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A COMMENT ON "DUE PROCESS OF LAW"

RAOUL BERGER*

The dialogue between Professor Randall Bridwell and myself¹ has served to clarify the issues and to develop large areas of agreement. Our differences are minor, with one exception—due process—and that may be due to a misunderstanding that can be dissipated. It turns, however, on what is the clearest and most important definition of due process in our constitutional history, so important that its meaning must not be obscured.

On the eve of the Philadelphia Convention, Hamilton stated in the New York Assembly that "[t]he words '*due process*' have a *precise technical import*, and are *only* applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature."² Professor Bridwell correctly understands me to read this as meaning that due process "embodied no *substantive* restrictions on legislative action . . . to which a court could resort to . . . overturn legislation."³ But, he continues, "when understood in its full context, however, Hamilton probably meant the *very opposite* . . ."⁴

The "very opposite" of "never" is "always," and Bridwell therefore suggests that due process authorizes "substantive restrictions on legislative action."⁵ Bridwell hardly means that due process "always" applies to statutes and authorizes such "substantive restrictions," for he states that due process "requires *some* restrictions on legislative actions that *differ greatly* from the previous '*substantive due process*' inventions of the Supreme

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1. Bridwell, *The Federal Judiciary: America's Recently Liberated Minority*, 30 S.C.L. REV. 467 (1979); Berger, *The Scope of Judicial Review: A Continuing Dialogue*, 31 S.C.L. REV. 171 (1980); Bridwell, *The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?*, 31 S.C.L. REV. 617 (1980) [hereinafter cited as Bridwell, *Judicial Review*].

2. 4 THE PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett & J. Cooke eds. 1962) (emphasis added in part) [hereinafter cited as A. HAMILTON].

3. Bridwell, *Judicial Review*, *supra* note 1, at 626 (emphasis added).

4. *Id.* (emphasis added).

5. *Id.*

Court.”⁶ The sole “restriction on legislative action” urged by Hamilton was that disqualification from holding office required judicial proceedings. Nowhere did he repudiate his statement that due process applied “only” to judicial proceedings. His argument, rather, was that due process required trial before condemnation, a right no statute could curtail. With this I agree, and may add that my studies were exclusively concerned with the “substantive” application of due process “to overturn legislation” on policy grounds; it never entered my mind that my analysis could be read to condone statutory denial of a constitutional right to trial.

At issue was an amendment to an Act of February 1787,⁷ which had earlier passed over Hamilton’s opposition. The Act disqualified officers of war vessels and privateers who had engaged in hostilities against Americans during the Revolutionary War from holding “any office . . . of trust”⁸ in the state. It was aimed at Loyalists who had aided the “enemy.” The proposed amendment added the “owners” of such vessels.⁹ Hamilton maintained that due process required “a judicial proceeding before anyone can be deprived of a right”; and he objected that the amendment would “directly deprive the shipowners of their rights without a judicial proceeding”¹⁰

It was the purpose of Magna Carta by the “law of the land” clause to assure that no man could be condemned without trial.¹¹ A fourteenth century statute provided that he must be “brought in to answer by due process of law.”¹² A few centuries later Coke explained that due process meant that “[n]o man may be put to answer without presentment”¹³ or by proper writ, what we would term service of proper process. “Put to answer” meant “put on trial.”¹⁴ Pointing to the New York declaration of rights guarantee

6. *Id.* at 627 (emphasis added).

7. An Act for Regulating Elections, ch. 15, 1785-88 Laws of New York 371 (1787).

8. *Id.* at 383. See A. HAMILTON, *supra* note 2, at 34-35 n.1.

9. See A. HAMILTON, *supra* note 2, at 34-35 n.1.

10. Bridwell, *Judicial Review*, *supra* note 1, at 626 (quoting R. Whitten, *The Constitutional Limitations on State-Court Jurisdiction—An Historical Interpretative Reexamination of the Due Process and Full Faith and Credit Clauses*, Part II, at 36 (1979)).

11. Berger, “*Law of the Land*” Reconsidered, 74 *Nw. U.L. Rev.* 1, 3 (1979).

12. Cited in R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 197 (1977).

13. Quoted in *id.* at 198.

14. *Ex parte Walker*, [1924] 24 *N.S.W.* 604, 616.

