalled its intent to use the Vermont Constitution to protect civil liberties in the face of recent Supreme Court rulings that more narrowly define personal freedoms. *See* State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) ("This generation of Vermont lawyers has an unparalleled opportunity to aid in the formulation of a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow").

37. Trustees of the University of North Carolina v. Foy, 5 N.C. (1 Mur.) 58, 88 (1805).

38. 1 N.C. (Mart.) 42, 45 (1787).

39. 1 S.C.L. (1 Bay) 252, 254 (1792) (emphasis in original).

40. 1 S.C.L. (1 Bay) 382 (1794).

and candle-making) within the city limits. According to one judge the law of the land clause meant the procedures known to the common law "down to the time of Edw. II," which generally required a trial by jury in order to validate judgment against a person or his property.[41] That is, "the true import of [the law of the land clause] was . . . to afford a real security to the citizens for the preservation of this right [trial by jury], and to become an effectual bar to the innovations of the legislature."[42] Accordingly, the court held that the city's action was invalid.

The final case of this early period, *Trustees of the University of North Carolina v. Foy*,[43] signaled several pioneer developments in due process jurisprudence. In *Foy*, the court invalidated the state's repeal of its earlier grant of land to trustees for the establishment of the University of North Carolina. First, the North Carolina court interpreted the law of the land clause as a general restriction on the "arbitrary will of the Legislature."[44] This mixing of substance and procedure was a distinctive characteristic of early due process jurisprudence.[45]

Second, echoing the principle of judicial review established by the Supreme Court in *Marbury v. Madison*, the court next determined that its role was "to expound and enforce the law and . . . to carry into effect the acts of the legislature as far as they are binding or do not contravene the constitution."[46] That is, the courts, not the legislature, must make the ultimate determination as to what constitutes due process.

Finally, the court ruled that the protections of the law of the land clause accorded "freemen" extended to members of a corporation as well as to individuals.[47] Hence, due process could protect corporations, trusts and other forms of association, a conclusion not reached by the Supreme Court under the fourteenth amendment until 1886.[48] Having established these principles, the court ruled:

> The property vested in the Trustees must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pro-

41. *Id.* at 391.
42. *Id.* at 390-91.
43. 5 N.C. (1 Mur.) 58 (1805).
44. *Id.* at 87-89.
45. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 25, at 336.
46. *Foy*, 5 N.C. at 88.
47. *Id.* at 87-88.
48. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886):
> The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of the opinion that it does.

> nounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body.[49]

An expansion of the class of persons and the types of interests covered by due process marked the middle period of due process jurisprudence (1821-1838) before the adoption of the fourteenth amendment. In *Marcy v. Clark*,[50] the Supreme Judicial Court of Massachusetts affirmed implicitly the finding of the North Carolina court in *Foy* that the range of persons covered by due process included corporations as well as individuals. In *Marcy*, the court held that members of a corporation were liable for corporate debts under state law, and that one corporate member could not escape liability by a fraudulent transfer of his corporate shares. The court rejected the plaintiff's contention that seizure of his property to satisfy corporate debts violated the law of the land clause. The court instead ruled that due process was satisfied by a judgment obtained against the corporation, which made all corporate members "virtually defendants in the action" and provided "an opportunity to be heard in the form they have chosen by joining the company."[51]

Vanzant v. Waddel[52] provided another early indication of the flexibility of due process. In *Vanzant*, the court held that the state could change statutorily the mode of summoning debtors of a bank to a hearing of claims because the statute

> does not give to any court an arbitrary power to seize the estate of the bank, or of the debtor to the bank, and dispose of it without giving the parties a day in court, and the means of contesting before a jury all such facts as may be necessary to the attainment of justice.[53]

Because the statute provided a "day in court . . . a right to be heard in defence [sic]; and that no one shall be held liable for the debt demanded, until a jury has passed upon it," the court ruled that the legislature could provide legitimately for a summary mode of summoning debtors.[54]

The *Vanzant* decision also highlights an additional core concern of early due process jurisprudence:

> The clause "LAW OF THE LAND," means a general and public law, equally binding upon every member of the community. . . .
>
> 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,

49. *Foy*, 5 N.D. at 89.
50. 17 Mass. 229 (1821).
51. Id. at 334-35. The court obviously strained to find compliance with due process norms, even if only by implication, in order to prevent the inequity of a fraudulent transfer.
52. 10 Tenn. (2 Yer.) 260 (1829).
53. *Id.* at 264-65.
54. *Id.* at 265.

