Warsaw University Law Review
ISSN 1644-0242
Vol. 17, No. 1/2018
DOI 10.26330/ppuw.2018.01.01

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'In America, the law is king' – historical perspective on the Due Process of Law in the United States

> 'For he is called rex not from reigning but from ruling well, since he is a king as long as he rules well but a tyrant when he oppresses by violent domination the people entrusted to his care. Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws'
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> Henry de Bracton, *De legibus et consuetudinibus Angliae* (c. 1230)

> 'It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right which they embodied was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government'
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> Justice Matthews, *Hurtado v. California*, 110 U.S. 516 (1884)

1. Introduction. Rule of Law defined

Respect for the rule of law is a primary feature of a liberal democracy. Despite its importance, however, the rule of law still is the most elusive of the main constitutional principles, which gives rise to 'rampant divergence of understandings'.[1] In trying to define this concept many would probably share the ambition expressed by one of the rebels in Shakespeare's *Henry VI* 'The first thing we do, let's kill all the lawyers'.

For some, the abuse and the over-use have made the phrase 'the Rule of Law' meaningless − it often may appear as 'just another one of those

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1 B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge 2004, p. 3.

self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling class chatter'.[2] Commenting on the US Supreme Court decisions in *Bush v Gore*,[3] in which the rule of law had been invoked by both sides, Jeremy Waldron observed that utterance of those words meant little more than 'Hooray for our side'.[4] For John Finnis, the rule of law is 'the name commonly given to the state of affairs in which a legal system is legally in good shape'.[5] For others, the rule of law is simply a political philosophy, i.e. a set of opinions about what the law should be. In relation to the American constitution, however, the rule of law determines the validity of law, which makes the *content* of this rule all the more important.[6]

Perhaps the precise meaning of the rule of law is not clear[7] because it is not really a principle at all; rather, it is a term that encapsulates a bundle of more specific principles.[8] For example, Jeffrey Jowell identifies the following values as underlying the rule of law concept: legality, certainty, consistency, accountability, efficiency, due process and access to justice.[9] For E.T. Sullivan[10] or Justice Anthony Kennedy[11] in its core, the rule of law means that law should be known, just, and enforceable.[12]

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[2] J.N. Shklar, *Political Theory and the Rule of Law* [in:] *The Rule of Law: Ideal or Ideology*, ed. A.C. Hutchinson, P.J. Monahan, Toronto 1987, p. 1.

[3] 531 US 98 (2000).

[4] J. Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?* [in:] *The Rule of Law and Separation of Powers*, ed. R. Bellamy, *The Rule of Law and Separation of Powers*, New York 2005, p. 119.

[5] J. Finnis, *Natural Law and Natural Rights*, Oxford 1980, p. 270.

[6] In *Marbury v Madison*, 5 U.S. 137, 163 (1803), the American government has been emphatically termed as one 'of laws, and not of men'.

[7] R.H. Fallon, *'The Rule of Law' as a Concept in Constitutional Discourse*, CLR 1997, vol. 97(1), p. 1.

[8] For example, according to Thomas Bingham, *The Rule of Law*, the rule of law consists of eight 'sub-rules'. E.T. Sullivan and T.M. Massaro call due process of law 'a deceptively simple representation of an amalgamation of enormously complex political and legal thought' – E.T. Sullivan and T.M. Massaro, *The Arc of Due Process in American Constitutional Law*, Oxford 2013, p. 6.

[9] J. Jowell, *The Rule of Law and its underlying values* [in:] *The Changing Constitution*, ed. J. Jowell, D. Oliver, Oxford 2007, chapter 1.

[10] Sullivan, Massaro, [2013], p. 3.

[11] Justice A.M. Kennedy's speech at The ABA Annual Meeting in August of 2006.

[12] See also R. Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, MJIL 2002, vol. 23, p. 472.

Even this contention, however, is not uncontroversial, for there is a sharp division between those who support formal and substantive conceptions of the rule of law.[13] For the adherents of the former view, 'like a sharp knife, the rule of law is morally neutral − [law is therefore] an efficient instrument for good purposes, or wicked'.[14] Similarly, Joseph Raz argues that the primary function of the rule of law is to ensure that 'the law should conform to standards designed to enable it effectively to guide action'.[15] In contrast, according to the substantive conceptions the laws must be in compliance with natural law or accepted traditions.[16] Rule of law is thus the rule of *good* law.

