92487-2

No.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN O'NEILL, vs. CHWEN-JYE JU and FRANCES DU JU,	Plaintiff, Defendants;
and	
FRANCES DU JU, vs. CHWEN-JYE JU,	Cross-claimant pro se, Cross-defendant;
and	
FRANCES DU JU, vs. JPMORGAN CHASE BANK, N.A. and BISHOP, MARSHALL & WEIBEL, P.S.	**Petitioner** and Third Party Plaintiff **pro se,** **Respondents** and Third Party Defendants.

COURT OF APPEALS CASE NO.: 46333-4-II

APPEAL FROM CLARK COUNTY SUPERIOR COURT
The Honorable David E. Gregerson, Case No. 13-2-02571-3

PETITION FOR REVIEW

FRANCES DU JU
Petitioner pro se
P. O. Box 5934, Vancouver, WA 98668
Tel: (360) 253-4530
E-mail: frances3688@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

A. IDENTITY OF PETITIONER

Frances Du Ju, Petitioner and Third Party Plaintiff pro se, asks this court to review decisions designated in Part B.

B. CITATION TO COURT OF APPEALS ("COA") DECISIONS

1. Unpublished Opinion ("Opinion") by Judges Lee, Worswick, and Maxa, entered on September 1, 2015;
2. Order Amending Opinion ("Order-Amend") by Judges Lee, Worswick, and Maxa, entered on October 27, 2015;
3. Order Denying Motion for Reconsideration, without Findings of Fact or Conclusions of Law from Judges Worswick, Lee and Melnick, entered on October 27, 2015.
4. Order Denying Motion to Publish, without Findings of Fact or Conclusions of Law from Judges Worswick, Maxa, and Lee, entered on October 27, 2015.

A copy of the decisions is in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Bishop and Chase committed per se violations of RCW 61.24.050(2)(a)(i), 61.24.050(2)(a), RCW 61.24.010(4), RCW 61.24.040(7), RCW 61.24.135, and Chapter 19.86 RCW? Whether their violation of RCW 61.24.010(2) is a question of fact? Whether they conducted false notarization of documents? Whether Bishop published the Trustee's Sale in the newspaper to comply with RCW 61.24.040(3)? Whether Bishop and Chase not only tried to deter the Courts from

recognizing that $16.33 was an issue of per se violation of RCW 61.24.050(2)(a)(i), but also affected Frances Ju's Surplus Funds?

2. Whether RCW 61.24.080 is unconstitutional? Whether Bishop's intentional and willful tardiness of withholding the Surplus Funds for 48 days before filing the funds with the Superior Court resulted in Frances Ju's injury?

3. Whether Judge Gregerson was in violations of ER 103(a)(2), ER 601, and ER 901(b)(1) to rule against Frances Ju's offer of her daughter's Affidavit? Whether this Court would consolidate cases where Judge Gregerson disregarded the statutes, court rules or case law to rule against a certain class of litigants, the Asian women? Whether Judge Gregerson applied his double standard, bias and prejudice in entering the Orders Granting Chase's and Bishop's Motions for Summary Judgment? Whether the appearance of fairness was violated? Whether Judge Gregerson was in violation of the Due Process Clause of the Fourteenth Amendment? Whether the hearings were fair proceedings under the Constitutions of the United States and Washington State? Whether Judge Gregerson should have disqualified himself in the proceeding? Whether there is a public interest at stake from Judge Gregerson's double standard, bias and prejudice?

4. Whether Chase and Bishop addressed Frances Ju's request for declaratory and other relief in their Motions for Summary Judgment? Whether Chase and Bishop procedurally leaped directly to entry of final judgment when Frances Ju's viable claims remained? Whether Chase's

and Bishop's Motions for final judgment are actually Dispositive Motions in disguise, for which CR 56(c) requires 28-day motion calendar? Whether Judge Gregerson should grant Chase's and Bishop's Motions for final judgment? Whether Judge Gregerson and/or the Court of Appeals ("COA") should have issued a declaratory judgment to remove foreclosure records from Frances Ju's credit report?

5. Whether the COA 3-Judge panel should have granted Frances Ju's requests for relief? Whether the COA should deny Frances Ju's Motion for Reconsideration and Motion to Publish? Whether the lack of review by this Court can impact the fairness and interests of the judicial system?

D. STATEMENT OF THE CASE

1. Statement of the Facts.

Petitioner incorporates ¶¶ I. and III.B of Opening Brief ("Op-Br") at pages 1-3 and 8-21; ¶¶ A, C, D, E and F of Reply Brief ("Rpy-Br") at pages 1-2 and 7-21; and ¶¶ 3, 4.A and 4.E of Motion for Reconsideration ("Mot-Rec") at pages 1-5 and 24-25 into this section due to page limit. Please refer to these sections for a more detailed statement with citation to the record.

Successor Trustee Bishop, Marshall & Weibel, P.S. ("Bishop")'s Ms. Bollero identified that this case is regarding "collusive bidding" (RP 4/4/14, 12:20) at the June 21, 2013, Trustee's Sale. This case is regarding Mr. O'Neill's, Bishop's and beneficiary JPMorgan Chase Bank, N.A. ("Chase")'s violations of Chapters 19.86 RCW and 61.24 RCW; and the

superior court's Orders to protect the lawbreakers and the COA's Orders to affirm the superior court's unjustified decisions.

Judge Gregerson's coming to preside over this case was very suspicious and might have his unlawful goal as stated in Op-Br ll. 15 at 5 through ll. 18 at 6. On February 7, 2014, Judge Gregerson wanted to protect the lawbreaker Mr. O'Neill and dissolved the preliminary injunction that Commissioner Liebman granted to Frances Ju. Mr. O'Neill then negligently sold the Property to Mr. and Mrs. Jones at $282,000 on April 1, 2014. A quick-illegal-money of "$109,500 minus his cost" was his gain in nine months. Frances Ju bought the premises in April 1989 and invested money in the premises. Her gain in twenty-four years was less than a half of Mr. O'Neill's illegal gain.

Bishop's Mr. Weibel's Declaration shows that Bishop paid "an additional fee as provided in RCW 36.18.010" for "an emergency nonstandard recording" of "Appointment of Successor Trustee" with Clark County Auditor's Office on August 23, 2013, (CP 46, Op-Br P.34) instead of February 5, 2013, that Bishop and Chase claimed. The County Auditor's Office is a "source whose accuracy cannot reasonably be questioned." Pages 3-5 of Mot-Rec summarized that three genuine issues of material fact existed in the appointment of Successor Trustee. August 23, 2013, was two months after the June 21, 2013, Trustee's Sale. RCW 61.24.010(2) states, "...Only upon recording the appointment of a successor trustee..., the successor trustee shall be vested with all powers of an original trustee." If Bishop had not recorded its appointment as the

successor trustee at the time of the Trustee's Sale, Bishop would not have had the legal right to conduct the Trustee's Sale. The Trustee's Sale must be set aside. This is a very important question of fact for the jury to decide; and a very important fact to affect the outcome of this case. Op-Br also addressed this issue at 43-45, among which Frances Ju cited Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) to answer Chase's and Bishop's contention regarding false notarization.

Bishop and Chase received money from the Trustee's Sale and did not care about Mr. O'Neill's per se violation of RCW 61.24.135(1) and Frances Ju's right and damages. Rpy-Br at 7-8 and Mot-Rec at 11-16 addressed that Bishop knew or should have known about the abnormal sale process and the collusive bidding; in addition to the "erroneous opening bid amount made by or on behalf of the foreclosing beneficiary", to which RCW 61.24.050(2)(a)(i) identifies as "an error with the trustee foreclosure sale process". RCW 61.24.050(2)(a) requires that up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary declare the trustee's sale and trustee's deed void. Nevertheless, Bishop and Chase never sent out a rescission notice. RCW 61.24.135(1) also states, "... The trustee may decline to complete a sale or deliver the trustee's deed and refund the purchase price, if it appears that the bidding has been collusive or defective, or that the sale might have been void." RCW 61.24.040(7) states, "... the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the

requirements of this chapter..." Bishop and Chase were in per se violations of these statutes.

Bishop knew or should have known that because Frances Ju did not have the money to pay her mortgage, her home was foreclosed. It was foreseeable that Frances Ju will face financial difficulty to rent a place or move when Bishop withheld $75,819.44 of Surplus Funds in its pocket for forty-eight days before it filed the funds with the Superior Court. Bishop's intentional and willful tardiness in filing the Surplus Funds resulted in Frances Ju's being arrested and prosecuted. The related criminal case is still under this Court's consideration on Frances Ju's Motion for Discretionary Review. RCW 61.24.010(4) states, "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." Bishop totally disregarded this duty and was in violation of this statute.

Judge Gregerson did not care about Mr. O'Neill, Chase and Bishop's violations of Chapter 19.86 RCW. Whether Frances Ju suffered injury and damages was not a concern to Judge Gregerson. Judge Gregerson simply habitually granted Frances Ju's opposing parties' motions. Not only were Judge Gregerson's rulings unsupported by the facts and existing case law, but they were also fundamentally unfair.

Chase and Bishop did not address Frances Ju's request for declaratory and other relief when Judge Gregerson granted Chase's and Bishop's Motions for Summary Judgment. Both Chase and Bishop procedurally leaped directly to entry of final judgment when Frances Ju's

viable claims remained. Their Motions for final judgment are actually Dispositive Motions in disguise, for which CR 56(c) requires 28-day motion calendar. This is a significant violation of the court rule and procedure. Opinion at 12 stated that Frances Ju "did not utilize the available procedures by seeking the superior court judge's recusal, she has waived the issue." The Opinion did not find that Chase and Bishop were in violation of the court rule and procedure. This shows that this Court did not apply the same standard on the Appellant, Frances Ju, and the Respondents, Chase and Bishop.

Order-Amend stated that Frances Ju "mentioned the yelling man for the very first time in her response to summary judgment, but she offered no evidence in support of the claim." RP 4/4/14, 16:17-17:13 shows that Frances Ju told Judge Gregerson that pursuant to CR 8, the principle of a complaint only requires that a complaint contain a short statement showing that the pleader is entitled to relief. The language in Paragraph 3.8 of the ATP Complaint is a copy of RCW 61.24.135(1). The language in RCW 61.24.135(2) is different. People can tell that it was a violation of RCW 61.24.135(1) by simply taking a quick look at the statement. Chase's Motion for Summary Judgment emphasized the violation of RCW 61.24.135(2). Rpy-Br at 7 ll. 12-15 stated, 'Bishop and Chase did not properly challenge this "collusive bidding" issue during the Superior Court filings; but argued the issue in the appellate process with this Court.' As stated ¶ E.3 *infra*, there was no discovery during the 2-day period between the filing of Frances Ju's ATP Complaint and Chase's

filing Motion for Summary Judgment; and there was a big concern of Self-Incrimination if Judge Gregerson had ruled on any discovery dispute.

2. Procedure Relevant to the Issues Presented for Review.

Petitioner incorporates ¶ III.A of Op-Br at pages 5-8 into this section due to page limit. Please refer to the section for a more detailed statement with citation to the record.

The Case Summary shows that on September 15, 2014, Frances Ju's Opening Brief was filed. Both Chase and Bishop ended up with filing "Motions to Extend Time to File" after they filed their Respondent's Briefs late. Frances Ju's November 14, 2014, first Reply Brief was treated as a "Motion to Strike" Bishop's Respondent's Brief. On December 12, 2014, her Reply Brief was filed under the COA's instruction.

On October 31, 2014, "Court's Motion for Sanctions for Failure to File" was filed against Mr. O'Neill. On November 3, 2014 around 7:49 p.m., Mr. O'Neill's attorney Ms. McCoy sent a letter to the Clerk by e-mail to coa2filings and Ms. Mitchell; and Cc'd parties. Ms. McCoy wrote, "Mr. O'Neill was not a party to those Motions and his interests are not affected by the Orders entered, or Ms. Du Ju's current Appeal." Even though what Ms. McCoy claimed was not true, the case summary showed that a decision was entered on the same evening; and that Mr. O'Neill's Respondent's Brief would not be required. Frances Ju's November 14, 2014, "Motion to Modify Decision" was not on the COA's Case Summary; but was denied by the COA Clerk's letter of explanation.

The COA set May 19, 2015, as the Non-Oral Argument hearing date. It was not until September 1, 2015, that the Opinion was filed. The COA only adopted the statements from the two respondents, Chase and Bishop, and disregarded the significant issues of material fact in dispute that Frances Ju stated in her briefs and her responses to Chase's and Bishop's Motions for Summary Judgment. The Opinion determined a new question of constitutional principle; reversed an established principle of law; and was in conflict with prior opinions of the court.

Frances Ju filed her Motion to Publish and Mot-Rec on September 18, 2015. The COA's Order-Amend and Orders denying the two Motions were entered on October 27, 2015. The COA did not state any Findings of Fact or Conclusions of Law in its Orders denying Motion to Publish and Mot-Rec; and Judge Melnick replaced Judge Maxa to sign the Order denying Mot-Rec. Judge Melnick is from Clark County.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Pursuant to RAP 13.4(b)(1), 13.4(b)(2), 13.4(b)(3), 13.4(b)(4), 18.8(a) and 18.12, Frances Ju files her Petition for Review.

Petitioner incorporates ¶¶ IV. and V. of Op-Br at pages 21-48; her Rpy-Br; and Mot-Rec at pages 5-24 into this section due to page limit. Please refer to these sections for a more detailed statement with citation to the record.

RAP 13.4(b) regards "Considerations Governing Acceptance of Review." It states,

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Decisions of the Court of Appeals are in Conflict with Other Decisions of the Supreme Court.

Judge Gregerson's six Orders, the COA's Opinion, Order Denying Motion to Publish and Mot-Rec are in conflict with the following decisions of the Supreme Court.

Frances Ju cited Klem v. Washington Mutual Bank, 176 Wn.2d 771, 295 P.3d 1179 (2013) to answer Chase's and Bishop's contention regarding false notarization.

(Klem) ¶ 45 states, "The trustee argues as a matter of law that the falsely notarized documents did not cause harm. The trustee is wrong; a false notarization is a crime and undermines the integrity of our institutions upon which all must rely upon the faithful fulfillment of the notary's oath. There remains, however, the factual issue of whether the false notarization was a cause of plaintiff's damages. That is, of course, a question for the jury. Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 314, 858 P.2d 1054 (1993) (citing Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wash.2d 747, 753-56, 818 P.2d 1337 (1991))..."

(Mot-Rec, pp. 4-5).

"And we must draw all reasonable inferences in favor of Sutton. *Lakey*[1], 176 Wash.2d at 922, 296 P.3d 860." "But treating Sutton's testimony as true, as we must in reviewing a grant of summary judgment, we hold that genuine issues of material fact exist..." The substance of the evidence of "collusive bidding" was made known to Judge Gregerson by Frances Ju's offer and was apparent from the context within which questions were asked. "The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a

[1] *Lakey v. Puget Sound Energy, Inc.*, 176 Wash.2d 909, 922, 296 P.3d 860 (2013).

genuine issue for trial." Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999).

(Mot-Rec, pp. 8-9).

RCW 61.24.010(4) states, "The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor." The Supreme Court addressed this duty of good faith on the trustee in Page 9 of Trujillo v. Nw Trustee Servs., Inc., (No. 90509-6, decided 8/20/2015): 'RCW 61.24.010(4) then requires a foreclosure trustee to act in good faith toward the borrower, beneficiary, and grantor. This duty "requires the trustee to remain impartial and protect the interests of all the parties."' Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 787, 336 P.3d 1142 (2014). 'We described this duty in *Lyons:*

A foreclosure trustee must "adequately inform" itself regarding the purported beneficiary's right to foreclose, including, at a minimum, a "cursory investigation" to adhere to its duty of good faith. . . . [A] trustee must treat both sides equally and investigate possible issues using its independent judgment to adhere to its duty of good faith.' *Id.* (internal quotation marks omitted) (quoting *Walker v. Quality Loan Serv. Corp. of Wash.,* 176 Wn. App. 294, 309-10, 308 P.3d 716 (2013)).'

(Mot-Rec, pp. 9-10).

"A plaintiff can establish an unfair or deceptive act or practice by showing "a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest." Klem v. Washington Mutual Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Bishop and Chase put it in writing that $95,814.82 was its "opening bid price" before Frances Ju corrected it that the opening bid price was $95,798.49. Bishop then conducted a deceptive practice by claiming that there was an additional cost of $16.33; and Chase also made the same statement. Bishop and Chase not only tried to deter the Courts from recognizing that it was an issue of per se violation of RCW 61.24.050(2)(a)(i), but also stole $16.33 from Frances Ju. If Bishop cannot or would not provide proof why this $16.33 was legitimate under the principle of accounting, the Surplus Funds should be at least $75,935.77 instead of $75,819.44. This Court erred by stating that there "is of no consequence to the issues." This issue could support the elements of Frances Ju's CPA claim under Klem.

(Mot-Rec, ll. 6-22 at 11).

RCW 61.24.040(7) states, "... the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter..." After a "collusive bidding" at the Trustee's Sale, Bishop still disregarded the requirement of RCW 61.24.040(7) and the injury to Frances Ju by

executing to Mr. O'Neill its deed. Apparently, Bishop did not "remain impartial and protect the interests of all the parties" as required under Lyons v. U.S. Bank Nat'l Ass'n at 787 and Trujillo v. Nw Trustee Servs., Inc. at Page 9. Bishop was in violation of its trustee's duty by not acting in good faith toward Frances Ju. This is another Bishop's per se violation of the DTA. Under Klem v. Washington Mutual Bank at 787, Frances Ju "can establish an unfair or deceptive act or practice" against Bishop. Bain and Lyons recognize that a violation of the DTA may support a claim for damages under the CPA if a borrower can establish an unfair or deceptive act or practice. Bain v. Metropolitan Mortgage Group, Inc., 175 Wn.2d 90, 115-20, 285 P.3d 34 (2012); Lyons v. U.S. Bank Nat'l Ass'n at 784-87.

(Mot-Rec, pp. 13-14).

The fact that Bishop withheld $75,819.44 of Surplus Funds in its pocket for forty-eight days before it filed the funds with the superior court made Frances Ju unable to obtain a "bridge loan" from her relatives. Frances Ju had no financial ability to rent a place or move to comply with the 20-day time frame that the Washington legislative set. Being a foreclosure trustee, Bishop knew or should have known that because Frances Ju did not have the money to pay her mortgage, her home was foreclosed. It was foreseeable that Frances Ju will face financial difficulty to rent a place or move when Bishop withheld the Surplus Funds in its pocket for 48 days. Bishop's intentional and willful tardiness in filing the Surplus Funds resulted in Frances Ju's being arrested and prosecuted. This is another example that Bishop did not "protect the interests of all the parties" as required under Lyons v. U.S. Bank Nat'l Ass'n at 787 and Trujillo v. Nw Trustee Servs., Inc. at Page 9. Bishop was in violation of its trustee's duty by not acting in good faith toward Frances Ju.