"LAND," under similar circumstances . . . .[55]

The court found support for this equal protection component in Magna Carta, which, the court noted, was adopted as part of the Tennessee Constitution because of "its value as a fundamental rule for the protection of the citizen against legislative usurpation."[56]

The shift from interpretation of the language "due process of law" or "law of the land" to the terms "liberty" and "property," which signaled a broadening of the range of interests captured by those terms, first appeared in this period. The Supreme Court of North Carolina, acting again as a precipitator of change in due process doctrine, held in *Hoke v. Henderson* that the right to public employment as a clerk of court constituted property meriting protection under the law of the land clause, a landmark ruling that significantly influenced early due process jurisprudence.[57]

Concluding upon review of state law that the present clerk of a county court, Henderson, enjoyed tenure in the office for the term of his good behavior therein, the court invalidated a statute which provided for the election of future occupants of the office, pursuant to which a successor (Hoke) had been chosen. Reasoning that Henderson had a prior vested property right to the office under state law, the court determined that he could not be deprived of the office under the law of the land clause "without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our fore-fathers."[58]

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55. *Id.* at 270. The equal protection component of early due process doctrine mandated that laws must apply generally, that is, to all citizens. Acts designed to bestow particular benefits to one, but not all, citizens were invalid. *See, e.g.*, Holden v. James, 11 Mass. 396, 405 (1814): "It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages, which are denied to all others under like circumstances . . . ." For a discussion of the cases developing this doctrine, see Corwin, *supra* note 1, at 377, 381.

56. 10 Tenn. at 271.

57. 15 N.C. (4 Dev.) 1 (1833), *rev'd Mial*, 134 N.C. 131, 46 S.E. 961 (1903). In *Mial*, the North Carolina Supreme Court overruled Hoke v. Henderson on the ground that a person appointed to a public office cannot have a property interest in the office, stating that "we expressly overrule [*Hoke*] and declare that no officer can have a property in the sovereignty of the State." 134 N.C. at 162, 46 S.E. at 971. The court was motivated to reverse *Hoke* in order to bring the law of North Carolina into conformity with the laws of other states and the United States. *Id.* at 139-40, 46 S.E. at 964.

Although no longer valid law, *Hoke* was an important precedent in the growth of early due process law, influencing other significant authorities of the pre-fourteenth amendment period, including Chancellor Kent who recommended the case as "replete with sound constitutional doctrines," *see* 2 J. KENT, *supra* note 10 at 13 n.b., and the Supreme Court, *see Murray's Lessee*, 59 U.S. at 280 (*citing Hoke*). Accordingly, this article will discuss fully the aspects of due process raised by the *Hoke* decision.

58. 15 N.C. at 16 (*citing Bayard*, 1 N.C. (Mart.) 42 (1787); *Foy*, 5 N.C. (1 Mur.) 58 (1805)).

Since Henderson was not dispossessed of the office by means of a trial by jury, the statute was invalid. In affording due process protection to government employees, the North Carolina court anticipated modern law.

The court also confirmed its earlier determination in *Foy* that the courts must determine what constitutes due process and whether statutes comport with that constitutional norm. While conceding that the legislature could abolish the office entirely if public necessity so required, the court ruled that the legislature could not discharge Henderson at will and transfer the office to someone else, without complying with due process.[59] The court recognized Henderson's reliance interest in the office, acknowledging his long (twenty-five years) tenure in the office,

> to which he has served a long apprenticeship, and to which he has devoted himself, abandoning other lines of life, or other roads to fortune which were once open to his free choice. True, he is free to work at other employments; but he is fit for none; he knows but this. . . . The loss is therefore undeniable.[60]

