

the arbitrary exercise of government power.⁷⁰⁷ Exactly what procedures are needed to satisfy due process, however, will vary depending on the circumstances and subject matter involved.⁷⁰⁸ One of the basic criteria used to establish whether due process is satisfied is whether such procedure was historically required in like circumstances.

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.⁷⁰⁹ 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.”⁷¹⁰ Fortunately, the states are not tied down by any provision of the Constitution to the practice and procedure that 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.⁷¹¹

Non-Judicial Proceedings.—A court proceeding is not a requisite of due process.⁷¹² Administrative and executive proceedings

⁷⁰⁷ 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).

⁷⁰⁸ *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).

⁷⁰⁹ *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.

⁷¹⁰ *Twining*, 211 U.S. at 101.

⁷¹¹ *Hurtado v. California*, 110 U.S. 516, 529 (1884); *Brown v. New Jersey*, 175 U.S. 172, 175 (1899); *Anderson Nat’l Bank v. Lockett*, 321 U.S. 233, 244 (1944).

⁷¹² *Ballard v. Hunter*, 204 U.S. 241, 255 (1907); *Palmer v. McMahon*, 133 U.S. 660, 668 (1890).