American legal system subscribes to the view that the rule of law – due process of law[17] – has both procedural and substantive components. In order to appraise and understand the modern due process of law in America, it is essential to trace its history from the early conceptions of the rule of law, as expounded by Ancient Greeks and English political and legal philosophers. From that perspective, we can then explain how unique circumstances and concerns played a vital role in shaping America's due process jurisprudence. This in turn will enable us to reflect on how it has deviated from its rule of law roots and to better understand the current tensions.

2. The ancient roots

As somewhat ironically noted by Justice Scalia: 'as usual, of course, the Greeks had the same thought.'[18] The concept of the rule of law can be found in ancient Greek theories of law (*nomos*)[19] – equality of laws to

[13] P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PL 1997, p. 467.

[14] T.R.S. Allan, *Law, Liberty and Justice*, Oxford 1993, p. 23.

[15] J. Raz, *The Autonomy of Law*, Oxford 1979, chapter 11.

[16] E.J. Weinrib, *The Intelligibility of the Rule of Law* [in:] Hutchinson, Monahan [1987], pp. 59–63.

[17] Some scholars use the terms 'rule of law' and 'due process of law' interchangeably.

[18] A. Scalia, *The Rule of Law as a Law of Rules*, UCLR 1989, vol. 56, No. 4, p. 1176.

[19] See generally F.D. Miller, *The Rule of Law in Ancient Greek Thought* [in:] *The Rule of Law in Comparative Perspective. Ius Gentium: Comparative Perspectives on Law and Justice*, ed. M. Sellers, T. Tomaszewski, vol. 3, Heidelberg 2010.

all manner of persons (*isonomia*).[20] In the fourth century BC, in the *Politics*, Aristotle observed:

'Persons who are similar by nature necessarily have the same right and the same merit according to nature. (…) Consequently, it is just to rule no more than to be ruled, and it is just [to rule and be ruled] by turns. But this is already law; for law is the order [*taxis*] [by which offices are shared]. Hence the rule of law is preferable to that of a single citizen.'[21]

Aristotle emphasised the importance of the separation of powers.[22] Furthermore, both the Greeks, and the Romans agreed that there was a natural law that is supreme over human laws. These thoughts were later carried and developed by the scholars in the Middle Ages.[23]

3. Magna Carta and the English developments

The legal historian W.S. Holdsworth said that the 'doctrine of the rule or supremacy of law… became perhaps the most distinctive, and certainly the most salutary, of all the characteristics of English constitutional law.'[24] Some give credit for coining the expression 'the rule of law' to A.V. Dicey, the English law professor at Oxford.[25]

The most important terms of Magna Carta are included in Chapters 39 and 40, which 'have the power to make the blood race':[26]

'39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

40. To no one will we sell, to no one deny or delay right or justice.'

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[20] F.A. Hayek, *The Constitution of Liberty: The Definitive Edition*, Chicago 2011, pp. 238–39.

[21] Aristotle, *Politics*, trans. by F.D. Miller, pp. 16–20.

[22] Aristotle, *Politics*, book IV.

[23] See e.g. R. Hittinger, *Thomas Aquinas and the rule of law*, 2007.

[24] W.S. Holdsworth, *A History of English Law*, London 1938, p. 647.

[25] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, London 1885.

[26] T. Bingham, *The Rule of Law*, London 2010, p. 27.

At that stage the Charter was not a statute, since it was written down centuries before the era of parliamentarism. It was also not an instant response to the oppression of a king. As noted by Sir James Holt: 'Magna Carta was not a sudden intrusion into English society and politics. On the contrary, it grew out of them … Laymen had been assuming, discussing and applying the principles of Magna Carta long before 1215. They could grasp it well enough.'[27]

The Charter rejected unaccountable royal power and recognized the supremacy of law, forever changing the constitutional landscape in England and in the world. The king became subject to the constraint of the law – 'the rule of law in embryo'.[28]

Part of its power was the myth that surrounded it. For example, a government's proposal that jury trial should be reformed usually produces the objection that it is interfering with an institution which has existed since Magna Carta (even though the jury trial was not created in Magna Carta).

It has also had a great influence in the United States. According to D.V. Stivison, writing in 1991, more than 900 courts (federal and state) in the United States had cited Magna Carta, whereas between 1940 and 1990 the Supreme Court had done so over sixty times.[29]

The phrase 'due process of law' has its origin in a statute of 1354, which elaborated on the Chapter 39 and declared 'that no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law.'[30]

The connection between 'due process' and 'law of the land' was solidified in the XVII century by Sir Edward Coke, who revolutionized the principles behind the rule of law concept. In his *Institutes of the Lawes of England*, he claimed that the 'true sense and exposition' of the 'law of

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[27] J.C. Holt, *Magna Carta*, Cambridge 1992, p. 295.