(Mot-Rec, ll. 2-16 at 14).

Whether a CPA claimant has suffered injury to business or property is a question of fact. Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 65, 204 P.3d 885 (2009). "[T]he exercise of reasonable care, were also questions of fact for the jury to determine." Cornelis DeHeer et al. v. The Seattle Post-Intelligencer et al., 60 Wn. 2d 122, 124, 372 P.2d 193 (1962).

(Mot-Rec, ll. 2-7 at 16).

In Pages 5-10 of Frances Ju's Responses to Chase's and Bishop's motions for entry of partial final judgment, Frances Ju addressed "Frances Ju's Request for Declaratory and Other Relief is a Justiciable Controversy." (CP 208-213, CP 193-198)... Frances Ju showed the superior court that she satisfied the four elements of Justiciable Controversy under Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814-15, 514 P.2d 137, 139 (1973); and that the broad issues of public import at play in this case.

(Mot-Rec, ll. 11-14 and ll. 19-22 at 24).

In Cox v. Helenius, 103 Wn.2d 383, 693 P.2d 683, this Court held, "Even if the statutory requisites to foreclosure had been satisfied and the Coxes had failed to properly restrain the sale, this trustee's actions, along with the grossly inadequate purchase price, would result in a void sale. SEE LOVEJOY v. AMERICUS, 111 Wash. 571, 574, 191 P. 790 (1920); MIEBACH v. COLASURDO, 102 Wn.2d 170, 685 P.2d 1074 (1984). Because the deed of trust foreclosure process is conducted without review or confirmation by a court, the fiduciary duty imposed upon the trustee is exceedingly high."

2. The Decisions of the Court of Appeals are in Conflict with Other Decisions of the Court of Appeals.

Judge Gregerson's six Orders, the COA's Opinion, Order Denying Motion to Publish and Mot-Rec are in conflict with the following decisions of the Court of Appeals.

In Sutton v. Tacoma School District No. 10, et al, 180 Wn. App. 859, 324 P.3d 763, (2014), this Court held, "the School District argues that Sutton cannot rely solely on her selfserving declaration to avoid summary judgment. The School District claims that a nonmoving party cannot rely on having its statements taken at face value, citing *Heath v. Uraga*, 106 Wash.App. 506, 513, 24 P.3d 413 (2001). We disagree."

(Mot-Rec, pp. 5-6).

In Sutton at 767, this Court reasoned, "Although there are circumstances where a party's declaration will not be enough to create a question of fact, here Sutton was an eyewitness and her deposition testimony and declaration were based on her personal observations of Frederick's contact. On summary judgment, we must treat that testimony as true even if it is self serving."... Frances Ju respectfully requests that this Court invoke Sutton and amend its Opinion. There was severe CPA violation on June 21, 2013, and caused injuries to Frances Ju.

(Mot-Rec, ll. 15-20 at 8, and ll. 7-9 at 9).

Violations of the DTA are "unfair" because beneficiaries and trustees have it within their power to comply with the DTA's rules, and consumers have no way to avoid the harm caused when the rules are broken during foreclosure. Blake v. Federal Way Cycle Center, 40 Wn. App. at 310.

(Mot-Rec, pp. 15-16).

There was no reason for Frances Ju to believe that Judge Gregerson would have acted more ethically to give Frances Ju a chance of hearing or to recuse himself on his own while "Recusal decisions lie within the sound discretion ***of the trial court.***" Tatham v. Rogers, 170 Wn. App. 76, 87, 283 P.3d 583 (2012)". Opening Brief at 13-14 addressed how hostile Judge Gregerson was when he scolded Frances Ju at the February 7, 2014, hearing. The superior court had to modify the CD of the hearing to some degrees to cover up Judge Gregerson's red face...Frances Ju did not see "balance" and "integrity" from Judge Gregerson.' Frances Ju deeply believes that no reasonable-mind litigant under the same circumstances would repeatedly "utilize the available procedures by seeking the superior court judge's recusal" as this Court cited Henriksen[2], 33 Wn. App. at 128 in the Opinion at 12 ll. 18.

(Mot-Rec, pp. 20-21).

"[A] grossly inadequate purchase price together with circumstances of other unfair procedures may provide equitable grounds to set aside a sale." Albice v. Premier Mortgage Servs. of Washington, Inc., 157 Wn.App. 932-33, 239 P.3d 1148 (2010).'

(CP 163, Op-Br ll. 8-11 at 43).

3. Significant Questions of Law under the Constitution of the State of Washington and of the United States are Involved.

Frances Ju addressed the importance of Judicial Impartiality and Due Process Clause of the 14th Amendment; Judge Gregerson's disregard of Chapters 19.86 and 61.24 RCW and violations of the Rules of Evidence; and his Double Standard, Bias, Prejudice, and discrimination

[2] Henriksen v.Lyons, 33 Wn. App. 123, 128, 652 P.2d 18 (1982), *review denied*, 99 Wn.2d 1011 (1983).

when he habitually unjustly granted Frances Ju's adversary parties' motions in pages 2-3, 6-16, 18-32, 35-42 of the Opening Brief. Frances Ju's Reply Brief also addressed this issue (P. 21-24); and the issue of Raising the Claimed Errors for the First Time in the Appellate Court pursuant to RAP 2.5(a) (P. 2-7). Mot-Rec addressed these Constitutional issues at pages 16-24. Due to page limit, Frances Ju only cited the case law stated in her Mot-Rec.

> Frances Ju also addressed in the Summary of Argument regarding the importance of judicial impartiality and the due process requirement. The Due Process Clause required Judge Gregerson's recusal when he knew that he would not be fair and it was highly likely that he had an unconstitutional "potential for bias", according to Mayberry v. Pennsylvania, 400 U.S. at 466 (1971) and Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009).
>
> (Mot-Rec, pp. 16-17).

Since the 1913 U.S. Supreme Court ruling in Interstate Commerce Comm'n v. Louisville & Nashville R.R., 227 U.S. 88, 57 L. Ed. 431, 33 S.Ct. 185, "A hearing should be fair and impartial, and before an unbiased tribunal" has been a vital part of Judicial Impartiality. "A hearing" in this U.S. Supreme Court's decision should have meant "every hearing." Frances Ju should be entitled to "raising for first time on review" under RAP 2.5(a)(3) "manifest error affecting a constitutional right" based on Judge Gregerson's biased and unconstitutional acts.

A party seeking to raise a claim of error for the first time on appeal must 1) establish that the claimed error is of constitutional magnitude and 2) show how, in the context of the trial, the claimed error actually affected the party's rights. State v. Williams, 137 Wn.2d 746, 975 P.2d 963 (1999). The exception is RAP 2.5(a)(3), the "manifest" error must truly be of constitutional magnitude. State v. Bobic, 140 Wn.2d 250, 257 (2000) (citations omitted).

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) states, "[A] claim of error may be raised for the first time on appeal if it is a `manifest error affecting a constitutional right.'" (quoting RAP 2.5(a)(3); citing State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn.App. 339, 342, 835 P.2d 251 (1992)). 'Constitutional error may be raised for the first time on appeal, particularly where the error affects "fundamental aspects of due process."' State v. Johnson, 100

Wn.2d 607, 614, 674 P.2d 145 (1983), overruled on other grounds by State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985).

(Mot-Rec, pp. 21-22).

"The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Post, 118 Wn.2d 596, 618, 837 P.2d 599 (1992); citing State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). The inquiry in regard to appearance of fairness was formulated in Chicago, Milwaukee, St. P. & P. R. R v. State Human Rights Comm'n, 87 Wn. 2d 802, 810, 557 P.2d 307 (1976). "Basically, the critical concern in determining whether a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person..."

(Mot-Rec, ll. 7-15 at 23).

"Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (quoting State v. Ladenburg, 67 Wn. App. 749, 754-55, 840 P.2d 228 (1992)). Judge Gregerson's granting Bishop's and Chase's motions for summary judgment and partial final judgment is a severe threat to the fairness and interests of the judicial system.

(Mot-Rec, pp. 23-24).

Op-Br at 17 and 19 stated that Mr. O'Neill did not send Frances Ju any RCW 61.24.060(2) written notice. During the course of this case in the Superior Court proceedings, Frances Ju addressed the need that the Washington legislative should review the issue regarding no deadline for the trustee to file the Surplus Funds and "not less than twenty days" for Frances Ju's Motion for Disbursement of Surplus Funds to be heard under RCW 61.24.080 while RCW 61.24.060(1) stated, "The purchaser at the trustee's sale shall be entitled to possession of the property on the twentieth day following the sale..." were reasonable. Even the Federal government needs to pay "just consideration" when obtaining citizens' private property under the Fifth Amendment. Wash. Const. art. I, § 3

states, "No person shall be deprived of life, liberty, or property, without due process of law." Frances Ju's Mot-Rec reiterated this issue:

> Opinion at 11 stated, "The relevant portion of RCW 61.24.080 does not provide a time frame in which the trustee must deposit surplus funds." Frances Ju believes that RCW 61.24.080 itself is unconstitutional. In Davis et al. v. Cox et al., No. 90233-0, 5/28/15, the Supreme Court found that RCW 4.24.525 violates the right of trial by jury under Wash. Const. art. I, § 21 and is invalid. In League of Women Voters of Wash. v. State of Wash. et al., No. 89714-0, 9/4/15, the Supreme Court found that certain portions of I-1240 violate Wash. Const. art. IX, § 2 and are void.
>
> (Mot-Rec, ll. 15-22 at 15).

Another issue regarding the Fifth Amendment is regarding the discovery in this case. Frances Ju's Amended Third Party Complaint was filed on February 19, 2014. Chase e-mailed Frances Ju its Motion for Summary Judgment on February 21, 2014 at 3:11 p.m. There was no discovery during the 2-day period. At the April 4, 2014, hearing, Judge Gregerson disregarded the Rules of Evidence and said, "There was no formal request for additional time." (RP 4/4/14, 30:24-25). The related criminal case was pending; and Judge Gregerson had been very unfair to Frances Ju. If Frances Ju had asked a continuance to conduct discovery, Chase and Bishop might have wanted to depose Frances Ju. When criminal and civil cases arose from the same incident, invoking Self-Incrimination under the Fifth Amendment always made discovery unpleasant. Self-Incrimination under the Fifth Amendment might have jeopardized Frances Ju unconstitutionally if Chase and/or Bishop would insisted that Frances Ju should answer all the questions during the discovery and Judge Gregerson could have habitually granted their

requests. Thus, Frances Ju's request to allow her daughter to file her affidavit after the hearing should have been granted and Judge Gregerson should not disregard of ER 103(a)(2), ER 601, and ER 901(b)(1).

4. This Petition Involves Issues of Substantial Public Interest that Should be Determined by the Supreme Court.

'Homeowners facing foreclosure – most often due to job loss, illness, or other unavoidable hardship – are vulnerable to unfair and deceptive acts by beneficiaries and trustees, who wield the "tremendous" and "incredible" power to sell the homeowner's property.' Klem v. Washington Mutual Bank, 176 Wn.2d 771, 789, 295 P.3d 1179 (2013). Washington State Consumer Protection Act ("CPA") therefore plays a vital role in protecting homeowners' rights. Even though "A hearing should be fair and impartial, and before an unbiased tribunal" has been held by the U.S. Supreme Court since 1913, the two judges, Judge Stahnke and Judge Gregerson, whom Frances Ju faced, did not want to treat foreclosed homeowner Frances Ju fairly and impartially.

The Deeds of Trust Act ("DTA") is a complex set of statutes, and most homeowners lack the expertise to analyze and apply it. Most foreclosed homeowners do not have the knowledge or ability to fight against law firms or large national banks; or go for appellate review on their own. Hiring attorney needs money and foreclosed homeowners do not have the financial ability to be represented by attorneys while some judges may repeatedly request the foreclosed homeowners to hire

attorneys. In Frances Ju's case, it took 284 days from the Trustee's Sale to the superior court's mailing the check of her Surplus Funds. This is an unreasonably and maliciously long time in a residential real estate transaction. There are broad, pressing public concerns at play in this instance, including the need to urge the Washington legislative to enact statutes to protect vulnerable foreclosed homeowners. Frances Ju respectfully requests that this Court address and determine this important issue of substantial public interest. Frances Ju believes that RCW 61.24.080 is unconstitutional; and that Bishop, the superior court judges and the superior court all knew about it, took advantage of it, and intentionally and willfully caused injuries to Frances Ju.

F. CONCLUSION.

Based upon the foregoing, Frances Ju respectfully requests that this Court accept review of her Petition for Review and accelerate disposition of this Petition, that this Court reverse the decisions of the Court of Appeals and the Superior Court and remand the case with specific instructions; that this Court set aside the Trustee's Sale; and that this Court issue a declaratory judgment to remove foreclosure records from Frances Ju's credit report.

DATED this 2nd day of November, 2015.

Respectfully Submitted,

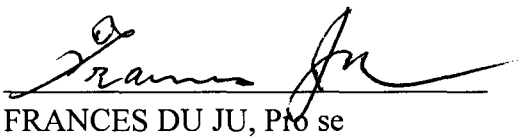
FRANCES DU JU
Petitioner and Third Party Plaintiff pro se

CERTIFICATE OF SERVICE BY MAILING

I, Frances Du Ju, hereby certify under penalty of perjury of the laws of the State of Washington that on **November 2, 2015,** I served Petition for Review with Appendices on the following named persons by **e-mail** and **First Class Mail:**

(1) David A. Weibel, Esq. and Barbara L. Bollero, Esq.
Bishop, Marshall & Weibel, P.S.
720 Olive Way, Suite 1201
Seattle, WA 98101-1801;

(2) Herbert H. Ray, Esq.
Keesal, Young & Logan
1301 Fifth Avenue, Suite 3300, Seattle, WA 98101;



FRANCES DU JU, Pro se

LIST OF APPENDICES

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

October 27, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN O'NEILL,

Plaintiff,

v.

CHWEN-JYE JU and FRANCES DU JU, and UNNAMED RESIDENTS,

Defendants.

FRANCES DU JU,

Cross-Claimant pro se,

v.

CHWEN-JYE JU,

Cross-Defendant,

and

FRANCES DU JU,

Appellant,

v.

JPMORGAN CHASE BANK, N.A. and BISHOP, WHITE, MARSHALL & WEIBEL, P.S.,

Respondents.

No. 46333-4-II

ORDER AMENDING OPINION

On September 1, 2015, this court issued its unpublished opinion in this matter. The court now amends the opinion. It is hereby

ORDERED that the opinion is amended as follows:

On page 8, line 11 and 12, we delete the following sentence that reads:

She mentioned the yelling man for the very first time during oral argument at the summary judgment hearing and offered no evidence in support of the claim.

and we insert the following language in its place:

She mentioned the yelling man for the very first time in her response to summary judgment, but she offered no evidence in support of the claim.

IT IS SO ORDERED.

DATED this ____ day of _____, 2015.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN O'NEILL,

Plaintiff,

v.

CHWEN-JYE JU and FRANCES DU JU, and UNNAMED RESIDENTS,

Defendants.

FRANCES DU JU,

Cross-Claimant pro se,

v.

CHWEN-JYE JU,

Cross-Defendant,

and

FRANCES DU JU,

Appellant,

v.

JPMORGAN CHASE BANK, N.A. and BISHOP, WHITE, MARSHALL & WEIBEL, P.S.,

Respondents.

No. 46333-4-II

UNPUBLISHED OPINION

LEE, J. — Frances Du Ju defaulted on her home mortgage, held by JPMorgan Chase Bank (Chase). Bishop, Marshall & Weibel (Bishop), as successor trustee, instituted nonjudicial foreclosure proceedings on the property, ultimately selling it to John O'Neill. Ju refused to vacate

the property and O'Neill brought an unlawful detainer action. Ju brought an amended third party complaint against Chase and Bishop, making various claims that the sale should be set aside. In response to Ju's amended third party complaint, both Chase and Bishop moved for summary judgment. The superior court granted both motions for summary judgment, and granted Chase and Bishop's motion for partial final judgment under CR 54(b).[1]

Ju appeals the orders granting summary judgment and the order granting partial final judgment. Because Ju failed to present evidence of a genuine issue of material fact, we affirm the superior court's orders granting summary judgment to both Chase and Bishop and the superior court's entry of partial final judgment in favor of Chase and Bishop.

FACTS

Ju and her ex-husband owned a home in Vancouver, Washington ("the property"). Chase held the mortgage note, secured by a deed of trust, against the property. In July 2012, Ju defaulted on her mortgage.

In January 2013, Chase appointed Bishop as successor trustee of the deed of trust. Bishop's appointment as successor trustee was recorded at the Clark County Auditor's Office on February 5, 2013.

On February 14, Bishop, acting as successor trustee, sent Ju a Notice of Trustee's Sale (NOTS) and recorded the NOTS at the Clark County Recorder's Office. The NOTS notified Ju of the default and stated that unless Ju cured her default, the property would be sold to satisfy the obligation due to Chase at a trustee's sale on June 21, 2013. The NOTS stated that a purchaser of the property at the trustee's sale would be entitled to possession of the property on the 20th day following the sale. The NOTS identified Bishop as the successor trustee and provided its contact information.

[1] CR 54(b) controls entry of judgments on multiple claims.

On June 21, Bishop conducted the nonjudicial foreclosure sale. Chase made an opening bid in the amount of $95,798.49,[2] the amount of its secured note, as a credit offset bid. O'Neill was the successful bidder and purchased the property for $172,500. Bishop recorded and delivered title of the property to O'Neill. After satisfying Chase's debt, a surplus of $75,819.46 remained. On August 8, Bishop deposited the surplus funds with the Clark County Superior Court.

Following the trustee's sale, Ju refused to vacate the property. On July 22, 2013, O'Neill filed a complaint for unlawful detainer against Ju and her ex-husband. Ju filed an answer and a cross-claim against her ex-husband,[3] and a third party complaint against JPMorgan Chase & Co.[4]

In September, JPMorgan Chase & Co. moved for summary judgment, arguing that it was not involved in the foreclosure. The superior court granted the summary judgment motion and dismissed Ju's claims against JPMorgan Chase & Co. with prejudice.

In February 2014, Ju filed an amended third party complaint against Chase and Bishop. Her amended third party complaint acknowledged that she was in default on her mortgage payments and that she had received a Notice of Trustee's Sale (NOTS). She alleged that (1) the trustee's sale violated the Consumer Protection Act (CPA), chapter 19.28 RCW, because of an erroneous opening bid, (2) O'Neill, Chase, and Bishop failed to send written notice of the successful sale, (3) Bishop did not timely deposit the surplus funds and Chase did not provide her information or help her file a motion for disbursement of the funds, and (4) Bishop was not clearly identified as the successor trustee and she was unable to contact Charter Title Corporation, the

[2] Chase bid $95,798.49. Ultimately, Chase received $95,814.82. The $16.33 increase is attributed to the cost of conducting the sale and is of no consequence to the issues.

