Procedural Due Process Liberty Interests

by ANN WOOLHANDLER*

Introduction

The Supreme Court's divided decision in *Kerry v. Din*[1] underscores the difficulty of defining liberty for purposes of procedural due process. Din, a United States citizen, complained that she had been denied procedural due process when the government refused to give her husband an immigrant visa. Her husband was a citizen of Afghanistan who formerly worked as a low-level civil servant for the Taliban regime. The government's only explanation for the visa denial was a citation to a statutory provision excluding persons for having engaged in terrorist activity.[2] Justice Scalia's plurality opinion reasoned that Din had no liberty interest entitling her to procedural due process.[3] Justice Kennedy's concurrence found it unnecessary to determine whether Din's liberty was at stake because Din had received whatever process she was due.[4] In dissent, Justice Breyer concluded that Din had an entitlement to more procedures based on her liberty interest in living with her husband in the United States.[5] Breyer relied on a combination of ingredients to find that Din had a liberty interest—fundamental rights decisions involving marriage, citizens' rights to reside in the country, and statutory immigration preferences for citizens' spouses.[6]

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1. Kerry v. Din, 135 S. Ct. 2128 (2015).

2. 8 U.S.C. § 1182(a)(3)(B) (2012). The statute generally requires that the government give notice of the specific "provisions or provisions of law under which the alien is inadmissible." 8 U.S.C. § 1182(b)(1)(B) (2012). Congress provided, however, that this notice provision did not apply to exclusions for terrorist activity. 8 U.S.C. § 1182(b)(3) (2012); *see also Din*, 135 S. Ct. at 2132.

3. *Din,* 135 S. Ct. at 2133, 2135 (Scalia, J., plurality opinion).

4. *Id.* at 2139, 2141 (Kennedy, J., concurring).

5. *Id.* at 2142 (Breyer, J., dissenting).

6. *Id.* at 2142–53 (Breyer, J., dissenting) (citing to the Court's recognition of the institution of marriage and interests in raising a family, citizens' rights to live in the country, and

The *Din* decision raises questions as to the content of procedural due process liberty. It also raises questions of the extent to which substantive constitutional rights, as well as statutorily granted interests, should be considered liberty interests for purposes of procedural due process.

Tom Merrill answered a number of such questions as to property interests. In *The Landscape of Constitutional Property*,[7] he systemized various forms of property protected by the Takings Clause and the Due Process Clauses, identifying them as takings property, procedural due process property, and substantive due process property.[8] No similar schematization has occurred with respect to liberty interests protected by the Due Process Clauses.[9] This article undertakes to provide a partial taxonomy. It particularly focuses on a subset of liberty interests—liberty interests protected by procedural due process, the liberty cognate to

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the law, "including visa law" that "surrounds marriage with a host of legal protections"); *id.* at 2137 (Scalia, J., plurality opinion) (noting the dissent's supplementing a fundamental right to marry with a fundamental right to live in the United States); Brief for Respondent at 33–36, Kerry v. Din, 135 S. Ct. 2128 (2015) (13-402) (relying on a fundamental right to marry, including a right to cohabit); *id.* at 3 (arguing for freedom from arbitrary government restrictions on Din's right to live with her spouse).

7. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000) (providing patterning definitions for different types of constitutionally protected property).

8. Merrill's "takings property" or "property-as-ownership" is the smallest category: where "nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from interfering with specific assets." *Id.* at 893, 969. Takings property is a subset within a larger category of "property-as-entitlement" or procedural due process property, where "nonconstitutional sources of law confer on the claimant an entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied." *Id.* at 893, 961. The largest category is substantive due process property, or "property-as-wealth," where "nonconstitutional sources of law confer an entitlement on a claimant having a monetary value." *Id.* at 987; *id.* at 959 (indicating that the three definitions were nested, such that takings property was also procedural due process property and substantive due process property). The monetary value for entitlement and substantive due process property should be readily ascertainable. *See id.* at 988.

9. A valuable analysis of due process issues generally, upon which this article amply relies, is provided by Richard H. Fallon, Jr., *Some Confusions about Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993); *see also id.* at 365–66 (noting the problem of "providing a comprehensive, substantive theory for the identification of constitutionally protected 'liberty' and 'property'"). Several works provide valuable histories of procedural due process. *See, e.g.*, Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044 (1984). Scholars have paid considerable attention to the expansions of procedural due process in the 1950s and 60s, and the Court's subsequent move in the 70s, beginning with *Board of Regents v. Roth*, 408 U.S. 564 (1972), to requiring more specific liberty and property interests. *See, e.g., id.* at 1065–76; *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 198 (1980) at 19 (criticizing the Court's move from treating life, liberty, or property as a unit).

Merrill's procedural due process property.[10] And it calls attention to subcategories within the procedural due process category.[11]

Procedural due process requires that fair procedures, to assure compliance with law, accompany individualized executive and judicial deprivations of life, liberty, or property.[12] Modern discussions of procedural due process often focus on the Supreme Court's requiring hearings or other process in administrative agencies—such as the plaintiff sought in *Kerry v. Din*. Another pervasive aspect of procedural due process is the Court's requiring judicial process when particular interests are at stake.[13] Judicially imposed requirements that certain causes of action

10. This article does not address the debate surrounding whether substantive due process liberty should exist apart from enumerated rights. *See generally* James E. Fleming & Linda C. McClain, *Liberty*, OXFORD HANDBOOK OF THE UNITED STATES CONSTITUTION (Mark Tushnet et al., eds., forthcoming 2015) (providing an overview of scholarship on substantive liberty); James W. Ely, Jr, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999) (discussing antebellum incarnations of substantive liberty interests).