[28] Bingham [2010], p. 30.

[29] D.V. Stivison, *Magna Carta in American Law* [in:] *Magna Carta in America*, ed. D.V. Stivison, 1993, p. 103.

[30] 1354 Liberty of Subjects Act Chapter 3 28 Edw 3.

the land' provision in the Charter is provided by the phrase 'due process of law'.[31] Although there is a debate whether Coke correctly characterized the seventeenth century English law,[32] 'the service these very errors have done to the cause of constitutional progress is measureless'.[33] For Coke argued that laws should be the fundamental basis from which any government should rule and that judiciary ought to be independent.[34] He also managed to transform the old writ of habeas corpus to 'the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it.'[35] Habeas corpus has been recognized as the most effective remedy against unlawful actions of the executive and was adopted and developed by the judges in the common law world, notably in the United States.[36]

3. Rule of Law concept arrives to America

As observed by John Rakove, 'the language of rights came naturally to the colonists; it was, they thought, their native tongue. (…) the original English settlers had carried all their rights with them and passed these rights on to their descendants as a birthright and a patrimony.'[37]

Although Coke's declaration in *Dr Bohnam's Case* that 'when an Act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such Act to be void'[38] was strongly opposed in England[39] and the parliamentary

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[31] E. Coke, *Institutes of the Lawes of England, Part II* (1642), TLE 2002, p. 50.

[32] K. Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, AJLH 1975, vol. 19, p. 277.

[33] W.S. McKechnie, *Magna Carta*, Glasgow 1914, p. 133.

[34] H. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, and Hale*, YLJ 1994, vol. 103, p. 1673–1694.

[35] Chief Justice Vaughan, *Bushell's Case* (1670) 135, p. 136.

[36] See generally P.D. Halliday, *Habeas Corpus From England to Empire*, Cambridge 2012.

[37] J.N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, Nowy Jork 2010, p. 290.

[38] *Dr Bohnam's Case* (1610), 8 Co Rep 107a, 118a, 77 ER 638 (CP).

[39] By e.g. W. Blackstone, *Book 1: Of the rights of persons, Commentaries on the laws of England*, Chicago 1979, pp. 137–138.

supremacy was reaffirmed, it was found more appealing in the colonies,[40] which incorporated some version of the Magna Carta law-of-the-land language into their fundamental laws, e.g. the Massachusetts Body of Liberties of 1641[41] or New York's Charter of Liberties and Privileges of 1683.[42] Similar assertions to Coke's claim in *Dr Bohnam's Case* were later repeated in *Marbury v Madison.*[43]

Of thirteen newly independent American states, ten included the law-of-the-land language in their constitutions.[44] Primarily, the references to Magna Carta Chapter 39 language focused on the arrest and trial procedures in criminal law.[45] However, not one constitution contained the phrase 'due process of law'.

4. Due process of law and the Constitution

The enactment of the Constitution of the United States was one of the most important events in the history of the rule of law. It was revolutionary in its attempt to establish an effective central government while preserving the autonomy of the states and the fundamental rights of the individuals. What is remarkable is that the US Constitution was genuinely endorsed by the citizens as it was a product of wide-ranging debate. For the first time the rule of law bound also the legislature.[46] As observed

[40] R.E. Riggs, *Substantive Due Process in 1791*, WLR 1990, vol. 94, p. 963.

[41] Para. 1: 'No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife or children, no mans goods or estaite shall be taken away from him, nor any way indammaged under colour of law or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country waranting the same, established by a generall Court and sufficiently published…'.

[42] Para. 13: 'That Noe freeman shall be taken and imprisoned or be disseized of his Freehold or Libertye or Free Customes or be outlawed or Exiled or any other wayes destroyed nor shall be passed upon adjudged or condemned But by the Lawfull Judgment of his peers and by the Law of this province.'

[43] 5 U.S. 137 (1803).

[44] Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Vermont, and Virginia.

[45] Especially: Pennsylvania, Vermont, Virginia, Massachusetts and New Hampshire. Maryland and Delaware seem to also refer to civil matters.