The Supreme Court of Alabama further expanded the definition of "property" when it determined in *In re Dorsey*[61] that the right to practice law as an attorney was a property right. In *Dorsey*, the court invalidated a statute providing that attorneys should be required, as a prerequisite to practicing law in the state, to take an oath confirming that they had never previously participated in a duel and would not do so in the future. Because the effect of this statute was to punish the class of persons desiring to practice law by depriving them of that right without a trial by jury, the court ruled the statute unconstitutional.[62]

One judge believed also that the act violated what, in essence, would today be called a "liberty interest":

> [T]he act . . . is contrary to the very scope and design of a free government . . . by preventing the citizen from the pursuit of happiness in his own mode. . . . And certainly if [the pursuit of happiness] means anything, it must include the right to select which of the various avocations or pursuits in life, a young man will engage in; his future destiny, and his value to the State, as one of its members, demands the

59. *Id.* at 20-21.
60. *Id.* at 30.
61. 7 Port. 293 (Ala. 1838).
62. *See, e.g., id.* at 381-82 (Ormond, J.):

> The term "due course of law," has a settled and ascertained meaning, and was intended to protect the people against privations of their lives, liberty, or property, in any other mode than through the intervention of the judicial tribunals of the country.—But, this law seeks to ascertain a fact, . . . not by the judgment of a competent court, but by the admission of the offender, and construes his silence into evidence of guilt.
>
> . . . I think . . . the law in question, is contrary to the spirit, the plain intent and meaning of [the due course of law clause].

> utmost freedom of choice; and it is, therefore, of the highest importance, in a free government, that this right of choice should not be impaired.[63]

Foreshadowing the future "rights-privileges" distinction, the dissent argued that the state indeed possessed sufficient authority to regulate the profession, characterizing lawyering as a "license to practice law, confer[ing] a mere franchise or privilege. . . . The license thus obtained, confers no rights in itself."[64] The Alabama court would later recognize the legislature's right to regulate professions on the basis of the public health and welfare, even if such regulation affected citizens in the pursuit of their chosen trade.[65]

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63. *Id.* at 382-83 (Ormond, J.). Judge Ormond conceded, interestingly, that "many of the objections I have stated are visionary." *Id.* at 387.

In his opinion, Judge Ormond also compared the oath under review to political test oaths, which were common in many countries. Commenting on the effect of the act in denying the right to practice law to those who refused to take the oath, Judge Ormond stated that: "I am unable to distinguish this, in principle, from the test oaths, which have stained the statute books of other countries." *Id.* at 383.

64. *Id.* at 392 (Collier, J., dissenting). Judge Collier commented further that: "this right [to practice law], when acquired, is at most, a mere privilege to practice that profession, so long as the attorney shall approve himself worthy of its honors." *Id.* at 399.

Earlier in this century, there was a distinction in due process law between "rights" and "privileges." The government could not deny a person a "right" except for specific reasons that comported with constitutional standards. Privileges of an individual, on the other hand, could be denied by the government for any reason and without any constitutional restrictions. Justice Oliver Wendell Holmes's statement that "[t]he petitioner may have a constitutional right to practice politics, but he has no constitutional right to be a policeman" has been commonly thought to articulate the doctrine. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (Holmes, J.).

Under the doctrine, many things, including an occupational license, *see* Barsky v. Board of Regents, 347 U.S. 442, 451 (1954), and restrictions on who could attend state universities, *see* Hamilton v. Regents of The Univ. of Cal., 293 U.S. 245 (1934), could be labeled mere "privileges," and not rights subject to constitutional protection. Consequently, the state had virtually unfettered discretion in its method of disbursing benefits. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 25, at 453-55. For this reason, primarily, the "rights-privileges" distinction was ultimately discredited as a constitutional law doctrine. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Berner, 374 U.S. 398, 404 (1963).

With the Supreme Court's recent rulings that predicate due process protection on the creation of "entitlements" by state law or other objective sources of law, *see, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); however, many commentators now fear the resurrection of the "rights-privileges" distinction. *See, e.g.*, Bishop v. Wood, 426 U.S. 341, 354 (1976) (Brennan, J., dissenting); J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 25, at 453-54; Rosenblum, *Schoolchildren: Yes, Policemen: No—Some Thoughts About the Supreme Court's Priorities Concerning the Right to a Hearing In Suspension and Removal Cases*, 72 NW. U.L. REV. 146, 160 (1977).