11. While this article mostly provides a positive account of liberty interests, there has been substantial scholarly attention to what interests should be recognized as procedural-due-process-protected. *See, e.g.*, ELY, *supra* note 9, at 192 n.28 (indicating that procedural due process should mean "that the government should not be able to injure you, at least not seriously, without employing fair procedures"); Henry Paul Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 433 (1977) (suggesting that liberty should perhaps include any extreme conduct that intentionally or recklessly causes extreme emotional distress); William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 487 (1977) (arguing for a liberty interest in being free from unfair adjudicative processes). Scholarship has particularly focused on whether reputational interests should be treated as liberty. *See, e.g.*, Monaghan, *supra*, at 423–29 (criticizing the Court's decision in Paul v. Davis, 424 U.S. 693 (1976)); Rubin, *supra* note 9, at 1074–75 (same); Jack M. Beerman, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 306 (1988) (arguing that the reputational interests in *Paul* should be treated as a property claim); Barbara E. Armacost, *Race and Reputation, The Real Legacy of* Paul v. Davis, 85 VA. L. REV. 569, 625 (1999) (arguing that procedural due process should apply as to statements that brand or accuse as distinguished from reporting law enforcement actions).

12. *See* John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) (stating, "In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law . . . . Second, the Due Process Clauses, as read procedurally, require that judicial or executive processes follow fair procedures"). Procedural due process constraints generally are inapplicable to legislation, due to the lack of an individualized determination. *See* Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).

13. *See* Fallon, *supra* note 9, at 309 (stating that the Due Process Clause generates right "to administrative process, to judicial review of administrative decisions, to judicial procedures, and to judicial remedies"); *cf.* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1724 (1975) (indicating that under the traditional theory of administrative law, standing gave a basis for judicial review coterminous with the individual's due process rights to adequate procedurals safeguards, because government interference with a

exist, as well as judicially imposed requirements that agencies provide procedures, are both likely to indicate that an interest is protected by procedural due process. This article therefore considers judicial requirements for certain causes of action respecting potential deprivations of liberty interests, in addition to considering requirements of agency process.[14]

This article aims to provide a positive account, directed to systematizing some of the major categories of liberty interests protected by procedural due process. It begins with the unexceptionable category of natural liberty in the sense of freedom from incarceration, and moves to other natural law interests such as occupational liberty.[15] It then addresses the extent to which substantive constitutional rights—sometimes assumed to be the most obvious liberty interests protected by procedural due process[16]—should be considered procedural due process liberty interests. The discussion below suggests that substantive constitutional rights are in fact late-coming procedural due process interests, and that the procedural protections for them may in some ways be more limited than for natural liberty and traditional property. The article will also address so-called

common law liberty or property right was also an interference with liberty or property under the Fifth and Fourteenth Amendments).

14. For many interests in particular contexts, agency process and judicial process can be at least partial substitutes for one another. *See, e.g.*, Security Trust and Safety Vault Co. v. City of Lexington, 203 U.S. 323, 333 (1906) (holding that although agency process had been defective, the full hearing provided by the courts cured the deficiency). For certain interests, such as the deprivation of natural liberty entailed in criminal proceedings, procedural due process tends to require court process. *See* Fallon, *supra* note 9, at 371 (indicating that requirements for judicial process were associated with traditional liberty interests). Whether judicial as opposed to agency process is required is a question of the process due, and is not a central focus of this article.

15. The interests are "other" than natural liberty and traditional property. Both natural liberty and traditional property would have been considered, at least to an extent, natural law rights at the time of the framing. *See* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 97–98 (1982). Property interests now tend to be seen as more state-law derived. *See* Merrill, *supra* note 7, at 943 (stating that the idea that "property rights are created not by the Constitution but by state law and other independent sources has far too much gravitational force for the Court to repudiate it entirely"). Use of the category "other natural law interests" does not require one to accept the concept of natural law, but only to recognize the term as descriptive of interests that, as an historical matter, many saw as taking their origins outside of the law of a particular sovereign.

16. *Cf.* Kerry v. Din, 135 S. Ct. at 2142–43 (Breyer, J., dissenting) (partly basing argument for procedural due process on substantive constitutional protections); Paul v. Davis, 424 U.S. 693, 710–11 n.5 (1976) (indicating that some procedural due process interests are protected "because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment"); *cf. Kerry*, 135 S. Ct. at 2133 (Scalia, J., plurality opinion) (indicating that plaintiff did not argue that her substantive due process rights were violated, but rather that because the law "affects her enjoyment of an implied fundamental liberty, the Government must first provide her a full battery of procedural-due-process protections").

positive liberty interests—that is, statutorily created liberty interests.[17] Some may assume that these are a common form of liberty interest,[18] but this article sees the category as fairly narrow. And while statutory causes of action are sometimes categorized as positive liberty or property interests, they are a somewhat limited form of procedural due process interest.

Any discussion of liberty, even if restricted to the procedural due process realm, is likely to have ignored important aspects of the topic and to have included issues some might find questionable. What is more, for a discussion aimed at liberty, this article includes a good bit of discussion of property, because it is difficult to discuss one without the other. For example, the procedural due process protections that surround criminal prosecution protect the defendant's liberty interests to the extent he may be incarcerated, and his property interests to the extent he may be fined.[19]

This article is organized to address major categories of liberty interests. Part I focuses on natural liberty—freedom from physical restraint in the sense of incarceration. Part II discusses the extension of liberty to what, for want of a better term, this article calls other natural law interests, with particular emphasis on interests in pursuing an occupation.[20] Part III discusses the extent to which substantive constitutional rights have become procedural due process liberty interests. Part IV discusses hybrids—interests that are in part substantive constitutional rights but also have aspects of other liberty categories. Part V addresses the extent of positive or statutorily created liberty interests, including statutory causes of action. Finally, Part VI analyzes *Kerry v. Din* in light of these categories.

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17. This article does not refer to constitutional rights as "positive" liberty interests.