[46] Cf. the doctrine of parliamentary sovereignty in the United Kingdom.

by Thomas Paine, 'in America the law is king. For as in absolute governments the King is law, so in free countries the law ought to be King; and there ought to be no other.'[47]

There were many prominent lawyers among the leaders of the American Revolution, who were well aware of the English common law. It was then no surprise that in resisting the British Crown, they relied on the precedent of Magna Carta. The Due Process Clauses refer to the rule of law language that appeared in the Magna Carta. At the beginning, they were understood as an expression of a rule of law principle that no citizen shall be subject to arbitrary treatment from the government.[48] Over time, however, the Due Process Clauses assumed a life of their own that led to a rich jurisprudence that evolved as the American society evolved, well beyond the historic understanding of the rule of law as inherited from the British – they became 'a central component of the American constitutional tradition'.[49]

It should be noted that there was almost no debate about the bill of rights at the time the Constitution was drafted.[50] However, it changed dramatically once the ratification process begun. The lack of bill of rights was one of the main objections raised by the states, so powerful that some even said it was 'a fatal defect; sufficient of itself to bring on the ruin of the republic.'[51]

The first state to propose the inclusion of the due process language was the state of New York in 1788. It should not come as a surprise given that New York state constitution already had a clause in its constitution that resembled the one enshrined in Magna Carta: 'no member of this State shall be disfranchised, or deprived of any the rights or privileges secured to the subjects of this State by this constitution, unless by the

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47 T. Paine, *Common Sense* (1776), Oxford 1995, p. 34.

48 W. Letwin, *Economic Due Process in the American Constitution and the Rule of Law* [in:] *Liberty and the Rule of Law*, ed. R.L. Cunningham, College Station 1979, p. 23.

49 Sullivan, Massaro, [2013], p. 12.

50 E.W. Hickok, Jr., *The Bill of Rights: Original meaning and Current Understanding*, Charlottesville 1991, p. 1.

51 J. Story, *Commentaries on the Constitution of the United States; with a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution. Abridged by the Author, for the Use of Colleges and High Schools*, 1833, Chapter XLIV, § 977.

law of the land, or the judgment of his peers.' In 1787 New York enacted its bill of rights to supplement the 'law of the land', which declared, *inter alia*, that 'no person shall be put to answer without presentment before justices, or matter of record, or due process of law according to the law of the land.'[52]

Eventually, New York ratified the Constitution emphasizing that the inclusion of Due Process Clause would be 'consistent with the said Constitution'.[53] Also Virginia, knowing that the state law would be subject to Supremacy Clause, requested that an amendment be added that 'no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties, privileges or franchises, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the law of the land.' New York and Virginia were later joined by Massachusetts, South Carolina, and New Hampshire that also formulated their own recommendations for amendments based on the due process of law.[54]

It should be noted that it was not the only perspective at that time. For example, Alexander Hamilton argued that the inclusion of bill of rights was 'not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted**.** For why declare that things shall not be done which there is no power to do?'[55]

It was also argued that the constitution did include numerous provisions in the nature of a bill of rights, for example the Privileges and Immunities Clause or the prohibition to interfere with private contract. As observed by Justice Story, essentially invoking the rule of law principles, 'the constitution itself was, in every rational sense, and to every useful purpose, a bill of rights for the Union. It specifies, and declares the political privileges of the citizens in the structure and administration of the government. It defines certain immunities and modes of proceeding, which relate

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[52] 2 Laws of N.Y. 344, 345, 10th Sess., chapter 1, §4 (1787) (repealed 1828).

[53] Ratification of the Constitution by the State of New York (July 26, 1788).

[54] R.B. Bernstein, *Amending America*, Kansas 1993, pp. 33–34.

[55] A. Hamilton, *The Federalist Papers No. 84*.

to their personal, private, and public rights and concerns. It confers on them the unalienable right of electing their rulers; and prohibits any tyrannical measures, and vindictive prosecutions. So, that, at best, much of the force of the objection rests on mere nominal distinctions, or upon a desire to make a frame of government a code to regulate rights and remedies.'[56]

Alexander Hamilton also argued that a bill of rights was in its nature more adapted to a monarchy, as they function as 'reservations of rights not surrendered to the prince.'[57] Indeed, as the preamble to the Constitution stipulates,[58] the people surrender nothing. In consequence, if we accept the argument that the Constitution alone was enough to protect the individual rights of citizens, then it serves as evidence that Due Process Clause was intended to accomplish more than structural elements of the rule of law principles could provide.

There are not many sources on the way the Fifth Amendment was drafted. As mentioned earlier, it was New York that proposed the substitution of the phrase 'due process of law' for the 'law of the land'.[59] There is little information as to why Madison, who presented the draft Bill of Rights, opted for the New York recommendation.[60] No debate in the House or the Senate on the meaning of the proposed 'due process' phrase was recorded.[61]

5. The two strands: due process of law in practice

a) Procedural due process

In the beginning of the nation, the usage of the phrase 'due process of law' was relatively infrequent, or in the words of Judge Easterbrook,

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[56] Story, [1833], Chapter XLIV, § 978.