65. In Mayor of Mobile v. Yuille, 3 Ala. 137 (1841), *overruled by* Mayor of Huntsville v. Phelps, 27 Ala. 55 (1855), the Alabama Supreme Court, in an opinion by Judge Ormond, ruled that the state could regulate the weight and price of bread in the public interest, rejecting defendant's argument that *Dorsey* precluded the state from interfering with a citizen's right to pursue "his lawful trade or calling in the mode his judgment might dictate." 3 Ala. at 139. Backing away from its reasoning in *Dorsey*, the court characterized that case as holding not that the legislature could not regulate a profession, but that the state could not single out some persons or class of persons for regulation while leaving other professionals unregulated. *Id.* at 140.

In the last period before the fourteenth amendment, due process jurisprudence was influenced significantly by the contest between state police powers and private rights. The New York courts played an especially crucial role during this transitional period, particularly with respect to refining the methodology employed in due process analysis.

The first key New York case of this period was *Taylor v. Porter*,[66] where the court invalidated the state's exercise of eminent domain in authorizing the construction of a private road over the land of a non-consenting individual. The due process methodology employed by the *Taylor* court focused carefully on the intersection of state and private rights, sustaining exercises of the former only when achieved in accordance with settled procedural protections. The court set forth three lines of inquiry, illustrating keenly once again the close interrelationship between procedure and substance in formulating due process law during this period.

The court first examined the scope of legislative power, inquiring whether that power extends to "reach the life, liberty or property of a citizen who is not charged with a transgression of the laws, and when the sacrifice is not demanded by a just regard for the public welfare."[67] Reasoning that the sanctity and "security of life, liberty and property . . . lies at the foundation of the social compact," the court concluded that the legislative power does not extend to "take the property of A . . . and give it to B," as "neither life, liberty nor property, except when forfeited by crime, or when the latter is taken for public use, falls within the scope of the [legislative] power," a finding based clearly on substantive due process.[68]

The court next examined the law of the land clause, which, the court reasoned, does not mean such law as the legislature may pass, for that construction "would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."[69] Tracing the clause to Magna Carta, the court recited Coke's commentary that "by the law of the land" means "by the due course and process of law," an interpretation that the court noted was consistent with decisions of other state courts and leading commenta-

66. 4 Hill (N.Y.) 140 (1843). The issue presented in *Taylor* was novel in that it involved a state's exercise of eminent domain for a private, not a public purpose. The state appropriated private property for the construction of a private road for one individual. The court ruled that such state action was unconstitutional, because "a private road cannot be laid out without the consent of the owner of the land over which it passes." *Id.* at 148.

67. *Id.* at 144. The court's concern for the public welfare arose, of course, on account of the state's exercise of eminent domain.

68. *Id.* at 145.

69. *Id. Accord* 2 J. STORY, *supra* note 10, at 693 (*citing Taylor* approvingly).

tors of the period.[70] Accordingly,

> [t]he meaning of the section then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It can be done by mere legislation.[71]

There exists no better statement of the meaning of the law of the land clause, in a procedural due process sense, in the pre-fourteenth amendment period.

Finally, the court examined the due process clause because, "if there can be doubt [under the law of the land clause] . . ., there can . . . be none" under the due process clause: "The words 'due process of law' . . . cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property."[72] Applying these principles, the court articulated the common view of due process:

> It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property; and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself, and either shut him up in prison, or put him to death. But none of these things can be done by mere legislation. There must be "due process of law."[73]

Taylor established that the life, liberty, and property of a person could be abridged only by some form of settled judicial proceeding, usually involving a trial at law.[74] There were, of course, certain exceptions to this general rule of due process jurisprudence, includ-

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70. 4 Hill at 146 (*citing Hoke*, 15 N.C. (4 Dev.). *See supra* note 14 and accompanying text.

71. 4 Hill at 146.

72. *Id.* at 146-47.

73. *Id.* at 147; *accord Bayard*, 1 N.C. (Mart.) at 45.

74. *Accord* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 356 (1868):

> 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 [sic.] 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 defense 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 prescribed for the class of cases to which the one in question belongs.