18. *See Kerry*, 135 S. Ct. at 2143 (Breyer, J., dissenting) (reasoning that the statutory protections surrounding marriage, "including visa law," created expectations that government will not deprive married couples of their freedom to live together without fair procedures); *id.* at 2136 (Scalia, J., plurality opinion) (finding "unobjectionable" Justice Breyer's assumption that due processes rights attach to liberty interests created by statutes, but arguing that such interests need to amount to a substantive entitlement); *Paul*, 424 U.S. at 710 (stating that a variety of interests comprehended within the meaning of either liberty or property "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law"); *cf.* Fallon, *supra* note 9, at 373 ("Under cases such as *Board of Regents v. Roth*, 408 U.S. 564 (1972), state law functions in the first instance to define the property, and much of the liberty, that the Due Process Clause protects").

19. Many modern decisions categorize the interest in bodily integrity as a liberty interest. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 672 (1977). Life also obviously involves interests in bodily integrity. While this article does not focus on interests in freedom from the infliction of deliberate physical harm, its analysis fairly readily extends to such interests.

20. *See, e.g.*, James W. Ely, Jr., *"To Pursue any Lawful Trade or Avocation": The Evolution of Unenumerated Economic Rights in the Nineteenth Century*, 8 J. CONST. L. 917 (2006) (discussing the inclusion of occupational interests in liberty, and the natural law roots of the interest).

I. Natural Liberty

The Fifth Amendment's due process clause, applicable as against the federal government, provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law;" the Fourteenth Amendment later added a due process clause applicable against the states. The Fifth Amendment's due process clause protected defendants' interests in criminal trials,[21] and also against ex parte judicial proceedings more generally.[22] At a minimum, then, liberty meant natural liberty in the sense of freedom from incarceration,[23] which would be at risk in criminal trials, as could life in capital cases.

Property, by ways of fines, forfeitures, and damages judgments against defendants, would be at risk in both civil and criminal trials. A court's imposition of both civil and criminal monetary liabilities leads to deprivations of property and therefore requires adequate process. When this article refers to deprivations of "traditional property," it includes both real and personal property[24] and the imposition of monetary liabilities.[25]

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21. *See* Stephen F. Williams, *"Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendment: The Framers' Intention*, 53 COLO. L. REV. 117, 126, 136 (1981) (indicating that the Fifth Amendment's due process clause was primarily intended to provide protection for the interests jeopardized in criminal trials); Easterbrook, *supra* note 15, at 99–100 (indicating that Chancellor Kent and Justice Story saw the due process clause as primarily directed to assuring that criminal trials conformed to prevailing practices).

22. *See* Easterbrook, *supra* note 15, at 96 (noting concerns with service and with precluding ex parte proceedings as to the protected interests); *see also* Pennoyer v. Neff, 95 U.S. 714 (1877); *cf.* Easterbrook, *supra* note 15, at 99 (attributing the desuetude of the clause in the antebellum period to its limited and uncontroversial nature).

23. *See, e.g.*, Easterbrook, *supra* note 15, at 97–98 (indicating that liberty meant freedom from physical custody); Monaghan, *supra* note 11, at 411 (noting the common law understanding of liberty as freedom from physical restraint); Charles E. Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions which Protect "Life, Liberty, and Property,"* 4 HARV. L. REV. 365, 373 (1891) (stating that the clause originally meant "simply life (including limb and personal health), personal liberty (in the more limited sense to signify freedom of the person or body, not all individual rights), and property"); Rubin, *supra* note 9, at 1094 (indicating that the framers "probably had in mind some definitive set of interests fixed by natural law").

24. *See* Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (Scalia, J., plurality opinion) (discussing historic meanings of due process, including references to loss of freehold and dispossession of goods and chattels).

25. "Traditional property" as used herein includes Merrill's takings property: "where non-constitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets." Merrill, *supra* note 7, at 969. This Article also includes within the "traditional" property protected by the due process clauses impositions of monetary liability. Imposition of such liabilities would not generally implicate "takings property" in the sense of being subject to Fifth Amendment just compensation provisions. *See id.* at 984 (indicating that fines do not meet the specific asset limitation on takings property, although indicating that the imposition of criminal fines was covered by due process).

A. Basic Manifestations of Procedural Due Process

1. Defenses to Criminal and Civil Liability

Ordinarily, a criminal trial accords the process due for deprivations of life or natural liberty, and for the imposition of criminal fines. Civil trials afford process for divesting title or imposing civil monetary liabilities with respect to defendants, whether at the instance of government or private plaintiffs. Such defensive rights—that is, rights to defend against an imposition of civil or criminal liability—are normally thought to be required by procedural due process.[26]

2. Remedies for Extrajudicial Deprivations of Liberty and Property

Governmental and private actors, however, may effect intentional deprivations of property or liberty without going through judicial process. For example, a government official might detain goods or persons without seeking prior judicial approval. Our legal system requires process for many such losses,[27] particularly those that are alleged to be intentional and unjustified by law.[28] These requirements of process were manifest in the traditional common law trespass-type actions available against both private parties[29] and government actors,[30] and in the availability of habeas corpus.[31]

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26. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1246–47 (1982) (indicating that rights to defend against enforcement actions are constitutionally required).

27. Other categories of procedural due process liberty interests do not necessarily exhibit the same set of procedural requirements as natural liberty and traditional property. For example, remedies are often required for even private intentional deprivations of natural liberty and traditional property. *See infra* note 29. This protection is not precisely paralleled as to substantive constitutional rights considered as procedural due process liberty interests. So too, natural liberty and traditional property receive procedural protections as to the application of admittedly valid statutory criteria for their deprivation, but this protection is less applicable to substantive constitutional rights. *See infra* text accompanying notes 114–16.