[3] Ju's ex-husband is not a party to this appeal, and the issues raised in Ju's cross-claim against her ex-husband are not at issue here.

[4] JPMorgan Chase & Co is the parent company of Chase.

original trustee. Ju requested that the sale be set aside and that she be entitled to sell the property without her ex-husband's signature.

Chase moved for summary judgment, arguing that Ju failed to present evidence to support her claims. Bishop also moved for summary judgment, arguing that Ju did not raise a triable issue of material fact as to whether Bishop met its statutory duty of good faith as trustee. The superior court granted both parties' motions for summary judgment.

Chase and Bishop then moved for entry of partial final judgment under CR 54(b). In response, Ju requested declaratory judgment to remove foreclosure records from her credit report and argued that the motion for partial final judgment was actually a summary judgment motion. The superior court granted the CR 54(b) motion, finding that partial final judgment was appropriate because the claims against Chase and Bishop had been resolved and there was no reason for delay. Ju appeals both orders granting summary judgment and the order for partial final judgment.

ANALYSIS

Ju appeals the superior court orders granting Chase's and Bishop's motions for summary judgment and the superior court's order granting partial final judgment and dismissal in favor of Chase and Bishop. Ju argues that summary judgment was improper because Chase and Bishop did not address her allegations that the trustee's sale was defective, the superior court should have allowed Ju to present an affidavit from her daughter, and the superior court judge was biased. Ju's arguments fail.[5]

[5] Ju argues that O'Neill violated RCW 61.24.060 and RCW 61.24.135. To the extent that Ju asserts claims against O'Neill, we do not address those claims. Ju did not assert a claim against O'Neill in her amended third party complaint and O'Neill is not a party to this appeal. Therefore, any claim against O'Neill is not properly before this court, and a claim that O'Neill failed to comply with applicable statutes is not properly asserted against Chase or Bishop.

A. SUMMARY JUDGMENT

1. Legal Standard

We review summary judgment rulings de novo. *Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775, 783, 336 P.3d 1142 (2014). In reviewing an order for summary judgment, we perform the same inquiry as the superior court. *Lyons*, 181 Wn.2d at 783. "Summary judgment is appropriate only if the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lyons*, 181 Wn.2d at 783.

On summary judgment, the moving party bears the initial burden of showing the absence of an issue of material fact. *Wash. Fed. Sav. & Loan Ass'n v. McNaughton*, 181 Wn. App. 281, 297, 325 P.3d 383 (2014). If the moving party meets this burden, the burden then shifts to the party with the burden of proof at trial to demonstrate the existence of an element essential to that party's case. *Id.* If the nonmoving party fails to demonstrate the existence of an essential element, then the court should grant summary judgment. *Id.* We interpret all of the facts, and inferences from those facts, in favor of the nonmoving party. *Lyons*, 181 Wn.2d at 783. We may affirm on any grounds established by the pleadings supported by the record. *Lane v. Skamania County*, 164 Wn. App. 490, 497, 265 P.3d 156 (2011).

2. Alleged Defects In Trustee's Sale

a. Appointment of successor trustee

Ju argues that the trustee's sale was defective because she was not provided notice of the prior trustee's, Charter Title Corporation, resignation or of Bishop's appointment as successor trustee. We disagree.

RCW 61.24.010(2) provides that a trustee is not required to resign from its trustee position; rather, a beneficiary can choose to replace a trustee with a successor trustee. However, the

appointment of a successor trustee must be recorded with the county clerk before the successor trustee is vested with powers of an original trustee. RCW 61.24.010(2).

Furthermore, if a trustee chooses to resign, RCW 61.24.010(2) requires the trustee to give written notice only to the beneficiary. Thus, even if the prior trustee was required to resign before a successor trustee is appointed, which it was not, Ju, as a borrower, would not have been entitled to notice under RCW 61.24.010.

Here, Chase, as beneficiary, appointed Bishop as the successor trustee, and Ju was notified that Bishop was the successor trustee when Bishop sent Ju the NOTS on February 14, 2013. The NOTS identified Bishop as the successor trustee and provided contact information for Bishop. Moreover, the appointment was recorded at the Clark County Auditor's Office on February 5, 2013. Upon recording the appointment of successor trustee, Bishop became vested with the powers of an original trustee, which included the power to initiate the nonjudicial foreclosure process. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 93, 285 P.3d 34 (2012); RCW 61.24.010.

Ju fails to cite any authority that requires Bishop to do more than record its appointment as successor trustee with the county clerk. Because Ju failed to present authority supporting her argument that she was entitled to notice that the original trustee had resigned or that a successor trustee had been appointed, her claim fails.

b. Defect in notice of trustee's sale

Ju claims that Bishop violated the CPA by deceptively listing Charter Title Corporation as the trustee on the NOTS. We disagree.

RCW 61.24.040(1)(f) provides a form for a NOTS, which requires identifying the trustee in the property description. In conformance with the notice form provided in RCW 61.24.040(1)(f), the NOTS listed Charter Title Corporation as the trustee at the time of the sale in the original recorded deed of trust. The NOTS also listed Bishop as successor trustee. Ju has not

offered any authority or argument to support the claim that the NOTS was erroneous or violated the CPA. Accordingly, her claim fails.[6]

c. Irregularities at the trustee's sale

Ju argues that the trustee's sale is void under RCW 61.24.050(2)(a)(i) because she challenged the sale. We disagree.

RCW 61.24.050(2) provides:

> (a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the trustee's sale and trustee's deed void for the following reasons:
>
> (i) *The trustee, beneficiary, or authorized agent for the beneficiary* assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale.

(Emphasis added). Thus, to the extent Ju argues that her challenge to the trustee's sale should void the trustee's sale pursuant RCW 61.24.050(2)(a)(i), Ju's claim fails. RCW 61.24.050(2)(a)(i) does not provide for Ju, as a borrower, to declare the trustee's sale and deed void, or assert an error with the foreclosure sale process.

d. Collusion at the trustee's sale

Ju also argues that the trustee's sale violated the CPA and that a "mistakenly low opening bid price; and the erroneous, unfair or deceptive sale process resulted in or contributed to a grossly inadequate sale price." Br. of Appellant at 42. Ju's claim has no merit.

---

[6] To the extent that Ju claims that the superior court judge erred by not asking Bishop what evidence Bishop had in complying with RCW 61.24.040, her argument fails for lack of a legal or factual basis. Ju did not allege that Bishop's service of the NOTS was insufficient or that Bishop otherwise violated RCW 61.24.040 in her third party complaint. Accordingly, Bishop did not address RCW 61.24.040 in its motion for summary judgment. Thus, the superior court judge had no obligation to ask Bishop what evidence it submitted on an issue not raised on summary judgment.

RCW 61.24.135(1) states in part:

> (1) It is an unfair or deceptive act or practice under the consumer protection act, chapter 19.86 RCW, for any person, acting alone or in concert with others, to offer, or offer to accept or accept from another, any consideration of any type not to bid, or to reduce a bid, at a sale of property conducted pursuant to a power of sale in a deed of trust. The trustee may decline to complete a sale or deliver the trustee's deed and refund the purchase price, if it appears that the bidding has been collusive or defective, or that the sale might have been void.

Ju argues that a man yelling, "Wow! Wow! Wow! Stop! Stop!" demonstrates irregularities in the conduct of the Trustee's sale. Br. of Appellant at 16. But Ju fails to support her argument with evidence or authority. She mentioned the yelling man for the very first time during oral argument at the summary judgment hearing and offered no evidence in support of the claim. There is no evidence in the record to support, or even raise a genuine issue of material fact, that there was any irregularity that occurred in the conduct of the trustee's sale.

e. Evidence regarding collusion at trustee's sale

Ju claims the superior court violated ER 103[7], 601[8], and 901[9] by not allowing her "to ask her daughter to write an Affidavit," which Ju alleges would have supported her argument that irregularities occurred at the trustee's sale. Br. of Appellant at 36. Because Ju did not properly offer evidence, there was no evidence for the superior court to consider, and her claim that

---

[7] ER 103(a), (2) states: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and" when the ruling is excluding evidence, the "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

[8] ER 601 states: "Every person is competent to be a witness except as otherwise provided by statute or by court rule."

[9] ER 901(b)(1) states: "By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:
(1) *Testimony of Witness with Knowledge*. Testimony that a matter is what it is claimed to be."

"[p]ursuant to ER 103(a)(2), ER 601, and ER 901(b)(1), [the superior court] should have allowed [Ju] to tell her daughter to write an Affidavit" fails. Br. of Appellant at 37.

We generally review evidentiary rulings for an abuse of discretion, but we review evidentiary rulings made in conjunction with summary judgment de novo. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 416, 150 P.3d 545 (2007) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 662-63, 958 P.2d 301 (1998) (holding that an appellate court reviews all evidence presented to the trial court, conducts the same inquiry, and reaches its own conclusion about admissibility of evidence)).

In opposition to Chase's and Bishop's summary judgment motions, Ju claimed that both Chase and Bishop violated RCW 61.24.135, the CPA, during the trustee's sale.[10] Ju did not argue any specific facts or violations—her argument was simply that the sale was unfair. At the summary judgment hearing, the superior court asked Ju whether she had offered any evidence supporting her contention that misconduct occurred at the trustee's sale. Ju responded that she had not offered any evidence to support her claim, but that she could ask her daughter, who Ju said was present at the sale, to write an affidavit. The superior court responded that the evidence was not before the court and that Ju had "ample opportunity" to offer sufficient evidence and that she made "no formal request for additional time. And the factual record as presented, simply cannot substantiate [the existence of a genuine issue of material fact]." Verbatim Report of Proceedings (April 4, 2014) at 30-31.

CR 56(c) provides that an adverse party may file documentation "not later than 11 calendar days before the hearing." Ju provides no basis upon which the superior court was required to allow Ju additional time to get an affidavit to support an argument she raised for the first time at the

[10] RCW 61.24.135, the "Consumer protection act—Unfair or deceptive acts or practices," prohibits collusive and defective bidding at a trustee sale.

summary judgment hearing. Accordingly, her claim fails and the superior court did not err by not considering evidence that Ju did not offer.[11]

f. Sale price

Ju further argues that the sale price was inadequate. We disagree.

Generally, a foreclosure sale price is inadequate when it is less than 20 percent of the fair market value. *Albice v. Premier Mortg. Services of Wash, Inc.*, 157 Wn. App. 912, 932-33, 239 P.3d 1148 (2010), *aff'd*, 174 Wn.2d 560, 276 P.3d 1217 (2012). Here, Clark County assessed the value of the property at $239,543 for purposes of 2013 taxes. A real estate broker assessed the value of the property at $258,811 in 2013. Ju agrees that the property sold at 74.1 percent of the fair market value. Ju has presented no evidence or argument to support her claim that the sales price was inadequate. Therefore, her claim that the sale price was inadequate fails.

g. Surplus funds

Ju further claims that Bishop failed to comply with some duty to timely deposit the surplus funds. Ju presents no factual or legal support for her contention that Bishop did not properly deposit the funds or mail notice.[12] Instead, Ju relies on RCW 61.24.080, which states in part:

> Disposition of proceeds of sale—Notices—Surplus funds.
> . . .
>
> (3) The surplus, if any, less the clerk's filing fee, shall be deposited, together with written notice of the amount of the surplus, a copy of the notice of trustee's sale, and an affidavit of mailing as provided in this subsection, with the clerk of the superior court of the county in which the sale took place. The trustee shall mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to RCW 61.24.040(1). The clerk shall index such funds under the name of the grantor as set

[11] To the extent that Ju's argument could be construed as arguing that the trial court should have granted a continuance for her to collect evidence, she has not offered authority or argument to support her claim that the trial court erred by not granting a continuance that Ju did not request.

[12] Ju states that she lives far away from her P.O. Box and that she was not able to retrieve her notice of the deposit until September 2013. She makes no cognizable argument that this statement is relevant to Chase and Bishop's legal duties.

> out in the recorded notice. Upon compliance with this subsection, the trustee shall be discharged from all further responsibilities for the surplus.

The relevant portion of RCW 61.24.080 does not provide a time frame in which the trustee must deposit surplus funds. Here, the trustee's sale occurred on June 21, 2013. CP at 36, 102. After settling expenses, the surplus funds were deposited with the Clark County Superior Court on August 8. Under the facts of this case, Ju's claim that Bishop failed to timely deposit the surplus funds fail as a matter of law.

B. CR 54(B) AND DECLARATORY JUDGMENT

Ju contends that the trial court erred by granting Chase's and Bishop's motions for partial final judgment. Specifically, Ju argues that "Chase and Bishop's motions for partial final judgment should have been raised as a Motion for Summary Judgment" and is a "dispositive [m]otion in disguise." Br. of Appellant at 5, 47. Ju also contends that her request for declaratory judgment was ignored. We disagree.

We review a superior court's entry of final judgment under CR 54(b) for abuse of discretion. *Hulbert v. Port of Everett*, 159 Wn. App. 389, 404, 245 P.3d 779, *review denied*, 171 Wn.2d 1024 (2011). CR 54(b) controls entry of judgments on multiple claims and provides that the superior court must meet four elements: "'(1) more than one claim for relief or more than one party against whom relief is sought; (2) an express determination that there is no just reason for delay; (3) written findings supporting the determination that there is no just reason for delay; and (4) an express direction for entry of the judgment.'" *Id.* at 405-06 (quoting *Fluor Enters, Inc. v. Walter Constr., Ltd.*, 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007)).

Ju cites no authority for and makes no argument to support her contention that any of her claims against Chase and Bishop survived summary judgment, or that the trial court otherwise improperly granted Chase and Bishop's motion for partial judgment under CR 54(b). And "[w]here no authorities are cited in support of a proposition, the court is not required to search out

authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962); *see* RAP 10.3(a)(6). Accordingly, Ju's argument that the superior court erred by granting Chase and Bishop's CR 54(b) motion fails.

C. JUDICIAL BIAS

Ju claims that the superior court judge should have recused himself because he was biased against her. As support for her claim, she states that the superior court judge advised her to seek legal counsel and ruled against her, and that the superior court judge may have been prejudiced against her race and national origin. Ju's claims fail for lack of factual or legal basis.

As a threshold matter, Ju raises the issue of judicial bias for the first time on appeal. Ju contends that her due process rights were affected by the superior court judge's bias. Presumably, Ju is arguing that this impairment of her constitutional rights triggers RAP 2.5, allowing her to raise her claim of judicial bias for the first time on appeal. However, "even constitutional rights can be waived by failing to utilize the machinery available for asserting them." *Henriksen v. Lyons*, 33 Wn. App. 123, 128, 652 P.2d 18 (1982), *review denied*, 99 Wn.2d 1011 (1983). And pro se litigants are expected to comply with procedural rules. *State Farm Mut. Auto Ins. Co. v. Avery*, 114 Wn. App. 299, 310, 57 P.3d 300 (2002). Because Ju failed to raise these issues below and did not utilize the available procedures by seeking the superior court judge's recusal, she has waived the issue. *See Henriksen*, 33 Wn. App. at 128.

A "trial judge is fully informed and is presumed to perform his or her functions regularly and properly without bias or prejudice." *Tatham v. Rogers*, 170 Wn. App. 76, 87, 283 P.3d 583 (2012). A party alleging judicial bias must present evidence of actual or potential bias. *In re Guardianship of Wells*, 150 Wn. App. 491, 503, 208 P.3d 1126 (2009). Without evidence of actual or potential bias, a claim of judicial bias is without merit. *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992).

Ju fails to point to any evidence that the superior court judge was biased against her. And, nothing in the record supports Ju's claims that the superior court judge had a "preference of dealing with attorneys, instead of [the] merit of the case," or that the superior court judge discriminated against Ju based on her race and national origin. Br. of Appellant at 16, 39. In her opening brief, Ju claims that while she was filing an ex parte motion, the superior court judge "unusually walked past her and looked at her at least twice." Br. of Appellant at 5, 31. Ju fails to demonstrate how this conduct amounted to or reflected judicial bias towards her. Ju also alludes to the superior court judge being biased in favor of Chase and Bishop. However, other than citing to the superior court judge's rulings against her, Ju presents no evidence to support her inference of bias. Ju's dissatisfaction with the outcome of the summary judgment hearing does not amount to judicial bias against her, and without evidence of actual or potential bias, her claim fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Worswick, P.J.

Maxa, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN O'NEIL, ET AL,

Respondents,

v.

FRANCES DU JU,

Appellant.

No. 46333-4-II

ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **September 1, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Lee, Melnick

DATED this 27th day of October, 2015.

FOR THE COURT:

Worswick J

PRESIDING JUDGE

FILED
COURT OF APPEALS
DIVISION II
2015 OCT 27 PM 1:14
STATE OF WASHINGTON
BY _____
DEPUTY

cc: David A. Weibel
Frances Du Ju
Herbert H Ray, JR
Barbara L Bollero
Arthur Simpson

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN O'NEIL, ET AL,

Respondents,

v.

FRANCES DU JU,

Appellant.

No. 46333-4-II

ORDER DENYING MOTION TO PUBLISH

APPELLANT moves to publish the Court's **September 1, 2015** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick, Maxa, Lee

DATED this 27th day of October, 2015.

FOR THE COURT:

Worswick J

PRESIDING JUDGE

cc: David A. Weibel
Frances Du Ju
Herbert H Ray, JR
Barbara L Bollero
Arthur Simpson

APPENDIX B

RCW 61.24.010

Trustee, qualifications — Successor trustee.

(1) The trustee of a deed of trust under this chapter shall be:

(a) Any domestic corporation or domestic limited liability corporation incorporated under Title 23B, 25, *30, 31, 32, or 33 RCW of which at least one officer is a Washington resident; or

(b) Any title insurance company authorized to insure title to real property under the laws of this state, or any title insurance agent licensed under chapter **48.17** RCW; or

(c) Any attorney who is an active member of the Washington state bar association at the time the attorney is named trustee; or

(d) Any professional corporation incorporated under chapter **18.100** RCW, any professional limited liability company formed under chapter **25.15** RCW, any general partnership, including limited liability partnerships, formed under chapter **25.04** RCW, all of whose shareholders, members, or partners, respectively, are either licensed attorneys or entities, provided all of the owners of those entities are licensed attorneys, or any domestic corporation wholly owned by any of the entities under this subsection (1)(d); or

(e) Any agency or instrumentality of the United States government; or

(f) Any national bank, savings bank, or savings and loan association chartered under the laws of the United States.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.

(3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.

(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

[2012 c 185 § 13; 2009 c 292 § 7; 2008 c 153 § 1; 1998 c 295 § 2; 1991 c 72 § 58; 1987 c 352 § 1; 1981 c 161 § 1; 1975 1st ex.s. c 129 § 1; 1965 c 74 § 1.]

Notes:

***Reviser's note:** Title 30 RCW was recodified and/or repealed pursuant to 2014 c 37, effective January 5, 2015.

TELEPHONE NUMBER: .....