See also 2 J. STORY, *supra* note 10, at 694 (footnote omitted): "[d]ue process of law . . . means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs."

ing the state's exercise of eminent domain illustrated in *Taylor*. In that context, due process required at least just compensation, determined pursuant to the owner's participation with the state in fixing the value of the land.[75] In most cases, however, due process mandated that some judicial proceeding take place prior to sanctioning state acts that abridged a person's life, liberty, or property.

The New York Court of Appeals applied *Taylor* in *Westervelt v. Gregg*[76] to invalidate a statute insulating the property of married women from their husbands' common law claims. The rationale was that the act legislatively deprived husbands of their prior vested property right in their wives' legacies, without the legal proceedings established for the protection of private rights.[77] *Taylor* and *Westervelt* illustrate graphically how the New York courts came to view the due process clause as a bulwark of substantive protection for private rights, "against all mere acts of power, whether flowing from the legislative or executive branches of the government," which implicated those rights but did not comply with the procedural requirements of due process.[78] From a substantive perspective, the New York view of due process held that once private rights were established validly pursuant to existing law, those rights could not later be extinguished by legislative acts alone. Viewed procedurally, due process required application of some judicial proceeding before any deprivation of life, liberty, or property could be sanctioned.

Other authorities did not go as far as the New York courts in interpreting the due process clause as a source of substantive protection for private rights. The decision of the South Carolina court in *State v. Simons*[79] represented a more conventional view of due process during this period. In *Simons*, the court overturned a statute that imposed a fine or forfeiture on any slave owner who returned a slave to the state after having traveled with the slave in any northern state. Judgment under the statute was rendered by a judicial proceeding of "two magistrates and five freeholders" and not the standard common law trial by jury of twelve peers.[80] The law of the land clause, the court reasoned, mandated application of the common law trial by jury of twelve men before any deprivation of

75. 4 Hill at 143, 147. See also Vanhorne's Lessee v. Dorrance, discussed *supra* in text accompanying notes 31-33.

76. 12 N.Y. 202 (1854) (*citing Taylor*, 4 Hill (N.Y.) 140 (1843)).

77. *See also* White v. White, 5 Barb. (N.Y.) 474, 484 (1849) (citing language and rationale of *Taylor* for invalidation, on due process and natural law grounds, of a statute that removed disability of married women in the control of their property under common law).

78. *Westervelt*, 12 N.Y. at 212.

79. 29 S.C.L. 639, 2 Spears 761 (1844) (*citing Zylstra*, 1 S.C.L. (1 Bay) 382 (1794).

80. *Id.* at 645, 2 Spears.

property.[81]

During the decade 1846 to 1856 at least sixteen states passed anti-liquor laws that prohibited, in essence, the sale, storage, or production of liquor for non-medicinal purposes. Most courts upheld these laws on the ground that they were valid and reasonable exercises of legislative power that did not deprive persons of their property without due process of law.[82] However, two state courts—the New York Court of Appeals in *Wynehamer v. People*[83] and the Indiana Supreme Court in *Herman v. State*[84] and *Beebe v. State*[85]—held the laws destroyed liberty and property rights in liquor without due process of law. Furthermore, one state court—the Massachusetts Supreme Judicial Court in *Fischer v. McGirr*[86]—recognized a state's right to legislate in this area, but declared violative of due process certain procedural sections of the Massachusetts law because they deprived persons of their property without a trial by jury and without even an opportunity to be heard and to confront witnesses.

Wynehamer is commonly viewed as a key precedent in the growth of substantive due process doctrine.[87] Nevertheless, there are also important procedural due process considerations contained in *Wynehamer*. Relying on *Taylor v. Porter*, *Hoke v. Henderson*, and other authority, the *Wynehamer* court affirmed the general New York rule that private rights, once established, may be abridged not "by a legislative act which aims at their destruction," but only "where they are held contrary to the existing law, or are forfeited by its violation . . . in the due administration of the law itself, before the judicial tribunals of the state."[88] In other words, due process "must be understood to mean that no person shall be deprived, by any form of legislation or governmental action, of either life, liberty or property, except as the consequence of some judicial proceeding, appropriately and legally conducted."[89] There

81. This somewhat modern requirement that a trial by jury must consist of twelve men was not altered explicitly until 1970 when the Supreme Court in Williams v. Florida, 399 U.S. 79 (1970), recognized that the unanimous decision of a six-person jury in all but capital cases was constitutionally proper.