28. *See* Adrian Vermeule, *Deference and Due Process* 6 (May 27, 2015) (indicating that a nonnegligent government action inflicting harm was necessary for a deprivation). This Article nevertheless sometimes refers to "intentional deprivations."

29. Professor John Goldberg has traced the right of redress originating in Britain and its transfer to the United States, including by way of the Fourteenth Amendment. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law of Redress for Wrongs*, 115 YALE L.J. 524, 529 (2005); *id.* at 614 (indicating there are strong claims to due process protection for redress of private wrongs (including as against private parties), and particularly for intentional misconduct injuring "bodily integrity," "liberty of movement," and "ownership of tangible property"); *id.* at 541 (finding support in Britain's Ancient Constitution and in Locke's argument that an individual's delegation of power to the state does not include "renunciation of his right to obtain redress from one who has wrongfully injured him"); *id.* at 550 (indicating that Blackstone saw rights of personal security, freedom of movement, and property as in vain had the constitution provided no method for their enjoyment, which included the right to apply to the courts for redress); *id.* at 560–65 (discussing reception of these ideas in America,

The line of cases associated with *Parratt v. Taylor*[32] also indicates that states are required to maintain adequate remedies for intentional deprivations of traditional liberty and property interests.[33] Such trespass and habeas causes of action resist legislative abrogation, thus manifesting that the underlying interests are procedural-due-process-protected.[34]

3. Anticipatory Court Actions; Review of Permitting

Actions that anticipate government enforcement actions under allegedly unconstitutional statutes, such as that brought in *Ex parte Young*,[35] also protect liberty and property interests that will be at stake in government enforcement. Because anticipatory actions anticipate defenses to enforcement actions,[36] they do not so much expand the interests protected by procedural due process but rather enhance the process. These

including in the Fourteenth Amendment); *cf.* Henry P. Monaghan, *Constitutional Adjudication: The Who and the When*, 82 YALE L.J. 1363, 1366 (1973) ("My own view is that, prior to their recent judicial expansion, the substantive constitutional guarantees could be viewed largely as securing against the government the same rights which the common law of tort and property secured against private individuals.").

30. This Article refers to both government entities as well as officers sued as individuals as "government" and "governmental parties."

31. *See* Fallon, *supra* note 9, at 369 ("History, including the historical availability of 'officer suits,' helps to define the legislature's constitutionally acceptable options concerning [foreclosure of judicial] review in different categories" (footnote omitted)); *id.* at 370 (indicating that in determining the need for individually effective remedies, "'old' property and traditional liberty interests often receive special solicitude under the Due Process Clause").

32. Parratt v. Taylor, 451 U.S. 521 (1981).

33. *See* Fallon, *supra* note 9, at 311 (indicating that the *Parratt* line of cases indicates that the states are required to maintain adequate systems of state remedies); *id.* at 361 (indicating that under existing law, "a statute aimed at protecting officials from tort liability for merely negligent deprivations is probably not objectionable"); Monaghan, *supra* note 11, at 428 (indicating that negligent deprivations are less likely to involve an abuse of power and thus are less likely to be deprivations of liberty or property). That certain causes of action are constitutionally required of course does not prevent there being constitutionally allowable defenses to such actions, such as the pervasive qualified immunity defense in modern law.

34. *See, e.g.*, Poindexter v. Greenhow, 114 U.S. 270 (1884) (indicating that trespass remedies as a general matter are not readily abrogable, and are effectively defensive); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 123 (1997) (discussing the constitutional compulsion for certain trespass actions); *see also id.* at 121 (citing authority). The extent to which a plaintiff's interest in a cause of action that does not protect natural liberty or traditional property is a procedural-due-process-protected interest is discussed below. *See infra* text accompanying notes 159–89.

35. *Ex parte* Young, 209 U.S. 123 (1908).

36. *See* John C. Harrison, *Ex parte* Young, 60 STAN L. REV. 989, 990–91 (2008) (arguing that *Young* was an anti-suit injunction action in which the plaintiff could raise defenses to an enforcement action).

actions are often required by procedural due process, because having to undergo an enforcement proceeding may be an inadequate remedy.[37]

Somewhat equivalent to anticipatory actions are procedures, including judicial review, that courts require when government denies or revokes permits or licenses to engage in certain activities. The procedures and judicial review anticipate enforcement proceedings that would ensue if the party proceeded to engage in the activity without a permit. And like anticipatory suits, they do not necessarily expand protected interests, but rather the process.

B. What the Process Determines

The requirement of procedures in connection with deprivations of natural liberty and traditional property suggests that government needs to show "cause" for its deprivation.[38] The procedures thus may ultimately protect a substantive right to be free of arbitrary deprivations of natural liberty and traditional property.[39] But government officials generally can satisfy a nonarbitrariness requirement by compliance with existing law. The legislature has broad power to determine the conditions under which natural liberty and traditional property may be taken away, such that the requirements of procedural due process as to natural liberty and traditional property tell us little about what the legislature may designate as an adequate reason or cause for a deprivation. Procedural due process protections for natural liberty and traditional property thus are very much directed to determining if statutory or common law requirements for deprivations of liberty and property have been met.[40]

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37. *Ex parte Young*, 209 U.S. at 164–65 (noting the difficulties of raising the unreasonableness of the rates as a defense to an enforcement action).

38. *Cf.* Merrill, *supra* note 7, at 961 (defining entitlement property as existing when "non-constitutional sources of law confer on the claimant an entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied").

39. *See* Fallon, *supra* note 9, at 363 (indicating that a general substantive due process duty of government to be nonarbitrary might be rationalized by saying the duty runs primarily to holders of liberty or property interests); *id.* at 310 (stating that substantive due process relies on the same principles as equal protection, that government cannot be arbitrary); *id.* at 342 (treating Parratt v. Taylor, 451 U.S. 521 (1981), as involving a substantive due process claim that the deprivations of the prisoner's hobby kit was arbitrary); *cf.* Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV 323, 332–34 (1987) (treating procedures and substance as part of one substantive package); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 167 (1986) ("The procedural requirement that administrators state their reasons follows from a substantive requirement that they act only reasonably . . . .").