If you do not reinstate the secured obligation and your Deed of Trust in the manner set forth above, or if you do not succeed in restraining the sale by court action, your property will be sold. The effect of such sale will be to deprive you and all those who hold by, through or under you of all interest in the property;

(3) In addition, the trustee shall cause a copy of the notice of sale described in subsection (1)(f) of this section (excluding the acknowledgment) to be published in a legal newspaper in each county in which the property or any part thereof is situated, once on or between the thirty-fifth and twenty-eighth day before the date of sale, and once on or between the fourteenth and seventh day before the date of sale;

(4) On the date and at the time designated in the notice of sale, the trustee or its authorized agent shall sell the property at public auction to the highest bidder. The trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous;

(5) The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in any of the counties where the property is located. The sale shall be on Friday, or if Friday is a legal holiday on the following Monday, and during the hours set by statute for the conduct of sales of real estate at execution;

(6) The trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days by (a) a public proclamation at the time and place fixed for sale in the notice of sale and if the continuance is beyond the date of sale, by giving notice of the new time and place of the sale by both first class and either certified or registered mail, return receipt requested, to the persons specified in subsection (1)(b)(i) and (ii) of this section to be deposited in the mail (i) not less than four days before the new date fixed for the sale if the sale is continued for up to seven days; or (ii) not more than three days after the date of the continuance by oral proclamation if the sale is continued for more than seven days, or, alternatively, (b) by giving notice of the time and place of the postponed sale in the manner and to the persons specified in subsection (1)(b), (c), (d), and (e) of this section and publishing a copy of such notice once in the newspaper(s) described in subsection (3) of this section, more than seven days before the date fixed for sale in the notice of sale. No other notice of the postponed sale need be given;

(7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value, except that these recitals shall not affect the lien or interest of any person entitled to notice under subsection (1)

of this section, if the trustee fails to give the required notice to such person. In such case, the lien or interest of such omitted person shall not be affected by the sale and such omitted person shall be treated as if such person was the holder of the same lien or interest and was omitted as a party defendant in a judicial foreclosure proceeding;

(8) The sale as authorized under this chapter shall not take place less than one hundred ninety days from the date of default in any of the obligations secured;

(9) If the trustee elects to foreclose the interest of any occupant or tenant of property comprised solely of a single-family residence, or a condominium, cooperative, or other dwelling unit in a multiplex or other building containing fewer than five residential units, the following notice shall be included as Part X of the Notice of Trustee's Sale:

X. NOTICE TO OCCUPANTS OR TENANTS

The purchaser at the trustee's sale is entitled to possession of the property on the 20th day following the sale, as against the grantor under the deed of trust (the owner) and anyone having an interest junior to the deed of trust, including occupants who are not tenants. After the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter **59.12** RCW. For tenant-occupied property, the purchaser shall provide a tenant with written notice in accordance with RCW **61.24.060**;

(10) Only one copy of all notices required by this chapter need be given to a person who is both the borrower and the grantor. All notices required by this chapter that are given to a general partnership are deemed given to each of its general partners, unless otherwise agreed by the parties.

[2012 c 185 § 10; 2009 c 292 § 9; 2008 c 153 § 3; 1998 c 295 § 5; 1989 c 361 § 1; 1987 c 352 § 3; 1985 c 193 § 4; 1981 c 161 § 3; 1975 1st ex.s. c 129 § 4; 1967 c 30 § 1; 1965 c 74 § 4.]

Notes:

Application -- 1985 c 193: See note following RCW **61.24.020**.

RCW 61.24.050

Interest conveyed by trustee's deed — Sale is final if acceptance is properly recorded — Redemption precluded after sale — Rescission of trustee's sale.

(1) Upon physical delivery of the trustee's deed to the purchaser, or a different grantee as designated by the purchaser following the trustee's sale, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. Except as provided in subsection (2) of this section, if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale.

(2)(a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the trustee's sale and trustee's deed void for the following reasons:

(i) The trustee, beneficiary, or authorized agent for the beneficiary assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale;

(ii) The borrower and beneficiary, or authorized agent for the beneficiary, had agreed prior to the trustee's sale to a loan modification agreement, forbearance plan, shared appreciation mortgage, or other loss mitigation agreement to postpone or discontinue the trustee's sale; or

(iii) The beneficiary or authorized agent for the beneficiary had accepted funds that fully reinstated or satisfied the loan even if the beneficiary or authorized agent for the beneficiary had no legal duty to do so.

(b) This subsection does not impose a duty upon the trustee any different than the obligations set forth under RCW **61.24.010** (3) and (4).

(3) The trustee must refund the bid amount to the purchaser no later than the third day following the postmarked mailing of the rescission notice described under subsection (4) of this section.

(4) No later than fifteen days following the voided trustee's sale date, the trustee shall send a notice in substantially the following form by first-class mail and certified mail, return receipt requested, to all parties entitled to notice under RCW **61.24.040**(l) (b) through (e):

NOTICE OF RESCISSION OF TRUSTEE'S SALE

NOTICE IS HEREBY GIVEN that the trustee's sale that occurred on (trustee's sale date) is rescinded and declared void because (insert the applicable reason(s) permitted under RCW **61.24.050**(2)(a)).

The trustee's sale occurred pursuant to that certain Notice of Trustee's Sale dated . . ., . . ., recorded . . ., . . ., under Auditor's File No. . . ., records of . . . County, Washington, and that certain Deed of Trust dated . . ., . . ., recorded . . ., . . ., under Auditor's File No. . . ., records of . . . County, Washington, from . . ., as Grantor, to . . ., as . . ., as original Beneficiary, concerning the following described property, situated in the County(ies) of . . ., State of Washington, to wit:

(Legal description)

Commonly known as (common property address)

(5) If the reason for the rescission stems from subsection (2)(a)(i) or (ii) of this section, the trustee may set a new sale date not less than forty-five days following the mailing of the notice of rescission of trustee's sale. The trustee shall:

(a) Comply with the requirements of RCW **61.24.040**(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW **61.24.040**(1)(f) to be published in a legal newspaper in each county in which the property or any part of the property is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

[2012 c 185 § 14; 1998 c 295 § 7; 1965 c 74 § 5.]

RCW 61.24.080

Disposition of proceeds of sale — Notices — Surplus funds.

The trustee shall apply the proceeds of the sale as follows:

(1) To the expense of sale, including a reasonable charge by the trustee and by his or her attorney: PROVIDED, That the aggregate of the charges by the trustee and his or her attorney, for their services in the sale, shall not exceed the amount which would, by the superior court of the county in which the trustee's sale occurred, have been deemed a reasonable attorney fee, had the trust deed been foreclosed as a mortgage in a noncontested action in that court;

(2) To the obligation secured by the deed of trust; and

(3) The surplus, if any, less the clerk's filing fee, shall be deposited, together with written notice of the amount of the surplus, a copy of the notice of trustee's sale, and an affidavit of mailing as provided in this subsection, with the clerk of the superior court of the county in which the sale took place. The trustee shall mail copies of the notice of the surplus, the notice of trustee's sale, and the affidavit of mailing to each party to whom the notice of trustee's sale was sent pursuant to RCW **61.24.040**(1). The clerk shall index such funds under the name of the grantor as set out in the recorded notice. Upon compliance with this subsection, the trustee shall be discharged from all further responsibilities for the surplus. Interests in, or liens or claims of liens against the property eliminated by sale under this section shall attach to the surplus in the order of priority that it had attached to the property, as determined by the court. A party seeking disbursement of the surplus funds shall file a motion requesting disbursement in the superior court for the county in which the surplus funds are deposited. Notice of the motion shall be personally served upon, or mailed in the manner specified in RCW **61.24.040** (1)(b), to all parties to whom the trustee mailed notice of the surplus, and any other party who has entered an appearance in the proceeding, not less than twenty days prior to the hearing of the motion. The clerk shall not disburse such surplus except upon order of the superior court of such county.

[2014 c 107 § 2; 1998 c 295 § 10; 1981 c 161 § 5; 1967 c 30 § 3; 1965 c 74 § 8.]

RCW 61.24.135

Consumer protection act — Unfair or deceptive acts or practices.

(1) It is an unfair or deceptive act or practice under the consumer protection act, chapter **19.86** RCW, for any person, acting alone or in concert with others, to offer, or offer to accept or accept from another, any consideration of any type not to bid, or to reduce a bid, at a sale of property conducted pursuant to a power of sale in a deed of trust. The trustee may decline to complete a sale or deliver the trustee's deed and refund the purchase price, if it appears that the bidding has been collusive or defective, or that the sale might have been void. However, it is not an unfair or deceptive act or practice for any person, including a trustee, to state that a property subject to a recorded notice of trustee's sale or subject to a sale conducted pursuant to this chapter is being sold in an "as-is" condition, or for the beneficiary to arrange to provide financing for a particular bidder or to reach any good faith agreement with the borrower, grantor, any guarantor, or any junior lienholder.

(2) It is an unfair or deceptive act in trade or commerce and an unfair method of competition in violation of the consumer protection act, chapter **19.86** RCW, for any person or entity to: (a) Violate the duty of good faith under RCW **61.24.163**; (b) fail to comply with the requirements of RCW **61.24.174**; or (c) fail to initiate contact with a borrower and exercise due diligence as required under RCW **61.24.031**.

[2011 c 58 § 14; 2008 c 153 § 6; 1998 c 295 § 15.]

Notes:

Findings -- Intent -- Short title -- 2011 c 58: See notes following RCW **61.24.005**.

APPENDIX C

Laws and Agency Rules

Washington State Constitution

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

FIFTH AMENDMENT

RIGHTS OF PERSONS

CONTENTS

an opportunity "to prove de novo" what petitioners had "failed to prove in the military courts." According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

Substantive Due Process

Justice Harlan, dissenting in *Poe v. Ullman*,[65] observed that one view of due process, "ably and insistently argued . . . , sought to limit the provision to a guarantee of procedural fairness." But, he continued, due process "in the consistent view of this Court has ever been a broader concept . . . . Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. . . . Thus the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'"

Discrimination.—"Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."[66] At other times, however, the Court assumed that "discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment."[67] The theory that was to prevail seems first to have been enunciated by Chief Justice Taft, who observed that the due process and equal protection clauses are "associated" and that "[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law."[68] Thus, in *Bolling v. Sharpe*,[69] a companion case to *Brown*

[65] 367 U.S. 497, 540, 541 (1961). The internal quotation is from Hurtado v. California, 110 U.S. 516, 532 (1884). Development of substantive due process is noted, supra, pp. 1343–47 and is treated infra, under the Fourteenth Amendment.

[66] Detroit Bank v. United States, 317 U.S. 329, 337 (1943); Helvering v. Lerner Stores Corp., 314 U.S. 463, 468 (1941).

[67] Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937). *See also* Currin v. Wallace, 306 U.S. 1, 13–14 (1939).

[68] Truax v. Corrigan, 257 U.S. 312, 331 (1921). *See also* Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[69] 347 U.S. 497, 499–500 (1954).

v. Board of Education,[70] the Court held that segregation of pupils in the public schools of the District of Columbia violated the due process clause. "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

"Equal protection analysis in the Fifth Amendment area," the Court has said, "is the same as that under the Fourteenth Amendment."[71] So saying, the court has applied much of its Fourteenth Amendment jurisprudence to strike down sex classifications in federal legislation,[72] reached classifications with an adverse impact upon illegitimates,[73] and invalidated some welfare assistance pro-

---

[70] 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the equal protection clause if the cases had come from the States. E.g., Hurd v. Hodge, 334 U.S. 24 (1948); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Railroad Trainmen v. Howard, 343 U.S. 768 (1952). *See also* Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

[71] Buckley v. Valeo, 424 U.S. 1, 93 (1976); Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[72] Frontiero v. Richardson, 411 U.S. 677 (1973); Califano v. Goldfarb, 430 U.S. 199 (1977). *But see* Rostker v. Goldberg, 453 U.S. 57 (1981); Califano v. Jobst, 434 U.S. 47 (1977).

[73] *Compare* Jiminez v. Weinberger, 417 U.S. 628 (1974) *with* Mathews v. Lucas, 427 U.S. 495 (1976).

tion against legislation deemed to abridge liberty of contract.[157] The two leading cases invalidating federal legislation, however, have both been overruled, as the Court adopted a very restrained standard of review of economic legislation.[158] The Court's "hands-off" policy with regard to reviewing economic legislation is quite pronounced.[159]

NATIONAL EMINENT DOMAIN POWER

Overview

"The Fifth Amendment to the Constitution says 'nor shall private property be taken for public use, without just compensation.' This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power."[160] Eminent domain "appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty."[161] In the early years of the nation the federal power of eminent domain lay dormant,[162] and it was not until 1876 that its existence was recognized by the Supreme Court. In *Kohl v. United States*[163] any doubts were laid to rest, as the Court affirmed that the power was as necessary to the existence of the National Government as it was to the existence of any State. The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken for the effectuation of a granted power,[164] but once this is conceded the ambit of national powers is so wide-ranging that vast numbers of objects

---

[157] *See* "liberty of contract" heading under Fourteenth Amendment, infra.

[158] Adair v. United States, 208 U.S. 161 (1908), overruled in substance by Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[159] E.g., United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1981); Schweiker v. Wilson, 450 U.S. 221 (1981).

[160] United States v. Carmack, 329 U.S. 230, 241–42 (1946). The same is true of "just compensation" clauses in state constitutions. Boom Co. v. Patterson, 98 U.S. 403, 406 (1879). For in-depth analysis of the eminent domain power, *see* 1 NICHOLS' THE LAW OF EMINENT DOMAIN (J. Sackman, 3d rev. ed. 1973); and R. Meltz, *When the United States Takes Property: Legal Principles*, CONGRESSIONAL RESEARCH SERVICE REPORT 91-339 A (1991) (revised periodically).

[161] Boom Co. v. Patterson, 98 U.S. 403, 406 (1879).

[162] Prior to this time, the Federal Government pursued condemnation proceedings in state courts and commonly relied on state law. Kohl v. United States, 91 U.S. 367, 373 (1876); United States v. Jones, 109 U.S. 513 (1883). The first general statutory authority for proceedings in federal courts was not enacted until 1888. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357. See 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 1.24 (J. Sackman, 3d rev. ed. 1973).

[163] 91 U.S. 367 (1876).

[164] United States v. Gettysburg Electric Ry., 160 U.S. 668, 679 (1896).

may be effected.[165] This prerogative of the National Government can neither be enlarged nor diminished by a State.[166] Whenever lands in a State are needed for a public purpose, Congress may authorize that they be taken, either by proceedings in the courts of the State, with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State.[167]

"Prior to the adoption of the Fourteenth Amendment," the power of eminent domain of state governments "was unrestrained by any federal authority."[168] The just compensation provision of the Fifth Amendment did not apply to the States,[169] and at first the contention that the due process clause of the Fourteenth Amendment afforded property owners the same measure of protection against the States as the Fifth Amendment did against the Federal Government was rejected.[170] However, within a decade the Court rejected the opposing argument that the amount of compensation to be awarded in a state eminent domain case is solely a matter of local law. On the contrary, the Court ruled, although a state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."[171] While the guarantees of just compensation flow from two

---

[165] E.g., California v. Central Pacific Railroad, 127 U.S. 1, 39 (1888) (highways); Luxton v. North River Bridge Co., 153 U.S. 525 (1894) (interstate bridges); Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890) (railroads); Albert Hanson Lumber Co. v. United States 261 U.S. 581 (1923) (canal); Ashwander v. TVA, 297 U.S. 288 (1936) (hydroelectric power). "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." Berman v. Parker, 348 U.S. 26, 33 (1954).

[166] Kohl v. United States, 91 U.S. 367 374 (1876).

[167] Chappell v. United States, 160 U.S. 499, 510 (1896). The fact that land included in a federal reservoir project is owned by a state, or that its taking may impair the state's tax revenue, or that the reservoir will obliterate part of the state's boundary and interfere with the state's own project for water development and conservation, constitutes no barrier to the condemnation of the land by the United States. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508 (1941). So too, land held in trust and used by a city for public purposes may be condemned. United States v. Carmack, 329 U.S. 230 (1946).

[168] Green v. Frazier, 253 U.S. 233, 238 (1920).

[169] Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[170] Davidson v. City of New Orleans, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth, and refused to equate the missing term with the present one.

[171] Chicago B. & Q. R.R. v. City of Chicago, 166 U.S. 226, 233, 236–37 (1897). *See also* Sweet v. Rechel, 159 U.S. 380, 398 (1895).

different sources, the standards used by the Court in dealing with the issues appear to be identical, and both federal and state cases will be dealt with herein without expressly continuing to recognize the two different bases for the rulings.

It should be borne in mind that while the power of eminent domain, though it is inherent in organized governments, may only be exercised through legislation or through legislative delegation, usually to another governmental body, the power may be delegated as well to private corporations, such as public utilities, railroad and bridge companies, when they are promoting a valid public purpose. Such delegation has long been approved. [172]

Public Use

Explicit in the just compensation clause is the requirement that the taking of private property be for a public use; the Court has long accepted the principle that one is deprived of his property in violation of this guarantee if a State takes the property for any reason other than a public use. [173] The question whether a particular intended use is a public use is clearly a judicial one, [174] but the Court has always insisted on a high degree of judicial deference to the legislative determination. "The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." [175] When it is state action being challenged under the Fourteenth Amendment, there is the additional factor of the Court's willingness to defer to the highest court of the State in resolving such an issue. [176] As early as 1908, the Court was obligated to admit that notwithstanding its retention of the power of judicial review, "no case is recalled where this Court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State court as a taking for public uses. . . ." [177] How-

[172] Noble v. Oklahoma City, 297 U.S. 481 (1936); Luxton v. North River Bridge Co., 153 U.S. 525 (1895). One of the earliest examples is Curtiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cr.) 233 (1810).

[173] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–59 (1896); Cole v. La Grange, 113 U.S. 1, 6 (1885).

[174] "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." City of Cincinnati v. Vester, 281 U.S. 439, 444 (1930).

[175] Berman v. Parker, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

[176] Green v. Frazier, 253 U.S. 283, 240 (1920); City of Cincinnati v. Vester, 281 U.S. 439, 446 (1930). *And see* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

[177] Hairston v. Danville & Western Ry., 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

ever, in a 1946 case involving federal eminent domain power, the Court cast considerable doubt upon the power of courts to review the issue of public use. "We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority."[178] There is some suggestion that "the scope of the judicial power to determine what is a 'public use'" may be different as between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,[179] but it may well be that the case simply stands for the necessity for great judicial restraint.[180] Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or expediency of the particular taking is exclusively in the legislature or the body to which the legislature has delegated the decision, and is not subject to judicial review.[181]

At an earlier time, the factor of judicial review would have been vastly more important than it is now, inasmuch as the prevailing judicial view was that the term "public use" was synonymous with "use by the public" and that if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But this view was rejected some time ago.[182] The modern conception of public use equates it with the police power in the furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such "definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power. . . ." Effectuation of these matters being within the authority of the legislature, the power to achieve them through the exercise of eminent domain is established. "For the power of

[178] United States ex rel. TVA v. Welch, 327 U.S. 546, 551–52 (1946). Justices Reed and Frankfurter and Chief Justice Stone disagreed with this view. Id. at 555, 557 (concurring).