[57] Hamilton, [1788].

[58] 'We the People of the United States, to (…) secure the blessings of liberty to ourselves and our posterity…'.

[59] North Carolina, Pennsylvania, and Virginia suggested the latter phrase.

[60] Madison presented his draft during a speech in the House of Representatives on June 8, 1789. On September 28, 1789 it was approved by Congress and reported to the states. On December 15, 1791, the Amendment was proclaimed ratified.

[61] C. Wolfe, *The Original Meaning of the Due Process Clause* [in:] Hickock, [1991], p. 220.

'fell into desuetude.'[62] When it was invoked it most often related to the process and proceedings of the courts, e.g. in *United States v Schooner Betsey*[63] it was argued before the Supreme Court that the 'due process of law' guarantees the right to trial by jury[64] and in *United States v Bryan & Woodcock*[65] the counsel submitted that retroactive laws are against the 'due process of law'. However, it was until sixty-five years after the adoption of the Constitution that the Supreme Court first examined the Due Process Clause![66]

Judicial and academic pronouncements throughout the first century after the ratification of the Constitution seem to reflect the understanding of Hamilton or Justice Story, who wrote in his *Commentaries* that the meaning of 'due process of law' in the U.S. Constitution is the same as in England, essentially reprising (and applying to a broader populace) the language of Magna Carta… so that this clause in effect affirms the right of trial according to the process and proceedings of the common law.'[67] This contention is supported by Justice Benjamin Curtis who wrote in *Murray's Lessee v Hoboken Land & Improvement Co.* that '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 Charta.', thereby referring to ancient practices and customs under common law, as derived from English legal system.[68] The Court also noted the Due Process Clause's opacity: 'The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process.' This statement notwithstanding, the Court added Congress was not 'free to make any process 'due process of law,' by its mere will.'[69] *Murray's Lessee* ruling is

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62 F. Easterbrook, *Substance and Due Process*, SCR, 1982, vol. 85, p. 99.

63 8 U.S. 443 (1808).

64 8 U.S. 443 (1808), at 451.

65 13 U.S. (19 Cranch) 374 (1815).

66 *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 U.S. 272.

67 Story, [1833], 3:1783.

68 (1856) 59 U.S. 272, 275–77.

69 (1856) 59 U.S. 272, 276.

important also for its recognition that due process applies beyond the criminal procedure, namely to property rights. As Charles Miller put it, 'it is this side of due process/law-of-the-land, the side of property rights and, to a considerable degree, natural rights, which is the genuine American 'contribution' to the due process tradition'.[70]

In *Pennoyer v Neff*,[71] the Supreme Court interpreted the words 'due process of law' as demanding that the defendant 'be brought within [the court's] jurisdiction by service of process within the State, or his voluntary appearance.',[72] thereby limiting a state court's territorial jurisdiction. Rich procedural due process jurisprudence eventually led the Court to develop a sophisticated test in *Mathews v Eldridge*,[73] which demands that courts balance: i) 'the private interest that will be affected by the official action'; (2) 'the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards'; and (3) 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'[74]

In the late-nineteenth century, the US Supreme Court in *Hurtado v California*[75] cut ties with explicit references to the English version of the rule of law existing at that time[76] and in *Powell v Alabama*[77] it no longer considered historical practice as a sufficient condition. In *Shaffer v Heitner*[78] the Court held that 'traditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms

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[70] C.A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition* [in:] *Nomos XVIII: Due Process,* ed. J.R. Pennock, J.W. Chapman, New York 1977, p. 13.

[71] (1878) 95 U.S. 714.

[72] (1878) 95 U.S. 714, 726.

[73] (1976) 424 U.S. 319.

[74] (1976) 424 U.S. 319, 335.

[75] 110 U.S. 516 (1884).

[76] See the quote from Justice Matthews at the beginning of this paper.

[77] 287 U.S. 45 (1932).

[78] 433 U.S. 186 (1977).

that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage.'[79]

b) Substantive due process

At the turn of the century, however, the Supreme Court's attention shifted to substantive due process. It was the Supreme Court's decision in *Lochner v New York*[80] that 'marked the clear beginning of the Court's foray into the oxymoronic field of substantive due process reasoning'.[81] Oxymoronic because the word that follows 'due' is 'process' – 'substantive due process' is a contradiction – 'sort of like a 'green pastel redness.'[82]

A good definition of 'substantive due process' is provided by Chief Justice Rehnquist in *Washington v Glucksberg* case of 1997, where he said that it is the belief that 'the Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint.'[83] For Robert Bork, Due Process Clauses 'impose substantive requirements on statutes.'[84]

Previous cases already hinted that the Court might move in that direction.[85] as the ideals prevalent in substantive due process reasoning are traceable all the way back to medieval England and the Magna Carta.[86]

Admittedly, the first substantive due process doctrine to arise was the 'vested rights' theory. This theory was most closely related to the procedural protections. Its origins lie in the natural law concepts.[87] The main

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[79] 433 U.S. 186 (1977), at 212.