40. *See* Harrison, *supra* note 12, at 499 (indicating that procedural due process requires the executive and the judiciary only to act in accordance with law when they deprive one of life, liberty, or property).

Substantive constitutional constraints on government[41] limit what the legislature can properly prescribe as a cause for the deprivation.[42] Determinations whether the government has crossed substantive constitutional lines are of course part of the process due when the government purports to deprive a person of liberty or property.

It should be noted, however, that at least historically, an individual's claim that government, to the individual's detriment, violated the Constitution did not in and of itself state a claim of a deprivation of liberty or property, and did not give the individual a cause of action.[43] Rather, the detriment would typically need to amount to a deprivation of natural liberty or traditional property for the individual to have a cause of action within which to raise the constitutional issue.[44] For example, when the State of Georgia during Reconstruction sought an injunction against the enforcement of federal statutes providing for a military government in the

41. The substantive constraints include substantive liberty interests. Substantive constitutional interests as used herein are distinguished from procedural constitutional interests. An equal protection claim thus would be substantive. Specific criminal procedural rights are not a primary focus of the discussion.

42. Historically the Court did not in terms distinguish substantive and procedural due process. *See* G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 88 (1997) (finding that "prior to the 1940s, substantive due process cases were not designated by that term at all"). Under a vested rights view of due process, certain legislative deprivations were prohibited because they transferred life, liberty, or property without providing judicial process. *See* Harrison, *supra* note 12, at 511–20 (discussing a vested rights view); Wallace Mendelson, *A Missing Link in the Evolution of Due Process*, 10 VAND. L. REV. 125, 127 (1956) (indicating that separation of powers was part of an understanding of due process, because a legislature's acting retrospectively in a particular case would be by improper procedure).

43. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404–05 (1821) (discussing that judicial review might not be available as to some violations of the Constitution, such as the grant of a title of nobility, and stating that Article III "does not extend the judicial power to every violation of the constitution which may possibly take place, but to 'a case in law or equity,' in which a right, under such law, is asserted in a Court of justice"); Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974) ("The Constitution itself was not a source of claims"); Harrison, *supra* note 36, at 1013 (suggesting that the Constitution itself does not make an officer's actions pursuant to an invalid rule into a tort). The Civil Rights Act of 1871 seemed to give a cause of action based on the constitutional violation, but may have been addressed to a limited set of rights. *See* Michael G. Collins, *"Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1505–06 (1989) (discussing limited versions of rights "secured by" the Constitution). That statute did not become an all-purpose vehicle for bringing constitutional claims until Monroe v. Pape, 365 U.S. 167 (1961).

44. *Cf.* Stewart, *supra* note 13, at 1717 n.235 (indicating that the traditional model's use of common law analogues to define interests that enjoyed legal protection was illustrated both in the context of standing and due process); Fallon, *supra* note 9, at 369–71 (indicating that current factors in deciding whether judicial review is required include whether the right is constitutional, and also whether a traditional liberty or property interest is involved).

state, the Court held that the dispute had not taken a form "appropriate for the exercise of judicial power."[45] For a justiciable case, the threatened rights "must be rights of persons or property."[46] Judicial process was required for authoritative deprivations of certain legal interests[47]—particularly natural liberty and traditional property—and any entitlement to raise constitutional issues depended on the issue's determination being necessary to the decision of some otherwise existing case.[48]

The procedural due process coverage for natural liberty and traditional property provides a broad swath of protections. Government regulation requires a means of enforcement, which typically runs against natural liberty or traditional property interests. And when a person is subject to enforcement, she is entitled to procedures to contest the validity (i.e., the constitutionality) of the rule and the validity of the application of the rule (e.g., whether the person's acts fit the statutory proscriptions). In addition, anticipatory actions and procedures for decisions denying permits protect underlying interests in liberty and property that would be at stake in potential government enforcement suits. Indeed, protections for liberty and property are sufficiently broad that one might be inclined to say there is a liberty interest in doing what one wants, absent a valid rule, validly applied. Nevertheless, it is probably more precise to say that, as a matter of procedural due process, one is entitled not to suffer an intentional

45. Georgia v. Stanton, 73 U.S. (6 Wall.) 50, 76 (1867), *discussed in* Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine*, 102 MICH. L. REV. 689, 714–25 (2004).

46. *Stanton*, 73 U.S. at 123 (1867).

47. Authoritative deprivations of certain other legal interests such as contract rights may require judicial process. But this article is particularly focused on interests that manifest themselves in more-or-less required defensive rights and causes of action against government and its officers. Such required remedies tend to surface most in enforcement actions to deprive one of natural liberty or traditional property, or where the government has effected such deprivations extrajudicially. For discussions of the due process status of contractual interests, see Merrill, *supra* note 7, at 986, 990–95; Michael M. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CALIF. L. REV. 267 (1988).

48. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170–71 (1803); *cf.* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (deciding a Contracts Clause question in a diversity suit on a bill of exchange, where the defendant pleaded discharge under a state insolvency law); Deshler v. Dodge, 57 U.S. (16 How.) 622 (1853) (deciding a Contracts Clause question in a replevin action after the collector seized bank notes); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (deciding a question as to the constitutionality of a state tax in an action seeking an injunction for return of funds); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (invalidating a conviction under a Pennsylvania law for interfering with exclusive federal legislative power to enforce the Fugitive Slave Clause). One could say that due process generally requires that a party be able to raise a relevant constitutional question in cases otherwise within the court's jurisdiction, since the court cannot ignore the Constitution as relevant law. Alternatively, one might say that the Constitution of its own force as supreme law (and without reference to due process) must be applied where relevant to a judicial decision.

governmental deprivation of natural liberty or traditional property absent a valid rule, validly applied.[49]

C. Some Extensions Involving Natural Liberty

1. Extensions of Process to New Contexts

A number of modern extensions of procedural due process have not added to liberty interests so much as recognized the need for procedural protections in areas involving incarceration or similar physical restraint on which the Supreme Court had not previously focused. For example, the Court has required adequate process for involuntary civil commitment[50] and "civil" delinquency proceedings.[51] Similarly the Court has indicated that procedural due process, even if only after the fact by way of court actions, must be provided as to corporal punishment of public school students, which involves physical restraint as well as interests in bodily integrity.[52]

2. Interests of Alleged Citizens and Certain Aliens in Avoiding Removal from the Country

In the early twentieth century the Court sketched procedural protections—not always clearly constitutionally based—for those making colorable claims of citizenship whom the government proposed to exclude at the border or to deport from within the country.[53] For example, the Court suggested that a person claiming citizenship who was excluded at the border would be entitled to Fifth Amendment protections, although it also

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49. *Cf.* Monaghan, *supra* note 11, at 412 (noting that the Blackstonian conception of liberty was not an "all encompassing 'right to be let alone;' it is a right to be let alone *only* with respect to one's bodily movement").

50. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (holding that the clear and convincing evidence suffices for civil commitment). The procedures, in addition to protecting natural liberty, also help to enforce the substantive constitutional limits on civil commitment, which generally requires a showing of endangerment to self or others absent confinement. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975).

51. *See In re* Gault, 387 U.S. 1, 41 (1967) (requiring procedures for delinquency proceedings that may result in institutional commitment where freedom is curtailed, even if the proceeding is termed civil); *cf.* Winck v. England, 327 F.3d 1296 (11th Cir. 2003) (discussing the availability of habeas for those seeking discharge from military service).

52. *See* Ingraham v. Wright, 430 U.S. 651 (1977).

53. For a history of the development of procedural due process rights in the immigration context, see Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632–55 (1992); *see also* LUCY E. SALYER, LAWS HARSH AS TIGERS (1995) (focusing on the role of Chinese immigration in shaping immigration law, including procedural decisions).

held that adequate agency procedures accorded the process due.[54] In addition, a person claiming citizenship whom the government proposed to deport from within the country, was entitled to a judicial determination of that claim.[55] And in *Yamataya v. Fisher*, the Court indicated that the deportation of a noncitizen already residing in the United States, and who had previously undergone inspection at the border, required procedural due process, which could be satisfied by adequate agency process.[56] (Under current law both exclusion at the border and deportation from within the country are referred to as removal.)[57]

The interests of alleged citizens and of certain aliens residing in the United States in avoiding removal are related to natural liberty, but extend

54. *See* Kwock Jan Fat v. White, 253 U.S. 454, 459 (1920) (asking "whether the hearing accorded to the petitioner was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law" with respect to a claim of citizenship at the border); *see also* United States v. Ju Toy, 198 U.S. 253, 263 (1905) (assuming for the purpose of the argument that the Fifth Amendment applied, and holding that agency process sufficed for a person claiming citizenship at the border); Chin Yow v. United States, 208 U.S. 8, 12–13 (1908) (based in part on the statutes' excluding only aliens and providing procedural remedies, holding that if a person claiming citizenship was excluded at the border, he could complain to a federal court in a habeas proceeding that agency process was insufficient, and if insufficient process were shown, the federal court could proceed to determine the citizenship claim); *id.* at 11 (noting that this case was distinguishable from *Ju Toy* because here the petitioner claimed the insufficiency of agency process); *see also* SALYER, *supra* note 53, at 111–14 (indicating that *Ju Toy* was seen as blurring the distinction between citizens and aliens by allowing agency process for both); *id.* at 181 (indicating that *Chin Yow* was ambiguous, and could be taken to mean "only that the Bureau of Immigration had to follow the procedures established in congressional statutes"); Motomura, *supra* note 53, at 1639 n.64 (indicating that *Chin Yow* "may have been decided on statutory not constitutional grounds").

55. Ng Fung Ho v. White, 259 U.S. 276, 282 (1922) (holding that two petitioners who had supported their claims with evidence that if believed would entitle them to findings of citizenship were entitled to a judicial trial as a matter of constitutional law); *id.* (indicating that these petitioners were not in the position of persons stopped at the border or who had entered surreptitiously, but rather had been admitted as citizens).

56. *See* Yamataya v. Fisher ("The Japanese Immigrant Case"), 189 U.S. 86, 101–02 (1903) (according agency but not judicial process to a person who had been admitted subject to a determination within a year of whether she was a pauper); *id.* at 100 ("But this court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution"); *cf.* Landon v. Plasencia, 459 U.S. 21, 32–33 (1982) (citing *Yamataya* and other cases for the proposition that a continuously present alien has a "right to due process" in deportation proceedings); Motomura, *supra* note 53, at 1638 ("*Yamataya* thus established that when aliens are in the United States, the Court would hear constitutional challenges based on procedural due process."); SALYER, *supra* note 53, at 173 ("In the *Japanese Immigrant Case* . . . the Court had grounded the right to be heard not in the immigration statutes but in 'the fundamental principles that inhere in "due process of law."'").