[179] Id. at 552.

[180] Id. So it seems to have been considered in Berman v. Parker, 348 U.S. 26, 32 (1954).

[181] Rindge Co. v. Los Angeles County, 262 U.S. 700, 709 (1923); Bragg v. Weaver, 251 U.S. 57, 58 (1919); Berman v. Parker, 358 U.S. 26, 33 (1954). "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in federal courts. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

[182] Clark v. Nash, 198 U.S. 361 (1905); Mt. Vernon-Woodberry Cotton Duck Co., v. Alabama Interstate Power Co., 240 U.S. 30, 32 (1916).

eminent domain is merely the means to the end."[183] Traditionally, eminent domain has been utilized to facilitate transportation, the supplying of water, and the like,[184] but the use of the power to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.[185]

The Supreme Court has approved generally the widespread use of the power of eminent domain by federal and state governments in conjunction with private companies to facilitate urban renewal, destruction of slums, erection of low-cost housing in place of deteriorated housing, and the promotion of aesthetic values as well as economic ones. In *Berman v. Parker*,[186] a unanimous Court ob-

[183] Berman v. Parker, 348 U.S. 26, 32, 33 (1954).

[184] E.g., Kohl v. United States, 91 U.S. 367 (1876) (public buildings); Chicago M. & S.P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (canal); Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); Dohany v. Rogers, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway); Delaware, L. & W.R.R. v. Morristown, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by railroad upon its own terminal grounds to afford ingress and egress to its patrons); Clark v. Nash, 198 U.S. 361 (1905) (right-of-way across neighbor's land to enlarge irrigation ditch for water without which land would remain valueless); Strickley v. Highland Boy Mining Co., 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a State attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right-of-way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

[185] E.g., Shoemaker v. United States, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); Rindge Co. v. Los Angeles County, 262 U.S. 700 (1923) (scenic highway); Brown v. United States, 263 U.S. 78 (1923) (condemnation of property near town flooded by establishment of reservoir in order to locate a new townsite, even though there might be some surplus lots to be sold); United States v. Gettysburg Electric Ry., 160 U.S. 668 (1896), and Roe v. Kansas ex rel. Smith, 278 U.S. 191 (1929) (historic sites). When time is deemed to be of the essence, Congress takes land directly by statute, authorizing procedures by which owners of appropriated land may obtain just compensation. *See, e.g.*, Pub. L. No. 90-545, § 3, 82 Stat. 931 (1968), 16 U.S.C. § 79(c) (taking land for creation of Redwood National Park); Pub. L. No. 93-444, 88 Stat. 1304 (1974) (taking lands for addition to Piscataway Park, Maryland); Pub. L. No. 100-647, § 10002 (1988) (taking lands for addition to Mannassas National Battlefield Park).

[186] 348 U.S. 26, 32-33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said: "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served

served: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." For "public use," then, it may well be that "public interest" or "public welfare" is the more correct phrase. *Berman* was applied in *Hawaii Housing Auth. v. Midkiff*,[187] upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking."[188] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[189]

Just Compensation

"When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation."[190] The Fifth Amendment's guarantee "that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[191]

The just compensation required by the Constitution is that which constitutes "a full and perfect equivalent for the property taken."[192] Originally the Court required that the equivalent be in

---

through an agency of private enterprise than through a department of government—or so the Congress might conclude." Id. at 33–34 (citations omitted).

[187] 467 U.S. 229, 243 (1984).

[188] 467 U.S. at 243.

[189] 467 U.S. at 240. *See also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

[190] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 573, 575 (1898).

[191] Armstrong v. United States, 364 U.S. 40, 49 (1960). "The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice." United States v. Cors, 337 U.S. 325, 332 (1949). There is no constitutional prohibition against confiscation of enemy property, but aliens not so denominated are entitled to the protection of this clause. *Compare* United States v. Chemical Foundation, 272 U.S. 1 (1926) *and* Stoehr v. Wallace, 255 U.S. 239 (1921), *with* Silesian-American Corp. v. Clark, 332 U.S. 469 (1947), Russian Fleet v. United States, 282 U.S. 481 (1931), *and* Guessefeldt v. McGrath, 342 U.S. 308 (1952).

[192] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. United States ex rel. TVA v. Powelson, 319 U.S. 266, 281 (1943); United States v. Miller,

money, not in kind,[193] but more recently has cast some doubt on this assertion.[194] Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future,'. . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.'"[195] The general standard thus is the market value of the property, i.e., what a willing buyer would pay a willing seller.[196] If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.[197] However, the Court is resistent to alternative standards, having repudiated reliance on the cost of substitute facilities.[198] Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. Holding that the reasons which underlie the rule of market value when a free market exists apply as well where value is measured by a government-fixed ceiling price, the Court permitted owners of cured pork and black pepper to recover only the ceiling price for the commodities, despite findings by the Court of Claims that the replacement cost of the meat exceeded its ceiling price and that the pepper had a "retention value" in excess of that price.[199] By a five-to-four decision, the Court ruled that the Government was not obliged to pay

317 U.S. 369, 375 1943); Roberts v. New York City, 295 U.S. 264 (1935). The value of the property to the government for its particular use is not a criterion. United States v. Chandler-Dunbar Co., 229 U.S. 53 (1913); United States v. Twin City Power Co., 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. Dohany v. Rogers, 281 U.S. 362 (1930).

[193] Van Horne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795); United States v. Miller, 317 U.S. 369, 373 (1943).

[194] Regional Rail Reorganization Act Cases, 419 U.S. 102, 150–51 (1974).

[195] Chicago B. & Q. R.R. v. Chicago, 166 U.S. 226, 250 (1897); McGovern v. City of New York, 229 U.S. 363, 372 (1913). *See also* Boom Co. v. Patterson, 98 U.S. 403 (1879); McCandless v. United States, 298 U.S. 342 (1936).

[196] United States v. Miller, 317 U.S. 369, 374 (1943); United States ex rel. TVA v. Powelson, 319 U.S. 266, 275 (1943). *See also* United States v. New River Collieries Co., 262 U.S. 341 (1923); Olson v. United States, 292 U.S. 264 (1934); Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the Government under a lease was held constitutional. Old Dominion Land Co. v. United States, 269 U.S. 55 (1925).

[197] United States v. Miller, 317 U.S. 369, 374 (1943).

[198] United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (condemnation of church-run camp; United States v. 50 Acres of Land, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable.

[199] United States v. Felin & Co., 334 U.S. 624 (1948); United States v. Commodities Trading Corp., 339 U.S. 121 (1950). *And see* Vogelstein & Co. v. United States, 262 U.S. 337 (1923).

the present market value of a tug when the value had been greatly enhanced as a consequence of the Government's wartime needs.[200]

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases decided by five-to-four votes, one in which compensation was awarded and one in which it was denied. Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land for nearly 50 years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.[201] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.[202]

Interest.—Ordinarily, property is taken under a condemnation suit upon the payment of the money award by the condemner, and no interest accrues.[203] If, however, the property is taken in fact before payment is made, just compensation includes an increment which, to avoid use of the term "interest," the Court has called "an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking."[204] If the owner and the Government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth

---

[200] United States v. Cors, 337 U.S. 325 (1949). *And see* United States v. Toronto Navigation Co., 338 U.S. 396 (1949).

[201] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id. at 480.

[202] United States v. Fuller, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally created value should apply only when the Government was in fact acting in the use of its own property; here the Government was acting only as a condemnor. Id. at 494.

[203] Danforth v. United States, 308 U.S. 271, 284 (1939); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

[204] United States v. Klamath Indians, 304 U.S. 119, 123 (1938); Jacobs v. United States, 290 U.S. 13, 17 (1933); Kirby Forest Industries v. United States, 467 U.S. 1 (1984) (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.[205] Where property of a citizen has been mistakenly seized by the Government and it is converted into money which is invested, the owner is entitled in recovering compensation to an allowance for the use of his property.[206]

Rights for Which Compensation Must Be Made.—If real property is condemned the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable "property," but also such lesser interests as easements[207] and leaseholds.[208] If only a portion of a tract is taken, the owner's compensation includes any element of value arising out of the relation of the part taken to the entire tract.[209] On the other hand, if the taking has in fact benefited the owner, the benefit may be set off against the value of the land condemned,[210] although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.[211] When certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the subsequent erection of a fire station on the property instead was held not to have deprived the owner of any part of his just compensation.[212]

Interests in intangible as well as tangible property are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights,[213] patent rights,[214] and trade secrets.[215] So too, the franchise of a private corporation is property which cannot be taken for public use without compensation. Upon condemnation of a lock and dam belonging to a navigation company, the Government was required to pay for the fran-

---

[205] Albrecht v. United States, 329 U.S. 599 (1947).

[206] Henkels v. Sutherland, 271 U.S. 298 (1926); *see also* Phelps v. United States, 274 U.S. 341 (1927).

[207] United States v. Welch, 217 U.S. 333 (1910).

[208] United States v. General Motors, 323 U.S. 373 (1945).

[209] Bauman v. Ross, 167 U.S. 548 (1897); Sharp v. United States, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a private right-of-way, an allowance was properly made for the value of the easement. United States v. Welch, 217 U.S. 333 (1910).

[210] Bauman v. Ross, 167 U.S. 548 (1897).

[211] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[212] Reichelderfer v. Quinn, 287 U.S. 315, 318 (1932).

[213] Lynch v. United States, 292 U.S. 571, 579 (1934); Omnia Commercial Corp. v. United States, 261 U.S. 502, 508 (1923).

[214] James v. Campbell, 104 U.S. 356, 358 (1882). *See also* Hollister v. Benedict Mfg. Co., 113 U.S. 59, 67 (1885).

[215] Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

chise to take tolls as well as for the tangible property.[216] The frustration of a private contract by the requisitioning of the entire output of a steel manufacturer is not a taking for which compensation is required,[217] but government requisitioning from a power company of all the electric power which could be produced by use of the water diverted through its intake canal, thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.[218] When, upon default of a ship-builder, the Government, pursuant to contract with him, took title to uncompleted boats, the material men, whose liens under state laws had attached when they supplied the shipbuilder, had a compensable interest equal to whatever value these liens had when the Government "took" or destroyed them in perfecting its title.[219] As a general matter, there is no property interest in the continuation of a rule of law.[220] And, even though state participation in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agreement with the state.[221] Similarly, there is no right to the continuation of governmental welfare benefits.[222]

Consequential Damages.—The Fifth Amendment requires compensation for the taking of "property," hence does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if they are not reflected in the market value of the property taken.[223] "Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever, he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage'

---

[216] Monongahela Navigation Co. v. United States, 148 U.S. 312, 345 (1983).

[217] Omnia Commercial Co. v. United States, 261 U.S. 502 (1923).

[218] International Paper Co. v. United States, 282 U.S. 399 (1931).

[219] Armstrong v. United States, 364 U.S. 40, 50 (1960).

[220] Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 n.32 (1978).

[221] Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986).

[222] "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." Bowen v. Gilliard, 483 U.S. 587, 604 (1987).

[223] Mitchell v. United States, 267 U.S. 341 (1925); United States ex rel. TVA v. Powelson, 319 U.S. 266 (1943); United States v. Petty Motor Co., 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, *see* New Haven Inclusion Cases, 399 U.S. 392, 489–95 (1970).

as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."[224] An exception to the general principle has been established by the Court where only a temporary occupancy is assumed; then the taking body must pay the value which a hypothetical long-term tenant in possession would require when leasing to a temporary occupier requiring his removal, including in the market value of the interest the reasonable cost of moving out the personal property stored in the premises, the cost of storage of goods against their sale, and the cost of returning the property to the premises.[225] Another exception to the general rule occurs with a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion ("severance damages") as well as the value of the taken portion.[226]

Enforcement of Right to Compensation.—The nature and character of the tribunal to determine compensation is in the discretion of the legislature, and may be a regular court, a special legislative court, a commission, or an administrative body.[227] Proceedings to condemn land for the benefit of the United States are brought in the federal district court for the district in which the land is located.[228] The estimate of just compensation is not required to be made by a jury but may be made by a judge or entrusted to a commission or other body.[229] Federal courts may ap-

---

[224] United States v. General Motors Corp., 323 U.S. 373, 382 (1945).

[225] United States v. General Motors Corp., 323 U.S. 373 (1945). In Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), the Government seized the tenant's plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business for the period of military occupancy; the Court narrowly held that the Government must compensate for the loss in value of the business attributable to the destruction of its "trade routes," that is, for the loss of customers built up over the years and for the continued hold of the laundry upon their patronage. *See also* United States v. Pewee Coal Co., 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

[226] United States v. Miller, 317 U.S. 369, 375–76 (1943). "On the other hand," the Court added, "if the taking has in fact benefitted the remainder, the benefit may be set off against the value of the land taken." Id.

[227] United States v. Jones, 109 U.S. 513 (1883); Bragg v. Weaver, 251 U.S. 57 (1919).

[228] 28 U.S.C. § 1403. On the other hand, inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491(a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States "founded . . . upon the Constitution." *See* Presault v. ICC, 494 U.S. 1 (1990).

[229] Bauman v. Ross, 167 U.S. 548 (1897). Even when a jury is provided to determine the amount of compensation, it is the rule at least in federal court that the trial judge is to instruct the jury with regard to the criteria and this includes deter-

point a commission in condemnation actions to resolve the compensation issue.[230] If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review,[231] although the scope of review may be limited by the legislature.[232] When the judgment of a state court with regard to the amount of compensation is questioned, the Court's review is restricted. "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."[233] "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally."[234] Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, its findings as to the amount of damages will not be overturned on appeal, even though as a consequence of error therein the property owner received less than he was entitled to.[235]

When Property Is Taken

The issue whether one's property has been "taken" with the consequent requirement of just compensation can hardly arise when government institutes condemnation proceedings directed to it. Where, however, physical damage results to property because of government action, or where regulatory action limits activity on the property or otherwise deprives it of value, whether there has been a taking in the Fifth Amendment sense becomes critical.

Government Activity Not Directed at the Property.—The older cases proceeded on the basis that the requirement of just compensation for property taken for public use referred only to "direct appropriation, and not to consequential injuries resulting from

---

mination of "all issues" other than the precise issue of the amount of compensation, so that the judge decides those matters relating to what is computed in making the calculation. United States v. Reynolds, 397 U.S. 14 (1970).

[230] Rule 71A(h), Fed. R. Civ. P. These commissions have the same powers as a court-appointed master.

[231] Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893).

[232] Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685 (1897). In federal courts, reports of Rule 71A commissions are to be accepted by the court unless "clearly erroneous." Fed. R. Civ. P. 53(e)(2).

[233] Backus v. Fort Street Union Depot Co., 169 U.S. 557, 569, (1898).

[234] McGovern v. City of New York, 229 U.S. 363, 370–71 (1913).

[235] Id. at 371. *And see* Provo Bench Canal Co. v. Tanner, 239 U.S. 323 (1915); Appleby v. City of Buffalo, 221 U.S. 524 (1911).

the exercise of lawful power."[236] Accordingly, a variety of consequential injuries were held not to constitute takings: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;[237] similar deprivations, lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street.[238] Nor was government held liable for the extra expense which the property owner must obligate in order to ward off the consequence of the governmental action, such as the expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,[239] or by a landowner in raising the height of the dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.[240]

But the Court also decided long ago that land can be "taken" in the constitutional sense by physical invasion or occupation by the government, as occurs when government floods land.[241] A later formulation was that "[p]roperty is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."[242] It was thus held that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired the guns at the fort across the land and had established a fire control service there.[243] In two major cases, the Court held that the lessees or operators of airports were required to compensate the owners of adjacent land when the noise, glare, and fear of injury occasioned by the low altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it.[244] Eventually, the term "inverse condemnation" came to

---

[236] Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment "has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals," the Court explained.

[237] Meyer v. City of Richmond, 172 U.S. 82 (1898).

[238] Sauer v. City of New York, 206 U.S. 536 (1907). *But see* the litigation in the state courts cited by Justice Cardozo in Roberts v. City of New York, 295 U.S. 264, 278–82 (1935).

[239] Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

[240] Manigault v. Springs, 199 U.S. 473 (1905).

[241] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1872).

[242] United States v. Dickinson, 331 U.S. 745, 748 (1947).

[243] Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922). *Cf.* Portsmouth Harbor Land & Hotel Co. v. United States, 250 U.S. 1 (1919); Peabody v. United States, 231 U.S. 530 (1913).

[244] United States v. Causby, 328 U.S. 256 (1946); Griggs v. Allegheny County, 369 U.S. 84 (1962). A corporation chartered by Congress to construct a tunnel and operate railway trains therein was held liable for damages in a suit by one whose

be used to refer to such cases where the government has not instituted formal condemnation proceedings, but instead the property owner has sued for just compensation, claiming that governmental action or regulation has "taken" his property.[245]

Navigable Waters.—The repeated holdings that riparian ownership is subject to the power of Congress to regulate commerce constitute an important reservation to the developing law of liability in the taking area. When damage results consequentially from an improvement to a river's navigable capacity, or from an improvement on a nonnavigable river designed to affect navigability elsewhere, it is generally not a taking of property but merely an exercise of a servitude to which the property is always subject.[246] This exception does not apply to lands above the ordinary high-water mark of a stream,[247] hence is inapplicable to the damage the Government may do to such "fast lands" by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements.[248] And, when previously nonnavigable waters are made navigable by private investment, government may not, without paying compensation, simply assert a navigation servitude and direct the property owners to afford public access.[249]

Regulatory Takings.—While it is established that government may take private property, with compensation, to promote the public interest, that interest also may be served by regulation of property use pursuant to the police power, and for years there was broad dicta that no one may claim damages due to a police regulation designed to secure the common welfare, especially in the

---

property was so injured by smoke and gas forced from the tunnel as to amount to a taking. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

[245] "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity." San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 638 n.2 (1981) (Justice Brennan dissenting). *See also* United States v. Clarke, 445 U.S. 253, 257 (1980); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

[246] Gibson v. United States, 166 U.S. 269 (1897); Lewis Blue Point Oyster Co. v. Briggs, 229 U.S. 82 (1913); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); United States v. Appalachian Power Co., 311 U.S. 377 (1940); United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Twin City Power Co., 350 U.S. 222 (1956); United States v. Rands, 389 U.S. 121 (1967).

[247] United States v. Virginia Elec. & Power Co., 365 U.S. 624, 628 (1961).

[248] United States v. Lynah, 188 U.S. 445 (1903); United States v. Cress, 243 U.S. 316 (1917); Jacobs v. United States, 290 U.S. 13 (1933); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Kansas City Ins. Co., 339 U.S. 799 (1950); United States v. Virginia Electric & Power Co., 365 U.S. 624 (1961).