82. Corwin, *supra* note 1, at 466, 471-75.

83. 13 N.Y. 378 (1856).

84. 8 Ind. 545 (1855).

85. 6 Ind. 501 (1855).

86. 67 Mass. (1 Gray) 1 (1854).

87. *See,e.g.*, J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 25, at 336; Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 417 (1978). For an extensive discussion of *Wynehamer*, see Corwin, *supra* note 1, at 467-75.

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

89. *Id.* at 434.

exists no clearer statement of the procedural meaning of the due process clause during the pre-fourteenth amendment period.

The court went on to explain the key role played by the judiciary in formulating due process law:

> It is plain, therefore, both upon principle and authority, that these constitutional safeguards [the law of the land clause and the due process clause], in all cases, require a judicial investigation . . . confined to the question whether, under the preexisting rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed.[90]

Furthermore, the

> change [in English law from the law of the land clause to the due process clause] shows that the object of the provision [the due process clause] was, in part at least, to interpose the judicial department of the government as a barrier against aggressions by the other departments. Hence, both courts and commentators in this country have held that these clauses, in either form, secure to every citizen a judicial trial, before he can be deprived of life, liberty or property.[91]

Due process thus connotes the process persons are entitled to receive when their life, liberty, or property are placed in jeopardy by state actions. "The better and larger definition of *due process* of law is, that it means *law in its regular course of administration through courts of justice*."[92]

The *Wynehamer* court recognized also that due process does not "necessarily import a jury trial."[93] In a criminal case, the court noted, due process required "an arraignment, formal complaint, confronting of witnesses, a trial, and regular conviction and judgment."[94] When forfeiture of property is a part of the punishment, as in *Wynehamer*, an ordinary judicial proceeding, including trial by jury, is required.[95] But most equity proceedings render deprivations of property without a trial by jury.[96] At a minimum, however, due process requires "the right to answer and contest the charge, and the consequent right to be discharged from it unless it is proved."[97]

Finally, *Wynehamer* continued the trend of expanding the property concept. The court considered intoxicating liquors to be

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90. *Id.* at 395.
91. *Id.* at 433 (*citing Hoke*, 15 N.C. (4 Dev.) 1 (1833); *Taylor*, 4 Hill (N.Y.) 140 (1843).
92. *Id.* at 395 (emphasis in original).
93. *Id.* at 425.
94. *Id.* at 454.
95. *Id.*
96. *Id.* at 425.
97. *Id.* at 443; *accord* 2 J. STORY, *supra* note 10, at 694: "When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted."

property (and "all property is alike in the characteristic of inviolability") because "[f]rom the earliest ages they have been produced and consumed as a beverage, and have constituted an article of great importance in the commerce of the world. In this country the right of property in them was never . . . for an instant questioned."[98]

In *Beebe v. State*, the Indiana court also held that an anti-liquor law was unconstitutional because it deprived persons of their property rights to liquor without due process of law. Property interests, including rights to liquor, are not subject to "the unlimited power of the legislature," the court reasoned, and cannot be abridged "without a remedy therefor by due course of law, that is, a legal trial in court."[99] In the companion case, *Herman v. State*, the Indiana court also held that the state prohibition law was invalid as an invasion of liberty:

> We lay down this proposition, then, as applicable to the present case, that the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages, so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment.[100]

In general, however, courts of this period did not interpret liberty expansively.[101] The view of liberty expressed by the Supreme Court of Vermont better typifies the period: "The liberty, spoken of in our bill of rights, is the liberty of the person of every subject."[102]

The doctrines developed by the New York courts, and especially *Wynehamer*, were considered quite novel. The conservative view of due process articulated by the Rhode Island court in *State v. Keeran*[103] was more representative of the era. In *Keeran*, the court sustained the state's anti-liquor law, dismissing the defendant's due process argument, based on *Wynehamer*, as "admitt[ing] of no such vague and general application" and disparaging it as

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98. *Wynehamer*, 13 N.Y. at 384-85; *accord Beebe*, 6 Ind. at 513; *Fischer*, 67 Mass. at 33.

