

tory rendition of this chapter in 1354. “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.”⁴¹⁷ Though Magna Carta was in essence the result of a struggle over interest between the King and his barons,⁴¹⁸ this particular clause over time transcended any such limitation of scope, and throughout the fourteenth century parliamentary interpretation expanded far beyond the intention of any of its drafters.⁴¹⁹ The understanding which the founders of the American constitutional system, and those who wrote the Due Process Clauses, brought to the subject they derived from Coke, who in his *Second Institutes* expounded the proposition that the term “by law of the land” was equivalent to “due process of law,” which he in turn defined as “by due process of the common law,” that is, “by the indictment or presentment of good and lawful men . . . or by writ original of the Common Law.”⁴²⁰ The significance of both terms was procedural, but there was in Coke’s writings on chapter 29 a rudimentary concept of substantive restrictions, which did not develop in England because of parliamentary supremacy, but which was to flower in the United States.

The term “law of the land” was early the preferred expression in colonial charters and declarations of rights, which gave way to the term “due process of law,” although some state constitutions continued to employ both terms. Whichever phraseology was used, the expression seems generally to have occurred in close association with precise safeguards of accused persons, but, as is true of the Fifth Amendment here under consideration, the provision also suggests some limitations on substance because of its association with the guarantee of just compensation upon the taking of private property for public use.⁴²¹

Scope of the Guaranty.—Standing by itself, the phrase “due process” would seem to refer solely and simply to procedure, to pro-

⁴¹⁷ 28 Edw. III, c. 3. See F. THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629*, 86–97 (1948), recounting several statutory reconfirmations. Note that the limitation of “free man” had given way to the all-inclusive delineation.

⁴¹⁸ W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (Glasgow, 2d rev. ed. 1914); J. HOLT, *MAGNA CARTA* (1965).

⁴¹⁹ F. THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629* (1948).

⁴²⁰ SIR EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND*, Part II, 50–51 (1641). For a review of the influence of Magna Carta and Coke on the colonies and the new nation, see, e.g., A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968).

⁴²¹ The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the “law of the land” phrase in a separate article, 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS*, H. Doc. No. 357, 59th