[249] Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermillion Corp., 444 U.S. 206 (1979).

FOURTEENTH AMENDMENT

RIGHTS GUARANTEED
PRIVILEGES AND IMMUNITIES OF CITIZENSHIP, DUE PROCESS AND EQUAL PROTECTION

CONTENTS

RIGHTS GUARANTEED

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE FOURTEENTH AMENDMENT AND STATES' RIGHTS

Amendment of the Constitution during the post-Civil War Reconstruction period resulted in a fundamental shift in the relationship between the Federal Government and the States. The Civil War had been fought over issues of States' rights, including the right to control the institution of slavery. In the wake of the war, the Congress submitted, and the States ratified, the Thirteenth Amendment (making slavery illegal), the Fourteenth Amendment (defining and granting broad rights of national citizenship), and the Fifteenth Amendment (forbidding racial discrimination in elections). The Fourteenth Amendment was the most controversial and far-reaching of the three "Reconstruction Amendments."

CITIZENS OF THE UNITED STATES

The citizenship provisions of the Fourteenth Amendment may be seen as a repudiation of one of the more politically divisive cases of the nineteenth century. Under common law, free persons born within a State or nation were citizens thereof. In the *Dred Scott Case*,[1] however, Chief Justice Taney, writing for the Court, ruled that this rule did not apply to freed slaves. The Court held that United States citizenship was enjoyed by only two classes of individuals: (1) white persons born in the United States as descendants

[1] Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). The controversy, political as well as constitutional, which this case stirred and still stirs, is exemplified and analyzed in the material collected in S. KUTLER, THE DRED SCOTT DECISION: LAW OR POLITICS? (1967).

state abridgment, although a federal statute enacted prior to the proposal and ratification of the Fourteenth Amendment did confer on all citizens the same rights to purchase and hold real property as white citizens enjoyed.[32]

In a doctrinal shift of uncertain significance, the Court will apparently evaluate challenges to durational residency requirements, previously considered as violations of the right to travel derived from the Equal Protection Clause,[33] as a potential violation of the Privileges or Immunities Clause. Thus, where a California law restricted the level of welfare benefits available to Californians who have been residents for less than a year to the level of benefits available in the State of their prior residence, the Court found a violation of the right of newly-arrived citizens to be treated the same as other state citizens.[34] Despite suggestions that this opinion will open the door to "guaranteed equal access to all public benefits,"[35] it seems more likely that the Court is protecting the privilege of being treated immediately as a full citizen of the state one chooses for permanent residence.[36]

DUE PROCESS OF LAW

Generally

Due process under the Fourteenth Amendment can be broken down into two categories—procedural due process and substantive due process. Procedural due process, based on principles of "fundamental fairness," addresses which legal procedures are required to be followed in state proceedings. Relevant issues, as discussed in detail below, include notice, opportunity for hearing, confrontation and cross-examination, discovery, basis of decision, and availability of counsel. Substantive due process, while also based on principles of "fundamental fairness," is used to evaluate whether a law can fairly be applied by states at all, regardless of the procedure followed. Substantive due process has generally dealt with specific subject areas, such as liberty of contract or privacy, and over time has alternately emphasized the importance of economic and noneconomic matters. In theory, the issues of procedural and substantive due process are closely related. In reality, substantive due

[32] Civil Rights Act of 1866, ch. 31, 14 Stat. 27, now 42 U.S.C. § 1982, as amended.

[33] *See* The Right to Travel, infra.

[34] Saenz v. Roe, 526 U.S. 489 (1999).

[35] 526 U.S. at 525 (Thomas, J., dissenting).

[36] The right of United States citizens to choose their state of residence is specifically protected by the first sentence of the 14th Amendment "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . ."

process has had greater political import, as significant portions of a state legislature's substantive jurisdiction can be restricted by its application.

While the extent of the rights protected by substantive due process may be controversial, its theoretical basis is firmly established and forms the basis for much of modern constitutional case law. Passage of the Reconstruction Amendments (13th, 14th and 15th) gave the federal courts the authority to intervene when a state threatened fundamental rights of its citizens,[37] and one of the most important doctrines flowing from this is the application of the Bill of Rights to the states through the due process clause.[38] Through the process of "selective incorporation," most of the provisions of the first eight Amendments such as free speech, freedom of religion, and protection against unreasonable searches and seizures are applied against the states as they are against the federal government. Though application of these rights against the states is no longer controversial, the incorporation of other substantive rights, as is discussed in detail below, has been.

Definitions

"Person".—The due process clause provides that no States shall deprive any "person" of "life, liberty or property" without due process of law. A historical controversy has been waged concerning whether the framers of the Fourteenth Amendment intended the word "person" to mean only natural persons, or whether the word was substituted for the word "citizen" with a view to protecting corporations from oppressive state legislation.[39] As early as the 1877 *Granger Cases*[40] the Supreme Court upheld various regulatory state laws without raising any question as to whether a corporation could advance due process claims. Further, there is no doubt that a corporation may not be deprived of its property without due proc-

[37] The Privileges or Immunities Clause, more so than the Due Process Clause, appears at first glance to speak directly to the issue of state intrusions on substantive rights and privileges— "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .". *See* AKHIL REED AMAR, THE BILL OF RIGHTS 163-180 (1998). As discussed earlier, however, the Court limited the effectiveness of that clause soon after the ratification of the 14th Amendment. *See* Privileges or Immunities, supra. Instead, the Due Process Clause, though selective incorporation, has become the basis for the Court to recognize important substantive rights against the states.

[38] See Bill of Rights, Fourteenth Amendment, supra.

[39] *See* Graham, *The 'Conspiracy Theory' of the Fourteenth Amendment*, 47 YALE L. J. 371 (1938).

[40] Munn v. Illinois, 94 U.S. 113 (1877). In a case arising under the Fifth Amendment, decided almost at the same time, the Court explicitly declared the United States "equally with the States . . . are prohibited from depriving persons or corporations of property without due process of law." Sinking Fund Cases, 99 U.S. 700, 718–19 (1879).

ess of law.[41] While various decisions have held that the "liberty" guaranteed by the Fourteenth Amendment is the liberty of natural,[42] not artificial, persons,[43] nevertheless, in 1936, a newspaper corporation successfully objected that a state law deprived it of liberty of the press.[44]

A separate question is the ability of a government official to invoke the due process clause to protect the interests of his office. Ordinarily, the mere official interest of a public officer, such as the interest in enforcing a law, has not been deemed adequate to enable him to challenge the constitutionality of a law under the Fourteenth Amendment.[45] Similarly, municipal corporations have no standing "to invoke the provisions of the Fourteenth Amendment in opposition to the will of their creator," the State.[46] However, state officers are acknowledged to have an interest, despite their not having sustained any "private damage," in resisting an "endeavor to prevent the enforcement of laws in relation to which they have official duties," and, accordingly, may apply to federal courts for the "review of decisions of state courts declaring state statutes which [they] seek to enforce to be repugnant to the" Fourteenth Amendment.[47]

---

[41] Smyth v. Ames, 169 U.S. 466, 522, 526 (1898); Kentucky Co. v. Paramount Exch., 262 U.S. 544, 550 (1923); Liggett Co. v. Baldridge, 278 U.S. 105 (1928).

[42] As to the natural persons protected by the due process clause, these include all human beings regardless of race, color, or citizenship. Yick Wo v. Hopkins, 118 U.S. 356 (1886); Terrace v. Thompson, 263 U.S. 197, 216 (1923). *See* Hellenic Lines v. Rhodetis, 398 U.S. 306, 309 (1970).

[43] Northwestern Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906); Western Turf Ass'n v. Greenberg, 204 U.S. 359, 363 (1907); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Earlier, in Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904), a case interpreting the federal antitrust law, Justice Brewer, in a concurring opinion, had declared that "a corporation . . . is not endowed with the inalienable rights of a natural person."

[44] Grosjean v. American Press Co., 297 U.S. 233, 244 (1936) ("a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"). In First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), faced with the validity of state restraints upon expression by corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—but decided instead that expression was protected, irrespective of the speaker, because of the interests of the listeners. *See* id. at 778 n.14 (reserving question). *But see* id. at 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights state gives them).

[45] Pennie v. Reis, 132 U.S. 464 (1889); Taylor and Marshall v. Beckham (No. 1), 178 U.S. 548 (1900); Tyler v. Judges of Court of Registration, 179 U.S. 405, 410 (1900); Straus v. Foxworth, 231 U.S. 162 (1913); Columbus & G. Ry. v. Miller, 283 U.S. 96 (1931).

[46] City of Pawhuska v. Pawhuska Oil Co., 250 U.S. 394 (1919); City of Trenton v. New Jersey, 262 U.S. 182 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36 (1933). *But see* Madison School Dist. v. WERC, 429 U.S. 167, 175 n. 7 (1976) (reserving question whether municipal corporation as an employer has a First Amendment right assertable against State).

[47] Coleman v. Miller, 307 U.S. 433, 441, 442, 443, 445 (1939); Boynton v. Hutchinson Gas Co., 291 U.S. 656 (1934); South Carolina Hwy. Dept. v. Barnwell Bros.,

"Property" and Police Power.—States have an inherent "police power" to promote public safety, health, morals, public convenience, and general prosperity,[48] but the extent of the power may vary based on the subject matter over which it is exercised.[49] If a police power regulation goes too far, it will be recognized as a taking of property for which compensation must be paid.[50] Thus, the means employed to affect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public, specifically, the public health, safety, or morals, or some other aspect of the general welfare.[51]

An ulterior public advantage, however, may justify a comparatively insignificant taking of private property for what seems to be

---

303 U.S. 177 (1938). The converse is not true, however, and the interest of a state official in vindicating the Constitution gives him no legal standing to attack the constitutionality of a state statute in order to avoid compliance with it. Smith v. Indiana, 191 U.S. 138 (1903); Braxton County Court v. West Virginia, 208 U.S. 192 (1908); Marshall v. Dye, 231 U.S. 250 (1913); Stewart v. Kansas City, 239 U.S. 14 (1915). *See also* Coleman v. Miller, 307 U.S. 433, 437–46 (1939).

[48] This power is not confined to the suppression of what is offensive, disorderly, or unsanitary. Long ago Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824). *See* California Reduction Co. v. Sanitary Works, 199 U.S. 306, 318 (1905); Chicago B. & Q. Ry. v. Drainage Comm'rs, 200 U.S. 561, 592 (1906); Bacon v. Walker, 204 U.S. 311 (1907); Eubank v. Richmond, 226 U.S. 137 (1912); Schmidinger v. Chicago, 226 U.S. 578 (1913); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Nebbia v. New York, 291 U.S. 502 (1934); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and aesthetic features of city); City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, 427 U.S. 50 (1976).

[49] Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Eubank v. Richmond, 226 U.S. 137, 142 (1912); Erie R.R. v. Williams, 233 U.S. 685, 699 (1914); Sligh v. Kirkwood, 237 U.S. 52, 58–59 (1915); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Hall v. Geiger-Jones Co., 242 U.S. 539 (1917); Panhandle Eastern Pipeline Co. v. Highway Comm'n, 294 U.S. 613, 622 (1935). "It is settled [however] that neither the 'contract' clause nor the 'due process' clause had the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property [or other vested] rights are held subject to its fair exercise." Atlantic Coast Line R.R. v. Goldsboro, 232 U.S. 548, 558 (1914).

[50] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Welch v. Swasey, 214 U.S. 91, 107 (1909). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980). *See* also analysis of "Regulatory Takings" under the Fifth Amendment. Although the Fourteenth Amendment does not contain a "takings" provisions such as is found in the Fifth Amendment, the Court has held that such provision has been incorporated. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 159 (1980).

[51] Liggett Co. v. Baldridge , 278 U.S. 105, 111–12 (1928); Treigle v. Acme Homestead Ass'n, 297 U.S. 189, 197 (1936).

a private use.[52] Mere "cost and inconvenience (different words, probably, for the same thing) would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its police power."[53] Moreover, it is elementary that enforcement of a law passed in the legitimate exertion of the police power is not a taking without due process of law, even if the cost is borne by the regulated.[54] Initial compliance with a regulation which is valid when adopted, however, does not preclude later protest if that regulation subsequently becomes confiscatory in its operation.[55]

"Liberty".—As will be discussed in detail below, the "liberty" guaranteed by the due process clause has been variously defined by the Court. In the early years, it meant almost exclusively "liberty of contract," but with the demise of liberty of contract came a general broadening of "liberty" to include personal, political and social rights and privileges.[56] Nonetheless, the Court is generally chary of expanding the concept absent statutorily recognized rights.[57]

The Rise and Fall of Economic Substantive Due Process: Overview

Long before the passage of the 14th Amendment, the due process clause of the Fifth Amendment was recognized as a restraint upon the Federal Government, but only in the narrow sense that a legislature needed to provide procedural "due process" for the en-

---

[52] Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911) (bank may be required to contribute to fund to guarantee the deposits of contributing banks).

[53] Erie R.R. v. Williams, 233 U.S. 685, 700 (1914).

[54] New Orleans Public Service v. New Orleans, 281 U.S. 682, 687 (1930).

[55] Abie State Bank v. Bryan, 282 U.S. 765, 776 (1931).

[56] *See* the tentative effort in Hampton v. Mow Sun Wong, 426 U.S. 88, 102 & n. 23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's due process clause and necessarily therefore the Fourteenth's.

[57] *See* the substantial confinement of the concept in Meachum v. Fano, 427 U.S. 215 (1976); and Montanye v. Haymes, 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases, in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous due process-liberty analysis. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972). For more recent cases, *see* DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189 (1989) (no Due Process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); Collins v. City of Harker Heights, 503 U.S. 115 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment); County of Sacramento v. Lewis, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment's guarantee of substantive due process).

charged.[363] Compulsory automobile insurance is so plainly valid as to present no federal constitutional question.[364]

Morality.—Legislatures have wide discretion in regulating "immoral" activities. Thus, legislation suppressing prostitution[365] or gambling[366] will be upheld by the Court as within the police power of a State. Accordingly, a state statute may provide that judgment against a party to recover illegal gambling winnings may be enforced by a lien on the property of the owner of the building where the gambling transaction was conducted when the owner knowingly consented to the gambling.[367] Similarly, a court may order a car used in an act of prostitution forfeited as a public nuisance, even if this works a deprivation on an innocent joint owner of the car.[368] For the same reason, lotteries, including those operated under a legislative grant, may be forbidden, regardless of any particular equities.[369]

Vested and Remedial Rights

As the Due Process Clause protects against arbitrary deprivation of "property," privileges or benefits that constitute property are entitled to protection.[370] Because an existing right of action to recover damages for an injury is property, that right of action is protected by the clause.[371] Thus, where repeal of a provision that made directors liable for moneys embezzled by corporate officers was applied retroactively, it deprived certain creditors of their property without due process of law.[372] A person, however, has no

---

[363] Reitz v. Mealey, 314 U.S. 33 (1941); Kesler v. Department of Pub. Safety, 369 U.S. 153 (1962). *But see* Perez v. Campbell, 402 U.S. 637 (1971). Procedural due process must, of course be observed. Bell v. Burson, 402 U.S. 535 (1971). A nonresident owner who loans his automobile in another state, by the law of which he is immune from liability for the borrower's negligence and who was not in the state at the time of the accident, is not subjected to any unconstitutional deprivation by a law thereof, imposing liability on the owner for the negligence of one driving the car with the owner's permission. Young v. Masci, 289 U.S. 253 (1933).

[364] Ex parte Poresky, 290 U.S. 30 (1933). *See also* Packard v. Banton, 264 U.S. 140 (1924); Sprout v. South Bend, 277 U.S. 163 (1928); Hodge Co. v. Cincinnati, 284 U.S. 335 (1932); Continental Baking Co. v. Woodring, 286 U.S. 352 (1932).

[365] L'Hote v. New Orleans, 177 U.S. 587 (1900).

[366] Ah Sin v. Wittman, 198 U.S. 500 (1905).

[367] Marvin v. Trout, 199 U.S. 212 (1905).

[368] Bennis v. Michigan, 516 U.S. 442 (1996).

[369] Stone v. Mississippi, 101 U.S. 814 (1880); Douglas v. Kentucky, 168 U.S. 488 (1897).

[370] *See, e.g.*, Snowden v. Hughes, 321 U.S. 1 (1944) (right to become a candidate for state office is a privilege only, hence an unlawful denial of such right is not a denial of a right of "property"). Cases under the equal protection clause now mandate a different result. *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 75 (1978) (seeming to conflate due process and equal protection standards in political rights cases).

[371] Angle v. Chicago, St. Paul, M. & D. Ry., 151 U.S. 1 (1894).

[372] Coombes v. Getz, 285 U.S. 434, 442, 448 (1932).

constitutionally protected property interest in any particular form of remedy and is guaranteed only the preservation of a substantial right to redress by an effective procedure.[373]

Similarly, a statute creating an additional remedy for enforcing liability is not, as applied to stockholders then holding stock, violative of due process.[374] Nor is a law that lifts a statute of limitations and makes possible a suit, theretofore barred, for the value of certain securities. "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. . . . Some rules of law probably could not be changed retroactively without hardship and oppression . . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment."[375]

State Control over Local Units of Government

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, and whether they shall be appointed or popularly elected.[376] Nor does a statute requiring cities to indemnify owners of property damaged by mobs or during riots result in an unconstitutional deprivation of the property, even when the city could not have prevented the violence.[377] Likewise, a person obtaining a judgment against a municipality for damages resulting from a riot is not deprived of property without due process of law by an act which so limits the municipality's taxing power as to prevent collection of funds adequate to pay it. As long as the judgment continues as an existing liability no unconstitutional deprivation is experienced.[378]

Local units of government obliged to surrender property to other units newly created out of the territory of the former cannot

---

[373] Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). *See* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (limitation of common-law liability of private industry nuclear accidents in order to encourage development of energy a rational action, especially when combined with congressional pledge to take necessary action in event of accident; whether limitation would have been of questionable validity in absence of pledge uncertain but unlikely).

[374] Shriver v. Woodbine Bank, 285 U.S. 467 (1932).

[375] Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315–16 (1945).

[376] Soliah v. Heskin, 222 U.S. 522 (1912); City of Trenton v. New Jersey, 262 U.S. 182 (1923). The equal protection clause has been employed, however, to limit a State's discretion with regard to certain matters. *See* "Fundamental Interests: The Political Process," infra.

[377] City of Chicago v. Sturges, 222 U.S. 313 (1911).

[378] Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883).

to preclude constitutional protection for other forms of intervention in the death process, such as suicide or euthanasia.[682]

PROCEDURAL DUE PROCESS: CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.[683] Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.[684] One of the basic criteria used to establish if due process is satisfied is whether such procedure was historically required in like circumstance.