57. *See* 8 U.S. C. §§ 1225, 1229 (2012). "Expedited removal" procedures apply to persons apprehended at or near the border. As noted *infra* note 131, however, certain claims may lead to more elaborate process.

beyond the core natural liberty interest in being free from imprisonment.[58] To be sure, removal generally involves the physical detention necessary to effect removal from the country and thus natural liberty. Going beyond freedom from incarceration is the person's interest in not being barred from the country overall. In according procedural rights to a person detained at the border and who made a colorable claim of citizenship, Justice Holmes said:

> Still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China . . . . The case would not be that of a person who is prevented from going in one direction . . . all others being open.[59]

Even if a citizen were not incarcerated nor denied access to the country, she would still have a constitutional right to retain her membership in the political community. Because of the substantive constitutional interests surrounding citizenship, this article will revisit due process issues

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58. In *Yamataya*, the plaintiff had undergone inspection and could distinguish her constitutional procedural due process claim from the claims of aliens who had entered surreptitiously. It remains unclear whether mere presence beyond the border is enough to trigger constitutional procedural due process protections. This uncertainty is partly due to the fact that statutes generally supply procedures. *See* David A. Martin, *Graduated Applications of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 98 (2002); *see also* Zadvydas v. Davis, 533 U.S. 678, 693–95 (2001) (discussing the distinction between "an alien who has effected an entry into the United States and one who has never entered ").

As discussed below, aliens excluded at the border (at least absent a previously granted status such as permanent residency) generally lack procedural due process rights. *See infra* text accompanying notes 131–1133. Prior to the 1996 changes to the immigration statutes, immigration practice more sharply distinguished exclusion at the border from deportation of those found within the United States. *See* Motomura, *supra* note 53, at 1639, 1642, 1653. Entrants without inspection received greater procedural protections in deportation proceedings than aliens at the border undergoing exclusion proceedings. *See* Martin, *supra* at 65, 97–98. The 1996 statute brought the status of entrants without inspection closer to that of aliens arriving at the border, although arriving aliens continue to receive somewhat less favorable treatment. *See id.* Professor Martin has suggested that procedural rights should be analyzed based on the level of community membership. *Id. at* 92 (delineating categories roughly in order of decreasing community membership: citizen, lawful permanent resident, admitted nonimmigrant, entrant without inspection, parolee, applicant at the border).

59. *See* Chin Yow v. United States, 208 U.S. 8, 12 (1908). As noted *supra* note 54, *Chin Yow* was not clearly a constitutional case, but in *Ng Fung Ho*, which relied explicitly on the Fifth Amendment, the Court said, "To deport one who so claims to be a citizen, obviously deprives him of liberty as was pointed out in *Chin Yow v. United States*, 208 U.S. 8, 13." *Ng Fung Ho*, 259 U.S. at 284–85.

surrounding removal after considering the status of substantive constitutional rights as liberty interests.

II. Other Natural Law Interests

A. Interests in Practicing Professions

Given the breadth of challenges to government action encompassed within protections of natural liberty and traditional property, there was generally little pressure during the nineteenth century to designate other interests as protected. For example, it might be a misdemeanor to practice medicine without a license. If the government brought an enforcement action against an unlicensed practitioner, procedural due process followed from the potential impacts that conviction would have on liberty or property through incarceration or fines, without a court's necessarily having to characterize the interest in pursuing a line of work as itself a liberty or property interest.[60] Similarly, requiring process for professional licensing or license revocation may not definitely indicate that the activity for which one seeks a permit is itself due-process-protected.[61] Engaging in the activity without the required license or permit, after all, often leads to enforcement actions where natural liberty or traditional property are at issue in the form of imprisonment and fines. In such enforcement proceedings, the defendant presumably could raise as a defense an unfair denial of a permit, at least if earlier opportunities to contest the denial were lacking.[62]

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60. *See, e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (on direct review of a criminal conviction, invalidating, based on ex post facto and attainder grounds, a state statutory oath requirement to engage in various vocations); Dent v. West Virginia, 129 U.S. 114 (1889) (on direct review of a criminal conviction, upholding state restrictions on the practice of medicine); Watson v. Maryland, 218 U.S. 173, 175 (1910) (on direct review of a criminal conviction for unauthorized practice, holding, inter alia, that procedures were adequate); Kenneth C. Sears, *Legal Control of Medical Practice: Validity and Methods*, 44 MICH. L. REV. 689, 709 (1946) (indicating that criminal proceedings with a jury trial were the normal method to address unlicensed practice).

61. *Cf.* Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 Duke L.J. 133, 155 (2014) (distinguishing specific and general permits, and indicating that all permits "apply to specified regulated actions and actors, have a specified duration, and impose enforceable conditions on the regulated entity"); Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 412 (1985) (characterizing permitting power as reversing the ordinary presumption of freedom of action).

62. In the criminal cases reviewed in the Supreme Court, the would-be practitioner generally challenged the licensing statute simpliciter, and had not sought a license from the licensing officials. *See Dent*, 129 U.S. at 117 (indicating the case was submitted to the jury on agreed facts and that the practitioner had not attempted to get a permit). These cases therefore did not clearly indicate how far the criminal defendant could challenge, in a criminal proceeding, an unfair denial of a permit. Some courts would have treated an executive permit denial as

Sometimes, however, government may impose a restriction on practicing a vocation without enforcement actions being an evident possibility. The governmental decision has a more self-enforcing quality. To the extent that the Court nevertheless required process to determine whether the person could properly be excluded from practice under existing law and whether the law was valid, the interest in pursuing a vocation would then appear to be a liberty or property interest independent of the possibility of enforcement actions.