[80] 198 U.S. 45 (1905).

[81] M.I. Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, VilLR 2009, vol. 54, p. 249.

[82] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Cambridge 1980, p. 18.

[83] 521 U.S. 702 (1997), at 719.

[84] R.H. Bork, *Coercing Virtue: The worldwide rule of judges*, Washington 2003, p. 69.

[85] E.g. *Allgeyer v Louisiana*, 165 U.S. 578 (1897) – the statute was struck down as unconstitutional for violating the freedom to contract and conduct business.

[86] Some scholars trace the roots of substantive due process in America to Justice Field's dissent in the *Slaughter-House Cases* or even further to Justice Chase's remarks in *Calder v Bull*, (3 U.S. 386, 388–90) of 1798.

[87] G.S. Wood, *The Origins of Vested Rights in the Early Republic*, VirLR 1999, vol. 85, p. 1421.

idea behind this doctrine is that once a given right becomes 'vested' in individuals, it cannot be rescinded by the legislature.[88] At that time mostly property rights were considered 'vested'. Legislative expropriation was analogized as a 'legislative sentence', i.e. legislature acting as if it were a court, ordering a transfer of property from A to B.[89] The substantive element of this doctrine was that 'vested' rights may be rescinded only by a court pursuant to preexisting law, rather than by an *ad hoc* legislative intervention. In effect, this theory served also to protect the separation of powers.[90]

The next 'incarnation' of the substantive due process doctrine was focused on the importance of prospective, equal and impartial laws. The emphasis was put on the word 'law', which 'seems to have been the textual point of departure for substantive due process'.[91] In *Hurtado v California*, the Court stated that 'it is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power…'[92]

Finally, in 1905, the Supreme Court decided the *Lochner* case,[93] where it struck down New York law prohibiting the employment of bakers for more than ten hours per day as interfering 'with the right of contract between the employer and employees' which is 'part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.' The Court focused on the reasonableness of the challenged legislation and whether the legislature exceeded the scope of its authority, thereby violating the due process. The Court referred to the traditional police powers of the states. Both the ends sought by the legislature and the means employed were subject to the scrutiny of the judiciary

[88] 'The proposition, that a power to do, includes virtually, a power to undo, as applied to a legislative body, is generally but not universally true. All vested rights form an exception to the rule.' – Alexander Hamilton, *The Examination No. XII*, N.Y. Evening Post, Feb. 23, 1802.

[89] 'A statute which attempts to confiscate the property of a citizen, or surrender it to another, without trial or judgment, is rather a sentence than a law' – *Nat'l Metro. Bank of Wash. v Hitz*, 12 D.C. (1 Mackey) 111, 121 (1881).

[90] N. Frost, R.B. Klein-Levine, T.B. McAffee, *Courts Over Constitutions Revisited: Unwritten Constitutionalism in the States*, UtLR 2004, vol. 333, p. 382.

[91] L.H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, YLJ 1980, vol. 89, p. 1066.

[92] (1884) 110 U.S. 516, pp. 535–536.

[93] 198 U.S. 45 (1905).

(a means/ends balancing test).[94] Unlike the 'vested rights' theory, the Lochner-era approach focused on the 'liberty' rather than 'property'.

In the following years, the Court found numerous economic regulations unconstitutional by applying the test set out in Lochner.[95] The Lochner era, however, came to a close in the 1930s. In 1934 in *Nebbia v New York*,[96] the Court applied a standard very different from the one in *Lochner* and retreated from placing individual contract rights over a state's ability to govern: 'So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.'[97] Similar observations were made in *West Coast Hotel Co. v Parrish,*[98] which eventually led to the repudiation of *Lochner* in *Williamson v. Lee Optical*.[99]

The modern theory of substantive due process that emerged in the Supreme Court jurisprudence was introduced by cases such as *Griswold v Connecticut*,[100] *Shapiro v Thompson*[101] and *Roe v Wade*.[102] It is centered around the notion of 'fundamental rights', which is a narrow category of liberty interests of highest importance. The scrutiny of government acts interfering with such rights is very strict. In principle, this doctrine 'forbids the government to infringe... 'fundamental' liberty interests at all…unless the infringement is narrowly tailored to serve a compelling state interest.'[103]

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[94] *R.R. Ret. Bd. v Alton R.R.*, 295 U.S. 330, 347 n.5 (1935): 'When the question is whether legislative action transcends the limits of due process . . . the decision is guided by the principle that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.'