Relevance of Historical Use.—The requirements of due process are determined in part by an examination of the settled usages and modes of proceedings of the common and statutory law of England during pre-colonial times and in the early years of this country.[685] In other words, the antiquity of a legal procedure is a factor weighing in its favor. However, it does not follow that a procedure settled in English law and adopted in this country is, or remains, an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be "fastened upon American jurisprudence like a strait jacket, only to be unloosed by constitutional amendment."[686] Fortunately, the States

---

[682] A passing reference by Justice O'Connor in a concurring opinion in Glucksberg and its companion case Vacco v. Quill may, however, portend a liberty interest in seeking pain relief, or "palliative" care. Glucksberg and Vacco, 521 U.S. at 736-37 (Justice O'Connor, concurring).

[683] Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. Marchant v. Pennsylvania R.R., 153 U.S. 380, 386 (1894).

[684] Hagar v. Reclamation Dist., 111 U.S. 701, 708 (1884). "Due process of law is [process which], following the forms of law, is appropriate to the case and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and whenever necessary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. Any legal proceeding enforced by public authority, whether sanctioned by age or custom or newly devised in the discretion of the legislative power, which regards and preserves these principles of liberty and justice, must be held to be due process of law." Id. at 708; *Accord*, Hurtado v. California, 110 U.S. 516, 537 (1884).

[685] Twining v. New Jersey, 211 U.S. 78, 101 (1908); Brown v. New Jersey, 175 U.S. 172, 175 (1899). "A process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." Hurtado v. California, 110 U.S. at 529.

[686] Twining, 211 U.S. at 101.

are not tied down by any provision of the Constitution to the practice and procedure which existed at the common law, but may avail themselves of the wisdom gathered by the experience of the country to make changes deemed to be necessary.[687]

Non-Judicial Proceedings.—A court proceeding is not a requisite of due process.[688] Administrative and executive proceedings are not judicial, yet they may satisfy the due process clause.[689] Moreover, the due process clause does not require *de novo* judicial review of the factual conclusions of state regulatory agencies,[690] and may not require judicial review at all.[691] Nor does the Fourteenth Amendment prohibit a State from conferring judicial functions upon non-judicial bodies, or from delegating powers to a court that are legislative in nature.[692] Further, it is up to a State to determine to what extent its legislative, executive, and judicial powers should be kept distinct and separate.[693]

The Requirements of Due Process.—Although due process tolerates variances in procedure "appropriate to the nature of the case,"[694] it is nonetheless possible to identify its core goals and requirements. First, "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[695] Thus, the required elements of due process are those that "minimize substantively unfair or mistaken deprivations" by enabling persons to contest the basis upon which a State proposes to deprive them of

---

[687] Hurtado v. California, 110 U.S. 516, 529 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1899); Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944).

[688] Ballard v. Hunter, 204 U.S. 241, 255 (1907); Palmer v. McMahon, 133 U.S. 660, 668 (1890).

[689] For instance, proceedings to raise revenue by levying and collecting taxes are not necessarily judicial proceedings, yet their validity is not thereby impaired. McMillen v. Anderson, 95 U.S. 37, 41 (1877).

[690] Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941) (oil field proration order). *See also* Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940) (courts should not second-guess regulatory commissions in evaluating expert testimony).

[691] *See, e.g.*, Moore v. Johnson, 582 F.2d 1228, 1232 (9th Cir. 1978) (upholding the preclusion of judicial review of decisions of the Veterans Administration regarding veteran's benefits).

[692] State statutes vesting in a parole board certain judicial functions, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), or conferring discretionary power upon administrative boards to grant or withhold permission to carry on a trade, New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 562 (1905), or vesting in a probate court authority to appoint park commissioners and establish park districts, Ohio ex rel. Bryant v. Akron Park Dist., 281 U.S. 74, 79 (1930), are not in conflict with the due process clause and present no federal question.

[693] Carfer v. Caldwell, 200 U.S. 293, 297 (1906).

[694] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313 (1950).

[695] Carey v. Piphus, 435 U.S. 247, 259 (1978). "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." Mathews v. Eldridge, 424 U.S. 319, 344 (1976).

protected interests.[696] The core of these requirements is notice and a hearing before an impartial tribunal. Due process may also require an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.

(1) Notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[697] The notice must be sufficient to enable the recipient to determine what is being proposed and what he must do to prevent the deprivation of his interest.[698] Ordinarily, service of the notice must be reasonably structured to assure that the person to whom it is directed receives it.[699] Such notice, however, need not describe the legal procedures necessary to protect one's interest if such procedures are otherwise set out in published, generally available public sources.[700]

(2) Hearing. "[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest."[701] This right is a "basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment . . . ."[702] Thus, the notice of hearing and the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[703]

---

[696] Fuentes v. Shevin, 407 U.S. 67, 81 (1972). At times, the Court has also stressed the dignitary importance of procedural rights, the worth of being able to defend one's interests even if one cannot change the result. Carey v. Piphus, 435 U.S. 247, 266–67 (1978); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Nelson v. Adams, 120 S. Ct. 1579 (2000) (amendment of judgement to impose attorney fees and costs to sole shareholder of liable corporate structure invalid without notice or opportunity to dispute).

[697] Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). *See also* Richards v. Jefferson County, 517 U.S. 793 (1996) (res judicata may not apply where taxpayer who challenged a county's occupation tax was not informed of prior case and where taxpayer interests were not adequately protected).

[698] Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970).

[699] Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Robinson v. Hanrahan, 409 U.S. 38 (1974); Greene v. Lindsey, 456 U.S. 444 (1982).

[700] City of West Covina v. Perkins, 525 U.S. 234 (1999).

[701] Mathews v. Eldridge, 424 U.S. 319, 333 (1976). "Parties whose rights are to be affected are entitled to be heard." Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[702] Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972). *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170–71 (1951) (Justice Frankfurter concurring).

[703] Armstrong v. Manzo, 380 U.S. 545, 552 (1965)

(3) Impartial Tribunal. Just as in criminal and quasi-criminal cases,[704] an impartial decision maker is an essential right in civil proceedings as well.[705] "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[706] Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.[707]

There is, however, a "presumption of honesty and integrity in those serving as adjudicators,"[708] so that the burden is on the objecting party to show a conflict of interest or some other specific reason for disqualification of a specific officer or for disapproval of the system. Thus, combining functions within an agency, such as by allowing members of a State Medical Examining Board to both investigate and adjudicate a physician's suspension, may raise substantial concerns, but does not by itself establish a violation of due process.[709] The Court has also held that the official or personal stake that school board members had in a decision to fire teachers

---

[704] Tumey v. Ohio, 273 U.S. 510 (1927)); *In re* Murchison, 349 U.S. 133 (1955).

[705] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[706] Marshall v. Jerrico, 446 U.S. 238, 242 (1980); Schweiker v. McClure, 456 U.S. 188, 195 (1982).

[707] Gibson v. Berryhill, 411 U.S. 564 (1973). Or, the conduct of deportation hearings by a person who, while he had not investigated the case heard, was also an investigator who must judge the results of others' investigations just as one of them would some day judge his, raised a substantial problem which was resolved through statutory construction). Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

[708] Schweiker v. McClure, 456 U.S. 188, 195 (1982); Withrow v. Larkin, 421 U.S. 35, 47 (1975); United States v. Morgan, 313 U.S. 409, 421 (1941).

[709] Withrow v. Larkin, 421 U.S. 35 (1975). Where an administrative officer is acting in a prosecutorial, rather than judicial or quasi-judicial role, an even lesser standard of impartiality applies. Marshall v. Jerrico, 446 U.S. 238, 248–50 (1980) (regional administrator assessing fines for child labor violations, with penalties going into fund to reimburse cost of system of enforcing child labor laws). But "traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law." Id. at 249.

who had engaged in a strike against the school system in violation of state law was not such so as to disqualify them.[710]

(4) Confrontation and Cross-Examination. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[711] Where the "evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealously," the individual's right to show that it is untrue depends on the rights of confrontation and cross-examination. "This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."[712]

(5) Discovery. The Court has never directly confronted this issue, but in one case it did observe in *dictum* that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."[713] Some federal agencies have adopted discovery rules modeled on the Federal Rules of Civil Procedure, and the Administrative Conference has recommended that all do so.[714] There appear to be no cases, however, holding they must, and there is some authority that they cannot absent congressional authorization.[715]

(6) Decision on the Record. While this issue arises principally in the administrative law area,[716] it is applicable generally. "[T]he

---

[710] Hortonville Joint School Dist. v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976). *Compare* Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (1974) (Justice Powell), *with* id. at 196–99 (Justice White), and 216 (Justice Marshall).

[711] Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See also* ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93–94 (1913). *Cf.* § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d).

[712] Greene v. McElroy, 360 U.S. 474, 496–97 (1959). *But see* Richardson v. Perales, 402 U.S. 389 (1971) (where authors of documentary evidence are known to petitioner and he did not subpoena them, he may not complain that agency relied on that evidence). *Cf.* Mathews v. Eldridge, 424 U.S. 319, 343–45 (1976).

[713] Greene v. McElroy, 360 U.S. 474, 496 (1959), *quoted with approval in* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

[714] RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 571 (1968–1970).

[715] FMC v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964).

[716] The exclusiveness of the record is fundamental in administrative law. *See* §7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e). However, one must show not only that the agency used *ex parte* evidence but that he was prejudiced thereby. Market Street Ry. v. Railroad Comm'n, 324 U.S. 548 (1945) (agency decision supported by evidence in record, its decision sustained, disregarding *ex parte* evidence).

decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."[717]

(7) Counsel. In *Goldberg v. Kelly*, the Court held that an agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.[718] In the years since, the Court has struggled with whether civil litigants in court and persons before agencies who could not afford retained counsel should have counsel appointed and paid for, and the matter seems far from settled. The Court has established the presumption that an indigent does not have the right to an appointed counsel unless his "physical liberty" is threatened.[719] However, where other liberty or property interests are threatened, a litigant may overcome this presumption, so that the right of an indigent to appointed counsel is to be determined on a case-by-case basis using a balancing standard.[720]

For instance, in a case involving a state proceeding to terminate the parental rights of an indigent without providing her counsel, the Court recognized the parent's interest as "an extremely important one." The Court, however, also noted the State's strong interest in protecting the welfare of children. Thus, as the interest in correct fact-finding was strong on both sides, the proceeding was relatively simple, no features were present raising a risk of criminal liability, no expert witnesses were present, and no "specially troublesome" substantive or procedural issues had been raised, the litigant did not have a right to appointed counsel.[721] In other due process cases involving parental rights, the Court has held that due

---

[717] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[718] 397 U.S. 254, 270–71 (1970).

[719] Lassiter v. Department of Social Services, 452 U.S. 18 (1981). The Court purported to draw this rule from Gagnon v. Scarpelli, 411 U.S. 778 (1973) (no *per se* right to counsel in probation revocation proceedings). To introduce this presumption into the balancing, however, appears to disregard the fact that the first factor of Mathews v. Eldridge, 424 U.S. 319 (1976), upon which the Court (and dissent) relied, relates to the importance of the interest to the person claiming the right. Thus, at least in this context, the value of the first *Eldridge* factor is diminished. The Court noted, however, that the Mathews v. Eldridge standards were drafted in the context of the generality of cases and were not intended for case-by-case application. *Cf.* 424 U.S. at 344 (1976)

[720] 452 U.S. at 31–32. The balancing decision is to be made initially by the trial judge, subject to appellate review. Id. at 32

[721] 452 U.S. at 27–31. The decision was a five-to-four, with Justices Stewart, White, Powell, and Rehnquist and Chief Justice Burger in the majority, and Justices Blackmun, Brennan, Marshall, and Stevens in dissent. Id. at 35, 59.

process requires special state attention to parental rights.[722] Thus, it would appear likely that in other parental right cases, a right to appointed counsel could be established.

The Procedure Which Is Due Process

The Interests Protected: "Life, Liberty and Property".—The language of the Fourteenth Amendment requires the provision of due process when an interest in one's "life, liberty or property" is threatened.[723] Traditionally, the Court made this determination by reference to the common understanding of these terms, as embodied in the development of the common law.[724] In the 1960s, however, the Court began a rapid expansion of the "liberty" and "property" aspects of the clause to include such non-traditional concepts as conditional property rights and statutory entitlements. Since then, the Court has followed an inconsistent path of expanding and contracting the breadth of these protected interests. The "life" interest, on the other hand, while often important in criminal cases, has found little application in the civil context.

The Property Interest.—The expansion of the concept of "property rights" beyond its common law roots reflected a recognition by the Court that certain interests which fell short of traditional property rights were nonetheless important parts of people's economic well-being. For instance, where household goods were sold under an installment contract and title was retained by the seller, the possessory interest of the buyer was deemed sufficiently important to require procedural due process before repossession

---

[722] *See e.g.*, Little v. Streater, 452 U.S. 1 (1981) (indigent entitled to state-funded blood testing in a paternity action the State required to be instituted); Santosky v. Kramer, 455 U.S. 745 (1982) (imposition of higher standard of proof in case involving state termination of parental rights).

[723] Morrissey v. Brewer, 408 U.S. 471, 481 (1982). "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, 408 U.S. 564, 569–71 (1972). Developments under the Fifth Amendment's due process clause have been interchangeable. *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974).

[724] For instance, at common law, one's right of life existed independently of any formal guarantee of it and could be taken away only by the state pursuant to the formal processes of law, and only for offenses deemed by a legislative body to be particularly heinous. One's liberty, generally expressed as one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of lands, chattels, and other properties, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally understood in Anglo-American countries.

The person may be remitted to other actions initiated by him[779] or an appeal may suffice. Accordingly, a surety company, objecting to the entry of a judgment against it on a supersedeas bond, without notice and an opportunity to be heard on the issue of liability, was not denied due process where the state practice provided the opportunity for such a hearing by an appeal from the judgment so entered. Nor could the company found its claim of denial of due process upon the fact that it lost this opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.[780] On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, a plaintiff who had never had an opportunity to introduce evidence in rebuttal to certain testimony which the trial court deemed immaterial but which the appellate court considered material was held to have been deprived of his rights without due process of law.[781]

When Process Is Due.—The requirements of due process, as has been noted, depend upon the nature of the interest at stake, while the form of due process required is determined by the weight of that interest balanced against the opposing interests.[782] The currently prevailing standard is that formulated in *Mathews v. Eldridge*,[783] which concerned termination of Social Security benefits. "Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

---

[779] Lindsey v. Normet, 405 U.S. 56, 65–69 (1972). However, if one would suffer too severe an injury between the doing and the undoing, he may avoid the alternative means. Stanley v. Illinois, 405 U.S. 645, 647 (1972).

[780] American Surety Co. v. Baldwin, 287 U.S. 156 (1932). *Cf.* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429–30, 432–33 (1982)

[781] Saunders v. Shaw, 244 U.S. 317 (1917).

[782] "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970), (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Justice Frankfurter concurring)). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894–95 (1961).

[783] 424 U.S. 319, 335 (1976).

sionaire's other premises—with the Government's interest in conducting a high-security program.[812]

Jurisdiction

Generally.—Jurisdiction may be defined as the power of a government to create legal interests, and the Court has long held that the Due Process clause limits the abilities of states to exercise this power.[813] In the famous case of *Pennoyer v. Neff*,[814] the Court enunciated two principles of jurisdiction respecting the States in a federal system[815] —first, "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and second, "no State can exercise direct jurisdiction and authority over persons or property without its territory."[816] Over a long period of time, however, the mobility of American society and

[812] 367 U.S. at 896–98. *See* Goldberg v. Kelly, 397 U.S. 254, 263 n.10 (1970); Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Arnett v. Kennedy, 416 U.S. 134, 152 (1974) (plurality opinion), and 416 U.S. at 181–183 (Justice White concurring in part and dissenting in part).

[813] Scott v. McNeal, 154 U.S. 34, 64 (1894).

[814] 95 U.S. 714 (1878)

[815] Although these two principles were drawn from the writings of Joseph Story refining the theories of continental jurists, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252–62. the constitutional basis for them was deemed to be in the due process clause of the Fourteenth Amendment. Pennoyer v. Neff, 95 U.S. 714, 733–35 (1878). The due process clause and the remainder of the Fourteenth Amendment had not been ratified at the time of the entry of the state-court judgment giving rise to the case. This inconvenient fact does not detract from the subsequent settled utilization of this constitutional foundation. Pennoyer denied full faith and credit to the judgment because the state lacked jurisdiction.

[816] 95 U.S. at 722. The basis for the territorial concept of jurisdiction promulgated in Pennoyer and modified over the years is two-fold: a concern for "fair play and substantial justice" involved in requiring defendants to litigate cases against them far from their "home" or place of business. International Shoe Co. v. Washington 326 U.S. 310, 316, 317 (1945); Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm., 339 U.S. 643, 649 (1950); Shaffer v. Heitner, 433 U.S. 186, 204 (1977), and, more important, a concern for the preservation of federalism. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945); Hanson v. Denckla, 357 U.S. 235, 251 (1958). The Framers, the Court has asserted, while intending to tie the States together into a Nation, "also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). Thus, the federalism principle is preeminent. "[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.' . . . Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment." 444 U.S. at 294 (internal quotation from International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

the increasing complexity of commerce led to attenuation of the second principle of *Pennoyer*, and consequently the Court established the modern standard of obtaining jurisdiction based upon the nature and the quality of contacts that individuals and corporations have with a State.[817] This "minimum contacts" test, consequently, permits the courts of a State to obtain power over out-of-state defendants.

In Personam Proceedings Against Individuals.—How jurisdiction is determined depends on the nature of the suit being brought. If a dispute is directed against a person, not property, the proceedings are considered *in personam*, and jurisdiction must be established over the defendant's person in order to render an effective decree.[818] Generally, presence within the State is sufficient to create personal jurisdiction over an individual, if process is served.[819] In the case of a resident who is absent from the state, domicile alone is deemed to be sufficient to keep him within reach of the state courts for purposes of a personal judgment, and process can be obtained by means of appropriate, substituted service or by actual personal service on the resident outside the State.[820] However, if the defendant, although technically domiciled therein, has left the State with no intention to return, service by publication, as compared to a summons left at his last and usual place of abode where his family continued to reside, is inadequate, inasmuch as it is not reasonably calculated to give actual notice of the proceedings and opportunity to be heard.[821]

With respect to a nonresident, it is clearly established that no person can be deprived of property rights by a decree in a case in

---

[817] International Shoe Co. v. Washington, 326 U.S. 310 (1945)). As the Court explained in McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957), "[w]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980)). The first principle, that a State may assert jurisdiction over anyone or anything physically within its borders, no matter how briefly there—the so-called "transient" rule of jurisdiction—McDonald v. Mabee, 243 U.S. 90, 91 (1917), remains valid, although in Shaffer v. Heitner, 433 U.S. 186, 204 (1977), the Court's *dicta* appeared to assume it is not.

[818] National Exchange Bank v. Wiley, 195 U.S. 257, 270 (1904); Iron Cliffs Co. v. Negaunee Iron Co., 197 U.S. 463, 471 (1905).

