

are not the same thing, but, insofar as they impose such implicit requirements of fair trials, fair hearings, and the like, which exist separately from, though they are informed by, express constitutional guarantees, the interpretation of the two clauses is substantially, if not wholly, the same. Save for areas in which the particularly national character of the Federal Government requires separate treatment, this book's discussion of the meaning of due process is largely reserved for the section on the Fourteenth Amendment. Finally, some Fourteenth Amendment interpretations have been carried back to broaden interpretations of the Fifth Amendment's Due Process Clause, such as, for example, the development of equal protection standards as an aspect of Fifth Amendment due process.

Procedural Due Process

In 1855, the Court first attempted to assess its standards for judging what was due process. At issue was the constitutionality of summary proceedings under a distress warrant to levy on the lands of a government debtor. The Court first ascertained that Congress was not free to make any process "due process." "To what principles, then, are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be two-fold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." A survey of history disclosed that the law in England seemed always to have contained a summary method, not unlike the law in question, for recovering debts owed the Crown. Therefore, "[t]ested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law. . . ." ⁴³⁵

This formal approach to the meaning of due process could obviously have limited both Congress and the state legislatures in the development of procedures unknown to English law. But when California's abandonment of indictment by grand jury was challenged, the Court refused to be limited by the fact that such proceeding

⁴³⁵ *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276–77, 280 (1856). The Court took a similar approach in Fourteenth Amendment due process interpretation in *Davidson v. City of New Orleans*, 96 U.S. 97 (1878), and *Munn v. Illinois*, 94 U.S. 113 (1877).