(passed by statute "in the same session") that "no man shall be . . . deprived of any right, but by *due process of law*," Hamilton maintained that the disqualification act violated due process by condemning without trial.¹⁵ Where a constitution, for example, guarantees trial by jury, no statute may deprive a man of that right.¹⁶ Similarly, a guarantee of "judicial proceedings" is violated by a statute providing for disqualification without trial. Hamilton justly rejected the argument that the disqualification statute could be justified because "the law of the land will include an act of the legislature," pointing out that Coke interpreted "the law of the land to mean presentment and indictment" Literally any "act" is part of the "law of the land," but it would be self-defeating to read that phrase to include an "act" which violates the very guarantee that "law of the land" was meant to protect.

Bridwell's authority, Professor Whitten, mistakenly concludes from the foregoing that

[t]his is why the words "due process of law," in [Hamilton's] view, could "*never* be referred to an Act of the legislature": because *an act of the legislature could not satisfy* the requirement of due process of law and was thus a violation of provisions that required due process—*i.e.*, judicial proceedings.¹⁸

For *an act could satisfy due process by securing the judicial proceeding not provided by the disqualification statute.* Hamilton was interested in obtaining a trial, not in transforming due process into an instrument of judicial control over all legislation. In England "law of the land" never was regarded as a limitation on the legislature;¹⁹ and the colonial materials, including those of New York, identified due process with the right to be brought into court, while preserving the legislative freedom to enact legislation.²⁰ Hamilton's statement, therefore, epitomized 400 years of English and colonial history.

Bridwell, I presume, would not argue that because no statute may deprive a man of guaranteed "procedural" rights, it fol-

15. A. HAMILTON, *supra* note 2, at 35-36.

16. *See* Berger, *supra* note 11, at 14-16.

17. A. HAMILTON, *supra* note 2, at 35.

18. Bridwell, *Judicial Review*, *supra* note 1, at 626-27 (quoting R. Whitten, *supra* note 10, at 36) (emphasis added).

19. Berger, *supra* note 11, at 5.

20. *Id.* at 8-9.

lows that courts are empowered to set aside a minimum-wage law. In other words, due process bars legislative deprivation of the right to judicial proceedings before condemnation; it does not empower courts to set legislation aside on "substantive" grounds. Bridwell and I are at one in thrusting aside the "'substantive due process' inventions of the Supreme Court,"²¹ and I fully concur that *procedural* rights protected by due process cannot be taken away by statute.

But an historian may not stop here—there *was* an exception from due process for the disqualification act; it was one of the many attainders against Loyalists passed in almost every one of the thirteen states during the Revolution.²² Attainders were legislative condemnations without trial; they were almost as old as the term "due process" and were employed by Parliament well into the eighteenth century.²³ But the disqualification act was a "bill of pains and penalties" rather than a "bill of attainder" because it contained no death penalty.²⁴ New York enacted an earlier legislative forfeiture in 1779;²⁵ there were English precedents for disqualification from office by such bills.²⁶ And the act had the sanction of the New York Constitution: "no acts of attainder shall be passed by the legislature of this State for crimes, *other than those committed before the termination of the present war . . .*"²⁷

Hamilton was out of tune with the bitter anti-Loyalist sentiment of the revolutionists;²⁸ his biographer stated that Hamilton "felt a sense of kinship with the Loyalists" because "they were wealthy and conservative members of society to whom he looked for aid against the radicalism that seemed to threaten the established social order," even though they "had chosen the wrong side in the struggle."²⁹ He had been counsel for a wealthy Loyalist in 1784 in a suit, *Rutgers v. Waddington*,³⁰ by a "patriot" who

21. Bridwell, *Judicial Review*, *supra* note 1, at 627.

22. Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 377-79 (1978).

23. *Id.* at 374.

24. *Id.* at 356-57.

25. *See id.* at 379 n.159.

26. *See id.* at 376.

27. *Quoted in id.* at 377.

28. *Id.* at 384-85.

29. *Quoted in id.* at 385.

30. *Cited in id.* at 383.

had fled the British occupation of New York and sought to recover for the use of her property. The decision went in part for Hamilton and provoked violent criticism; the assembly denounced the judgment as "subversive of all law and good order."³¹ All of which helps to explain why Hamilton stood almost alone in the 1787 assembly in protesting against the disqualification statute.

31. Quoted in *id.* at 383-84.