[95] E.g. *Adkins v Children's Hospital of the District of Columbia* 261 U.S. 525 (1923) – minimum wages for female employees was struck down.

[96] 291 U.S. 502 (1934).

[97] 291 U.S. 502 (1934), at 537.

[98] 300 U.S. 379 (1937), especially at 400.

[99] 348 U.S. 483 (1955).

[100] 381 U.S. 479 (1965).

[101] 394 U.S. 618 (1969).

[102] 410 U.S. 113 (1973).

[103] *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Griswold case concerned Connecticut's law proscribing the use of contraceptives, even by married people. The Court expressly denied that it followed *Lochner* in reaching its conclusion.[104] Justice Goldberg stated that 'the right of privacy in the marital relation is fundamental and basic – a personal right 'retained by the people' within the meaning of the Ninth Amendment' and further added that the right of privacy 'is protected by the Fourteenth Amendment from infringement by the States.'[105]

In the controversial case of *Roe v Wade,* the Supreme Court struck down Texas's anti-abortion statute and introduced a standard that prohibited states from banning or severely restricting abortion.[106] In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[107] the Court upheld the core ruling of *Roe v Wade* that the Constitution's Fourteenth Amendment is a source of a woman's fundamental right to procure an abortion.[108] The Court substituted the *Roe*'s standard of scrutiny for an undue burden test (i.e. whether state regulations are undue burden on a woman seeking a surgical abortion).[109] It also termed the abortion right a 'liberty interest' (instead of this right being grounded in the right to privacy, as was the case in *Roe*). In the words of Erin Daly: 'Abortion as privacy, for instance, means that women are protected against governmental intrusion but can make no claim to governmental assistance. Abortion as a liberty issue, on the other hand, permits a broader understanding of abortion that more accurately reflects the multiple meanings of reproductive rights (…). By identifying abortion as part of a more general liberty interest, the Court raised the stature of the abortion decision, at least by implication.'[110]

The Court's substantive due process jurisprudence also reached the matters concerning human sexuality. In *Bowers v Hardwick*,[111] the right of

[104] 381 U.S. 479 (1965), at 481–82, per Justice William Douglas.

[105] 381 U.S. 479 (1965), at 499.

[106] 410 U.S. 113 (1973), at 164–65.

[107] 505. U.S. 833 (1992).

[108] 505 U.S. 833 (1992), at 844–71.

[109] 505 U.S. 833 (1992), at 874.

[110] E. Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, AULR 1995, vol. 77, p. 122.

[111] 478 U.S. 186 (1986).

states to outlaw homosexual sodomy was upheld by the Court. Seventeen years later, however, *Bowers* was overruled in *Lawrence v Texas*[112] In contrast to *Bowers*, this judgment suggests that 'majority alone is no longer a sufficient justification for a statute.'[113] The majority ruled that anti-homosexual sodomy law violated substantive due process rights. Justice Kennedy held that there was 'an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex[114] (…) Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.'[115] For 'Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.'[116]

6. Conclusion

It emerges from the above analysis that the Supreme Court attempts to reconcile individual rights with the sovereignty of the states. In doing so, however, its interpretation of the Due Process Clauses varies significantly depending on the nature of the right at stake.

When it comes to fundamental liberties that occupy a privileged position in a liberal democracy like marital rights, reproductive rights and sexual autonomy, the Court moved from deference toward the state to protection of the autonomy of individuals. Other (not sufficiently fundamental) rights are subject to more relaxed standard of scrutiny as was famously highlighted by the Court in *Williamson v. Lee Optical*,[117] where the Court stated that 'The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise,

[112] 539 U.S. 558 (2003).

[113] Radu, [2009], p. 260.

[114] 539 U.S. 558 (2003), at 572.

[115] 539 U.S. 558 (2003), at 578.

[116] 539 U.S. 558 (2003), at 562.

[117] 348 U.S. 483 (1955).

improvident, or out of harmony with a particular school of thought'.[118] It is noteworthy that the fundamental rights cases evolved in exactly the opposite way than socioeconomic liberties (the 'transition' from *Lochner* to *Lee Optical*).

The differences in the Court's protection of various rights under Due Process Clauses resemble the 'thin' and 'thick' conceptions of the rule of law.[119] It is fair to say that procedural rule of law in the US is relatively 'thick' (e.g. cases on fair notice, adequate hearing, personal jurisdiction referred to above). On the other hand, the protection of substantive rights ranges from a very thin 'rational basis' of protection in cases involving socioeconomic rights to a 'thick' standard for fundamental rights.