99. 6 Ind. at 512.

100. 8 Ind. at 558.

101. *See, e.g.*, Parker v. Kaughman, 34 Ga. 136 (1865) (compulsory military enrollment does not deprive a person of his liberty without due process of law); Nott's Case, 11 Me. 208 (1834) (commitment to a poorhouse does not deprive a person of his liberty without due process of law). *But see* 2 J. STORY, *supra* note 10, at 698 (footnote omitted):

> The [liberty] rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right. . . . The word [liberty] . . . embraces all our liberties—personal, civil, and political. None of them are to be taken away, except in accordance with established principles; none can be forfeited, except upon the finding of legal cause, after due inquiry.

102. Lincoln v. Smith, 27 Vt. 328, 361 (1855).

103. 5 R.I. 497 (1858).

> the loose habit of taking constitutional clauses, which, from their history and obvious purpose, have a well-defined meaning, away from all their natural connections, and, by drawing remote inferences from them, of pressing them into the service of any constitutional objection with the ingenuity or fancy of the objector may contrive or suggest.[104]

Of due process, which the Rhode Island constitution limited to criminal cases, the court stated:

> Surely, if any clause in the constitution has a definite meaning, which should exclude all vagaries which would render courts the tyrants of the constitution, this clause, embodying, as it does, with improvements, the precious fruits of our English liberty, can claim to have, both from its history and long received interpretation. It is no vague declaration concerning the rights of property, which can be made to mean anything and everything . . . .[105]

With these prohibition cases, the development of procedural due process before the adoption of the fourteenth amendment came to a close. The next period of major development in due process law would occur after the adoption of the fourteenth amendment, primarily through decisions of the Supreme Court.

IV

What is perhaps most striking about the pre-fourteenth amendment authorities is the relative simplicity and coherence of the methodology employed in due process analysis. Best articulated by the Supreme Court in its decision of *Murray's Lessee v. Hoboken Land and Improvement Co.*,[106] the prevailing methodology of the era stipulated that when private rights were placed in jeopardy by state actions, the Constitution must first be examined to determine whether a guarantee more specific than due process existed.[107] If no such textual guarantee existed, "those settled usages and modes of proceeding existing in the common and statute law of England" must be examined.[108]

Since the interests at issue frequently derived no protection from specific constitutional provisions, the second step of this meth-

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104. *Id.* at 504-05, 507. *Keeran* was actually the second time the Rhode Island court was faced with the question of the validity of the state's prohibition law. The *Keeran* court confirmed its initial decision in State v. Paul, 5 R.I. 185 (1858), that the law was valid.

105. *Id.* at 505.

106. For a discussion of *Murray's Lessee*, see *supra* text accompanying notes 19-29.

107. The seventh amendment guarantee of a trial by jury was the most frequent constitutional provision called into question by the due process cases. This right was usually subsumed within the predominant due process methodology, resulting in the requirement of a jury trial before deprivation of a life, liberty or property interest could be legitimized. *See, e.g.*, Wynehamer v. People; *In re* Dorsey; Zylstra v. Corporation of Charleston.

In cases of eminent domain, a just compensation constitutional clause was often implicated. *See, e.g., Taylor*, 4 Hill (N.Y.) 140 (1943).

108. *Murray's Lessee*, 59 U.S. at 277.

odology was generally employed to find that the interests could be abridged only by following some form of settled judicial proceeding, usually involving a trial at law. This second step of the inquiry received its clearest articulation in New York decisions, which asserted that "no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law"[109] and that "no person shall be deprived, by any form of legislation or governmental action, of either life, liberty or property, except as the consequence of some judicial proceeding, appropriately and legally conducted."[110]

In looking to "those settled usages and modes of proceeding existing in the common and statute law of England" courts ruled almost without exception that a jury trial, conducted "according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution,"[111] was the procedure necessary to validate deprivation of life, liberty, or property. Indeed, the only case of this era in which the holding of a jury trial was not set forth as a prerequisite to abrogation of a life, liberty or property interest was *Murray's Lessee*, where the Supreme Court concluded that the common law authorized the type of summary, *ex parte* procedure employed to collect proceeds owed the government.