[819] McDonald v. Mabee, 243 U.S. 90, 91 (1917). *Cf.* Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913). The rule has been strongly criticized but persists. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The 'Power' Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956). But in Burnham v. Superior Court, 495 U.S. 604 (1990), the Court held that service of process on a nonresident physically present within the state satisfies due process regardless of the duration or purpose of the nonresident's visit.

[820] Milliken v. Meyer, 311 U.S. 457 (1940).

[821] McDonald v. Mabee, 243 U.S. 90 (1917).

which he neither appeared nor was served or effectively made a party.[822] The early cases held that the process of a court of one State could not run into another and summon a resident of that state to respond to proceedings against him, when neither his person nor his property was within the jurisdiction of the court rendering the judgment.[823] This rule, however, has been attenuated in a series of steps.

Consent has always been sufficient to create jurisdiction, even in the absence of any other connection between the litigation and the forum. For example, the appearance of the defendant for any purpose other than to challenge the jurisdiction of the court was deemed a voluntary submission to the court's power,[824] and even a special appearance to deny jurisdiction might be treated as consensual submission to the court.[825] The concept of "constructive consent" was then seized upon as a basis for obtaining jurisdiction. For instance, with the advent of the automobile, States were permitted to engage in the fiction that the use of their highways was conditioned upon the consent of drivers to be sued in state courts for accidents or other transactions arising out of such use. Thus, a state could designate a state official as a proper person to receive service of process in such litigation, and establishing jurisdiction required only that the official receiving notice communicate it to the person sued.[826]

Although the Court approved of the legal fiction that such jurisdiction arose out of consent, the basis for jurisdiction was really the State's power to regulate acts done in the state that were dan-

---

[822] Rees v. Watertown, 86 U.S. (19 Wall.) 107 (1874); Coe v. Armour Fertilizer Works, 237 U.S. 413, 423 (1915); Griffin v. Griffin, 327 U.S. 220 (1946).

[823] Sugg v. Thornton, 132 U.S. 524 (1889); Riverside Mills v. Menefee, 237 U.S. 189, 193 (1915); Hess v. Pawloski, 274 U.S. 352, 355 (1927). *See also* Harkness v. Hyde, 98 U.S. 476 (1879); Wilson v. Seligman, 144 U.S. 41 (1892).

[824] Louisville & Nashville R.R. v. Schmidt, 177 U.S. 230 (1900); Western Loan & Savings Co. v. Butte & Boston Min. Co., 210 U.S. 368 (1908); Houston v. Ormes, 252 U.S. 469 (1920). *See also* Adam v. Saenger, 303 U.S. 59 (1938) (plaintiff suing defendants deemed to have consented to jurisdiction with respect to counterclaims asserted against him).

[825] State legislation which provides that a defendant who comes into court to challenge the validity of service upon him in a personal action surrenders himself to the jurisdiction of the court, but which allows him to dispute where process was served, is constitutional and does not deprive him of property without due process of law. In such a situation, the defendant may ignore the proceedings as wholly ineffective, and attack the validity of the judgment if and when an attempt is made to take his property thereunder. If he desires, however, to contest the validity of the court proceedings and he loses, it is within the power of a State to require that he submit to the jurisdiction of the court to determine the merits. York v. Texas, 137 U.S. 15 (1890); Kauffman v. Wootters, 138 U.S. 285 (1891); Western Indemnity Co. v. Rupp, 235 U.S. 261 (1914)

[826] Hess v. Pawloski, 274 U.S. 352 (1927); Wuchter v. Pizzutti, 276 U.S. 13 (1928); Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953).

gerous to life or property.[827] Inasmuch as the State did not really have the ability to prevent nonresidents from doing business in their state,[828] this extension was necessary in order to permit States to assume jurisdiction over individuals "doing business" within the State. Thus, the Court soon recognized that "doing business" within a State was itself a sufficient basis for jurisdiction over a nonresident individual, at least where the business done was exceptional enough to create a strong state interest in regulation, and service could be effectuated within the State on an agent appointed to carry out the business.[829]

The culmination of this trend, established in the case of *International Shoe Co. v. Washington*,[830] was the requirement that there be "minimum contacts" with the State in question in order to establish jurisdiction. The outer limit of this test is illustrated by *Kulko v. Superior Court*,[831] in which the Court held that California could not obtain personal jurisdiction over a New York resident whose sole relevant contact with the State was to send his daughter to live with her mother in California.[832] The argument was made that the father had "caused an effect" in the State by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of maintaining the daughter in New York. The Court explained that, "[l]ike any standard that requires a determination of 'reasonableness,' the 'minimum contacts' test . . . is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present."[833] Although the Court noted that the "effects" test had been accepted as a test of contacts when wrongful activity outside a State causes injury within the State or when commercial activity affects state residents, the Court found that these factors were not present in this case, and any economic benefit to Kulko was derived in New York and not in California.[834] As with many such cases, the decision was narrowly limited to its facts and does little

---

[827] Hess v. Pawloski, 274 U.S. 352, 356–57 (1927).

[828] 274 U.S. at 355. *See* Flexner v. Farson, 248 U.S. 289, 293 (1919).

[829] Henry L. Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[830] 326 U.S. 310, 316 (1945).

[831] 436 U.S. 84 (1978).

[832] Kulko had visited the State twice, seven and six years respectively before initiation of the present action, his marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient or relevant to jurisdiction. 436 U.S. at 92–93.

[833] 436 U.S. at 92.

[834] 436 U.S. at 96–98.

to clarify the standards applicable to state jurisdiction over nonresidents.

Suing Out-of-State (Foreign) Corporations.—A curious aspect of American law is that a corporation has no legal existence outside the boundaries of the State chartering it.[835] Thus, the basis for state court jurisdiction over an out-of-state ("foreign") corporation has been even more uncertain than that with respect to individuals. Before the case of *International Shoe Co. v. Washington*,[836] it was asserted that inasmuch as a corporation could not carry on business in a State without the State's permission, the State could condition its permission upon the corporation's consent to submit to the jurisdiction of the State's courts, either by appointment of someone to receive process or in the absence of such designation, by accepting service upon corporate agents authorized to operate within the State.[837] Further, by doing business in a State, the corporation was deemed to be present there and thus subject to service of process and suit.[838] This theoretical corporate presence conflicted with the idea of corporations having no existence outside their State of incorporation, but it was nonetheless accepted that a corporation "doing business" in a State to a sufficient degree was "present" for service of process upon its agents in the State who carried out that business.[839]

Such presence did not, however, expose a corporation to all manner of suits. Under the reasoning of these early cases, even continuous activity of some sort by a foreign corporation within a State would not suffice to render it amenable to suits therein unrelated to that activity. Without the protection of such a rule, it was maintained, foreign corporations would be exposed to the manifest hardship and inconvenience of defending, in any State in which they happened to be carrying on business, suits for torts wherever committed and claims on contracts wherever made.[840] And if the

---

[835] *Cf.* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839).

[836] 326 U.S. 310 (1945).

[837] Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855); St. Clair v. Cox, 196 U.S. 350 (1882); Commercial Mutual Accident Co. v. Davis, 213 U.S. 245 (1909); Simon v. Southern Ry., 236 U.S. 115 (1915); Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917).

[838] Presence was first independently used to sustain jurisdiction in International Harvester Co. v. Kentucky, 234 U.S. 579 (1914), although the possibility was suggested as early as St. Clair v. Cox, 106 U.S. 350 (1882). *See also* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (Justice Brandeis for Court).

[839] *E.g.*, Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917); St. Louis S. W. Ry. v. Alexander, 227 U.S. 218 (1913).

[840] *E.g.*, Old Wayne Life Ass'n v. McDonough, 204 U.S. 8 (1907); Simon v. Southern Railway, 236 U.S. 115, 129–130 (1915); Green v. Chicago, B. & Q. Ry., 205 U.S. 530 (1907); Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516 (1923); Davis v. Farmers Co-operative Co., 262 U.S. 312 (1923); Helicopteros Nacionales de Colombia v.

stream of commerce with the expectation that they will be purchased by consumers in the forum State."[860]

The Court has had to decide how to apply *International Shoe* principles in several more situations. Thus, circulation of a magazine in a state is an adequate basis for that state to exercise jurisdiction over an out-of-state corporate magazine publisher in a libel action. The fact that the plaintiff did not have "minimum contacts" with the forum state was not dispositive since the relevant inquiry is the relations among the defendant, the forum, and the litigation.[861] Or, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction over the out-of-state authors of such article, despite the lack of minimum contact between the authors (as opposed to the publishers) and the state.[862] Further, while there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state.[863]

Actions In Rem: Proceeding Against Property.—In an *in rem* action, which is brought directly against a property interest, a State can validly proceed to settle controversies with regard to rights or claims against tangible or intangible property within its borders, notwithstanding that jurisdiction over the defendant was

---

[860] 444 U.S. at 298. Of the three dissenters, Justice Brennan argued that the "minimum contacts" test was obsolete and that jurisdiction should be predicated upon the balancing of the interests of the forum State and plaintiffs against the actual burden imposed on defendant, 444 U.S. at 299, while Justices Marshall and Blackmun applied the test and found jurisdiction because of the foreseeability of defendants that a defective product of theirs might cause injury in a distant State and because the defendants had entered into an interstate economic network. 444 U.S. at 313. The balancing of interests test was applied in Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987), holding unreasonable exercise of jurisdiction by a California court over an indemnity action by a Taiwan tire manufacturer against a Japanese manufacturer of tire valves, the underlying damage action by a California motorist having been settled.

[861] Keeton v. Hustler Magazine, 465 U.S. 770 (1984) (holding as well that the forum state may apply "single publication rule" making defendant liable for nationwide damages).

[862] Calder v. Jones, 465 U.S. 783 (1984) (jurisdiction over reporter and editor responsible for defamatory article which they knew would be circulated in subject's home state).

[863] Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). *But cf.* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (purchases and training within state, both unrelated to cause of action, are insufficient to justify general *in personam* jurisdiction).

never established.[864] Unlike jurisdiction *in personam*, a judgment entered by a court with *in rem* jurisdiction does not bind the defendant personally but determines the title to or status of the only property in question.[865] Proceedings brought to register title to land,[866] to condemn[867] or confiscate[868] real or personal property, or to administer a decedent's estate[869] are typical in rem actions. Due process is satisfied by seizure of the property (the "*res*") and notice to all who have or may have interests therein.[870] Under prior case law, a court could acquire *in rem* jurisdiction over nonresidents by mere constructive service of process,[871] under the theory that property was always in possession of its owners and that seizure would afford them notice, inasmuch as they would keep themselves apprized of the state of their property. It was held, however, that this fiction did not satisfy the requirements of due process, and, whatever the nature of the proceeding, that notice must be given in a manner that actually notifies the person being sought or that has a reasonable certainty of resulting in such notice.[872]

Although the Court has now held "that all assertions of state-court jurisdiction must be evaluated according to the ['minimum contacts'] standards set forth in *International Shoe Co. v. Washington*,"[873] it does not appear that this will appreciably change the result for *in rem* jurisdiction over property. "[T]he presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the

---

[864] Accordingly, by reason of its inherent authority over titles to land within its territorial confines, a state court could proceed to judgment respecting the ownership of such property, even though it lacked a constitutional competence to reach claimants of title who resided beyond its borders. Arndt v. Griggs, 134 U.S. 316, 321 (1890); Grannis v. Ordean, 234 U.S. 385 (1914); Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917).

[865] Boswell's Lessee v. Otis, 50 U.S. (9 How.) 336, 348 (1850).

[866] American Land Co. v. Zeiss, 219 U.S. 47 (1911); Tyler v. Judges of the Court of Registration, 175 Mass. 71, 76, 55 N.E. 812, 814 (Chief Justice Holmes), appeal dismissed, 179 U.S. 405 (1900).

[867] Huling v. Kaw Valley Ry. & Improvement Co., 130 U.S. 559 (1889).

[868] The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874).

[869] Clarke v. Clarke, 178 U.S. 186 (1900); Riley v. New York Trust Co., 315 U.S. 343 (1942).

[870] Pennoyer v. Neff, 95 U.S. 714 (1878). Predeprivation notice and hearing may be required if the property is not the sort that, given advance warning, could be removed to another jurisdiction, destroyed, or concealed. United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) (notice to owner required before seizure of house by government).

[871] Arndt v. Griggs, 134 U.S. 316 (1890); Ballard v. Hunter, 204 U.S. 241 (1907); Security Savings Bank v. California, 263 U.S. 282 (1923).

[872] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Schroeder v. City of New York, 371 U.S. 208 (1962); Robinson v. Hanrahan, 409 U.S. 38 (1972).

[873] 433 U.S. 186 (1977).

source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendant's claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest. The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State."[874] Thus, for "true" *in rem* actions, the old results are likely to still prevail.

Quasi in Rem: Attachment Proceedings.—If a defendant is neither present within a State nor domiciled therein, he cannot be served personally, and any judgment in money obtained against him would be unenforceable. This does not, however, prevent attachment of a defendant's property within the state. The practice of allowing a State to attach a non-resident's real and personal property situated within its borders to satisfy a debt or other claim by one of its citizens goes back to colonial times. Attachment is considered a form of *in rem* proceeding sometimes called *"quasi in rem,"* and under *Pennoyer v. Neff*[875] an attachment could be implemented by obtaining a writ against the local property of the defendant and giving notice by publication.[876] The judgement was then satisfied from the property attached, and if the attached property was insufficient to satisfy the claim, the plaintiff could go no further.[877]

This form of proceeding raised many questions. Of course, there were always instances in which it was fair to subject a person to suit on his property located in the forum State, such as

---

[874] 433 U.S. at 207–08 (footnote citations omitted). The Court also suggested that the State would usually have jurisdiction in cases such as those arising from injuries suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that controversy. Id.

[875] 95 U.S. 714 (1878). *Cf.* Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Corn Exch. Bank v. Commissioner, 280 U.S. 218, 222 (1930); Endicott Co. v. Encyclopedia Press, 266 U.S. 285, 288 (1924).

[876] The theory was that property is always in possession of an owner, and that seizure of the property will inform him. This theory of notice was disavowed sooner than the theory of jurisdiction. See "Actions in Rem: Proceedings Against Property," supra.

[877] Other, quasi in rem actions, which are directed against persons, but ultimately have property as the subject matter, such as probate, Goodrich v. Ferris, 214 U.S. 71, 80 (1909), and garnishment of foreign attachment proceedings, Pennington v. Fourth Nat'l Bank, 243 U.S. 269, 271 (1917); Harris v. Balk, 198 U.S. 215 (1905), might also be prosecuted to conclusion without requiring the presence of all parties in interest. The jurisdictional requirements for rendering a valid divorce decree are considered under the full faith and credit clause, Art. I, §1.

The Court therefore imposed a standard of "clear and convincing" evidence.[1187]

Difficult questions of what due process may require in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the State when such children are wards of the State were confronted in *Parham v. J.R.*[1188] Under the challenged laws there were no formal preadmission hearings, but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but balanced this against such factors as the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually act in behalf of their children's welfare, the independent role of medical professionals in deciding to accept the children for admission, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.[1189] Similarly, the same concerns, reflected in the statutory obligation of the State to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the Government.[1190] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[1191]

EQUAL PROTECTION OF THE LAWS

Scope and Application

State Action.—"[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[1192] The Amendment by its express terms provides that "[n]o

---

[1187] Addington v. Texas, 441 U.S. 418 (1979). *See also* Vitek v. Jones, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[1188] 442 U.S. 584 (1979). *See also* Secretary of Public Welfare v. Institutionalized Juveniles, 442 U.S. 640 (1979).

[1189] 442 U.S. at 598-617. The dissenters agreed on this point. Id. at 626–37.

[1190] 442 U.S. at 617-20. The dissenters would have required a preconfinement hearing. Id. at 637–38.

[1191] 442 U.S. at 617. The dissent would have mandated a formal postadmission hearing. Id. at 625–26.

[1192] Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Similarly, the due process clause of the Fifth Amendment, with its equal protection component, limits only federal governmental action and not that of private parties, as is true of each of the provisions of the Bill of Rights. The scope and reach of the "state action" doctrine is thus

State . . ." and "nor shall any State . . ." engage in the proscribed conduct. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws." [1193] While the state action doctrine is equally applicable to denials of privileges or immunities, due process, and equal protection, it is actually only with the last great right of the Fourteenth Amendment that the doctrine is invariably associated. [1194]

"The vital requirement is State responsibility," Justice Frankfurter once wrote, "that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme" to deny protected rights. [1195] Certainly, state legislation commanding a discriminatory result is state action condemned by the first section of the Fourteenth Amendment, and is void. [1196] But the difficulty for the Court has begun when the conduct complained of is not so clearly the action of a State but is, perhaps, the action of a minor state official not authorized or perhaps forbidden by state law so to act, or is, perhaps on the other hand, the action of a private party who nonetheless has some relationship with governmental authority.

The continuum of state action ranges from obvious legislated denial of equal protection to private action that is no longer so sig-

---

the same whether a State or the National Government is concerned. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

[1193] Civil Rights Cases, 109 U.S. 3, 11 (1883). With regard to the principal issue in this decision, the limitation of the state action requirement on Congress' enforcement powers, *see* "State Action," infra.

[1194] Recently, however, because of broadening due process conceptions and the resulting litigation, issues of state action have been raised with respect to the due process clause. *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).

[1195] Terry v. Adams, 345 U.S. 461, 473 (1953) (concurring). The Justice was speaking of the state action requirement of the Fifteenth Amendment. The Nineteenth and Twenty-sixth Amendments also hinge on state action; the Thirteenth Amendment, banning slavery and involuntary servitude, does not.

[1196] United States v. Raines, 362 U.S. 17, 25 (1960). A prime example is the statutory requirement of racially segregated schools condemned in Brown v. Board of Education, 347 U.S. 483 (1954). *And see* Peterson v. City of Greenville, 373 U.S. 244 (1963), holding that trespass convictions of African Americans "sitting-in" at a lunch counter over the objection of the manager cannot stand because of a local ordinance commanding such separation, irrespective of the manager's probable attitude if no such ordinance existed.

nificantly related to state action that the Amendment applies. The prohibitions of the Amendment "have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." [1197]

"Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order." [1198] That the doctrine serves certain values and disserves others is not a criticism of it but a recognition that in formulating and applying the several tests by which the presence of "state action" is discerned, [1199] the Court has considerable discretion and the weights of the opposing values and interests will lead to substantially different applications of the tests. Thus, following the Civil War, when the Court sought to reassert federalism values, it imposed a rather rigid state action standard. During the civil rights movement of the 1950s and 1960s, when almost all state action contentions were raised in a racial context, the Court generally found the presence of state action. As

[1197] Ex parte Virginia, 100 U.S. 339, 346–47 (1880).

[1198] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936–37 (1982). "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Justice Harlan concurring).

[1199] "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).