What shapes the American due process doctrine was the federal character of the United States and the enlightened balance that was struck between the autonomy of states, effective central government and the individuals' rights.

Furthermore, the American due process jurisprudence owes an intellectual debt to rule of law concepts that were developed in Europe, in England in particular. What is distinct about the American rule of law, compared to the British counterpart, is the rejection of the principle of parliamentary sovereignty which, according to the English orthodox doctrine[120] (accepted by the courts)[121] means that there is no legal limit to the laws that it may enact. As observed by the constitutional writer Dicey it means that no one can lawfully override or set aside an Act of Parliament.[122] The American rule of law jurisprudence did not choose that path, as the founding fathers feared the arbitrary acts of the British Crown and its officials as well as the abuses from the legislature.[123] It should be mentioned that authoritative voices in the UK now doubt whether parliamentary sovereignty can coexist with the rule of law,

[118] 348 U.S. 483 (1955), at 488.

[119] Tamanaha, [2004], p. 91.

[120] See generally A. Goldsworthy, *The Sovereignty of Parliament,* Oxford 1999.

[121] E.g. *British Railways Board v Pickin* [1974] AC 765, 782, per Lord Reid.

[122] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885), London 1959, p. 38.

[123] Rakove, [2010], p. 290.

notably Sir Francis Jacobs,[124] Vernon Bogdanor[125] or T.R.S. Allan.[126] What is at stake, according to Professor Goldsworthy, 'is the location of ultimate decision-making authority – the right to the 'final word' – in a legal system.'[127] for 'whoever hath an absolute Authority to interpret any written, or spoken Laws; it is He, who is truly the Law-giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them.'[128]

Naturally, it is the judiciary through its judicial review powers that drives the changes in the Due Process jurisprudence in the US. The Supreme Court has the ability to strike down legislation and unilaterally create new policies. Moreover, 'unlike the rationale set forth for judicial review in *Marbury v Madison*, due process jurisprudence is not based explicitly on specific terms of a written Constitution, but instead on evolving authority such as social mores, conceptions of morality, and shifts in legal rules.'[129] The founders, however, were well aware of the tension between democratic notions of rule of law and the powers of judiciary. In fact, they embraced the judicial review.[130] They structured the entire government based on the idea that laws should govern the individuals' behavior, in a fair and just manner. And 'as we evolve, the long arc of due process should evolve as well, and bend to meet the needs of rising generations.'[131]

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[124] Sir F. Jacobs, *The Sovereignty of Law: The European Way, Hamlyn Lectures 2006*, Cambridge 2007, p. 5.

[125] V. Bogdanor, *The Sovereignty of Parliament or the Rule of Law?*, *Magna Carta Lecture*, 15 June 2006, p. 20.

[126] T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford 1993. Also *Parliamentary Sovereignty: Law, Politics, and Revolution*, (1997) 113 LQR 443.

[127] Goldsworthy, [1999], chapter 10, p. 3.

[128] Bishop Benjamin Hoadly to King George I, The nature of the kingdom, or church, of Christ: A sermon preach'd before the King, at the Royal chapel at St. James's, on Sunday March 31, 1717.

[129] Sullivan, Massaro, [2013], p. 35.

[130] A. Hamilton, *The Federalist No. 78*: 'Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing'.

[131] Sullivan, Massaro, [2013], p. 37. On the other hand, Justice Scalia cautioned in *Mistretta v United States* 488 U.S. 361 (1989) against judicial adventurism: 'There are many desirable dispositions that do not accord with the constitutional structure we live under. And, in the long run, the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous.' – at 427.

In America the Law is King – Historical Perspective On The Due Process Of Law In The United States

Summary

Despite its elusive character, the rule of law is a fundamental feature of American government. Rule of law ideals can be traced back to the ancient times and primarily to the British legal and political philosophy (starting with the Magna Carta 1215) that heavily influenced the formation of the US Constitution. Due process of law, enshrined in the Fifth and Fourteenth Amendments, is the modern variant of rule of law principles. This paper describes the most important events and conflicts in the development of due process jurisprudence, revealing unique circumstances and concerns that shaped America's own legal system. It shows the evolution of the understanding of the due process of law by focusing on the development of two interdependent strands of due process (procedural and substantive) and explains how American due process has deviated from its (British) rule of law roots.

Keywords: rule of law; procedural due process of law; substantive due process of law; historical development; American constitution

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