Leading commentators and other authorities of the period recognized, at least theoretically, that the process due in due process analysis was somewhat flexible and did not necessarily always require a jury trial.[112] Chancery, maritime, military, and other equi-

109. *Taylor*, 4 Hill (N.Y.) at 146.

110. *Wynehamer*, 13 N.Y. at 434.

111. *Foy*, 5 N.C. at 88.

112. *See, e.g.*, 2 J. STORY, *supra* note 10, at 691-92:

> The meaning of the phrase "due process of law" has been barely alluded to in another place, in which it is said in effect to affirm the right of trial according to the process and proceedings of the common law [citing State v. Simons]. Without doubt it does affirm this in very many cases . . . in which it is admissible to take property without giving any trial in the courts, and by modes somewhat arbitrary; and there are also cases in which persons may be deprived of liberty and even of life by other process than that of the common-law courts, and which, nevertheless, is "due process" for the special cases and under the special circumstances. To say, therefore, that due process of law implies a right of trial according to the course of common law, is to take our general definition of the principle from that which, though its [sic] ordinary, is not its universal application, and consequently is in danger of leading us into error.

Accord id. at 694 (*citing Wynehamer* and *Westervelt*):

> Different principles are applicable in different cases, and require different forms and proceedings: in some, they must be judicial; in others, the government may interfere directly and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and

table courts historically rendered decisions affecting private rights without a trial by jury.[113] Similarly, certain interests, such as the collection of public debts illustrated in *Murray's Lessee*, could legitimately be affected without conducting a jury trial. Yet, while authorities of the era recognized this flexibility in principle, the courts almost invariably called for a jury trial when faced with specific due process issues. This is the most striking difference between these early decisions and those today.

All of the pre-fourteenth amendment authorities looked to history, to "those settled usages and modes of proceeding existing in the common and statute law of England" and, as its procedural law developed, of the United States, for application of appropriate procedures. These courts clearly found no warrant for devising procedures to gauge affected interests outside the context of the Constitution or the common law. The courts were mainly concerned with establishing root and, hence, mainly traditional procedural protections for what were primarily fundamental rights and interests. Given the fundamental nature of the interests at issue and the relative stability and coherence of the society of this period, moreover, there seemed little need to look beyond historical sources for suitable procedures. This historical methodology was not changed until 1884, when the Supreme Court recognized in *Hurtado v. California*[114] that the range of process of law was not limited by history, but could progress with changing societal conditions.

In employing the due process methodology of the period, courts engaged in a relatively simple one-step process of determining the requirements of due process. There was no concerted attempt to separate the question of what specific interests were entitled to due process protection from the question of what process was due. Due process was not limited to real or personal property, but also protected other interests, such as continued government office. Both constitutional questions were answered with reference

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sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.

But see id: "When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted."

113. For a discussion of these courts and the means employed by them to reach decisions, see *Zylstra*, 1 S.C.L. at 391-94. A more modern discussion of historical common law courts, which reached decisions by means other than through a trial by jury, can be found in Atlas Roofing Co. v. Occupational Safety Comm'n, 430 U.S. 442, 458-59 (1977).

114. 110 U.S. 516 (1884). For a discussion of Hurtado v. California, see Easterbrook, *supra* note 1, at 102-03.

to historical notions of fairness or natural law principles. The key determination for these early courts was really whether a particular interest merited due process protection, for due process almost always meant a jury trial. Today, the seventh amendment right to a civil jury is often considered an historic relic, while due process is considered a fundamental right. Before 1868, however, the two concepts were thought to be inseparable.

A final valuable contribution by these early courts was their articulation of the core values embraced by the due process concept. Given shape by the early decisions discussed above, due process came to mean reasonable notice to those whose rights were implicated by state actions, followed by a meaningful opportunity to be heard in defense of one's rights, and provision of a fair and neutral proceeding to determine ultimately the status of the rights at issue. This core of basic personal, procedural rights constituted the important legacy of the early precedents. Accordingly, when the fourteenth amendment was adopted in 1868 the Supreme Court inherited a strong foundation from which to fashion national law.