An early example of an exclusion from a profession that would not involve potential government enforcement suits, was federal courts' removal of attorneys for misbehavior from the roll of persons entitled to practice before them. It is difficult for an attorney to argue cases before a court that has disbarred him. By contrast, a doctor may more easily engage in unlicensed practice—which occurs outside the presence of licensing officials—and thereby risk a government enforcement action.[63] In the disbarment cases, the Court indicated that the lower courts must give the attorney notice and a chance to be heard. For example, in *Ex parte Robinson*, a lower federal court summarily disbarred an attorney whom the court believed had advised a potential grand jury witness to disappear. The Supreme Court indicated that the lower court had improperly denied

conclusive when criminal charges were brought. *See In re* Yick Wo, 68 Cal. 294, 298–99 (1885) (refusing, in a habeas proceeding, to review the discretion of the supervisors in denying a permit to conduct a laundry business in a wooden building), *rev'd sub nom.* Yick Wo v. Hopkins, 118 U.S. 356 (1886). On the other hand, there are indications that a defendant could challenge an earlier permit denial as a defense in criminal proceedings. *See id.* at 374 (granting habeas to individuals who had been convicted of violation of permitting statutes after they had applied for and been denied permits); *id.* at 374 ("It appears that both petitioners have complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health."); *cf. Dent*, 129 U.S. at 124–25 ("If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the Board after it had decided that the diploma he presented was insufficient."). Complaints that juries often failed to convict in prosecutions for unauthorized practice, *see* Sears, *supra* note 60, at 709, suggest that defendants were given substantial leeway in presenting and arguing criminal defenses. *Cf.* St. Louis and San Francisco Ry. Co. v. Gill, 156 U.S. 649, 666 (1895) (stating that a bill in equity might be a preferable way to contest railroad rates alleged to be unreasonable, but no such action was available in this case and the issue could be raised as a defense to an action by a passenger to collect penalties for exceeding the rate).

63. Granted, a doctor denied a license might refrain from practice or patients might not seek his services, such that no enforcement action will follow. *Cf.* Joseph Vining, LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW 76 (1978) (observing that where agencies engage in direct regulation seemingly without court involvement, the affected person could use self-help, thereby leading the agency to invoke judicial intervention by way of civil or criminal sanctions).

Robinson the right to be heard,[64] and reached analogous results in several other federal-court disbarment suits.[65] Similarly in the later case of *Goldsmith v. United States Board of Tax Appeals*, the Court indicated that a certified public accountant who had been excluded from practice before the Board of Tax Appeals for alleged misbehavior in a prior job was entitled to a hearing.[66]

The Court was initially reluctant to say outright that such vocational interests were "liberty" or "property" interests,[67] even though interests in working had a Lockean natural law pedigree.[68] This reluctance eventually gave way, however, in the substantive constitutional case *Allgeyer v.*

64. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 513 (1873).

65. *See, e.g.*, *Ex parte* Bradley, 74 U.S (7 Wall.) 364, 373, 375 (1869) (indicating that the procedures followed by the lower court for disbarment violated the most familiar principles of criminal justice, by imposing punishment ex parte without notice or opportunity for defense or explanation of misbehavior); *see also Ex parte* Secombe, 60 U.S. (19 How.) 9, 13 (1857) (treating the enrollment and removal of attorneys from acting as officers of the court as calling for "judicial discretion," and on that ground holding that mandamus was not the proper remedy).

66. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 124 (1926) (indicating a hearing was required, although the Court did not refer to what the underlying right was). The Court, however, did not grant relief in the case, on the ground that Goldsmith should have asked for a hearing before the Board of Tax Appeals, rather than immediately seeking mandamus from the Supreme Court of the District of Columbia.

67. *Robinson*, 86 U.S. (19 Wall.) at 512 (treating the attorney's initial enrollment as the court's "judgment" that the attorney had the requisite qualifications such that the removal from the bar also required "a judgment of the court after opportunity to be heard"); *id.* at 513 (treating the matter as one of "private rights"); Dent v. West Virginia, 129 U.S. 114, 121–22 (1889) (stating on review of an enforcement proceeding: "The interest [in pursuing vocations], or, as it is sometimes termed, the estates acquired in them, that is, the right to continue their prosecution, is often of great value to their possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken."). *See generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 246 n.53 (1998) (collecting cases showing the recurrent theme that "restrictions on work constituted not only deprivations of liberty but also takings of property").

In the substantive constitutional *Slaughter House Cases*, New Orleans butchers challenged a state-granted slaughterhouse monopoly. 83 U.S. (16 Wall.) 36, 57 (1872). While the opinion was primarily addressed to rejecting the plaintiffs' Fourteenth Amendment privileges or immunities claim, the Court made short work of the plaintiffs' claim that the monopoly also violated the due process clause: "[i]t is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem advisable, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision." *Id.* at 80–81.

68. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (1690) (stating that a person owned "the labour of his body and the work of his hands," that his labor was a form of property, and that combining that labor with materials from nature was the source of other property); *see also* Ely, *supra* note 20, at 929–30 (discussing Locke's linking labor and property, and his influence on constitutional thought); *id.* at 932 ("The nascent notions of a right to work at lawful trades and to enter contracts without legislative abridgement were strengthened by the anti-slavery movement and the 'free labor' ideology of the Civil War era." (footnote omitted)).

Louisiana[69]—often seen as the beginning of the *Lochner* era. The Court in *Allgeyer* invalidated under the due process clause a conviction for making an out-of-state marine insurance contract on property then in state, with a company that had not complied with Louisiana insurance law. The Court included as part of due process liberty the right of the citizen "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."[70]

In *Allgeyer,* the substantive challenge to the statute arose as the insured's defense to Louisiana's action for a fine,[71] such that procedures would follow from the fact that traditional property was at stake. The extent to which substantive constitutional interests including "fundamental" rights, when unaccompanied by potential deprivations of natural liberty and traditional property, give rise to procedural due process protections is addressed more fully in Part III below. For now it is worth noting that, to the extent a substantive constitutional right evokes procedural due process protections, the process is directed primarily to determining whether a governmental party has violated the substantive constitutional right—e.g., whether the state's prohibition on certain insurance contracts violates the Fourteenth Amendment.

By contrast, the procedural due process protections for natural liberty and traditional property operate more broadly, because they often require procedures to determine the government's compliance with statutory or common law requisites for a deprivation—e.g., requiring government to put on proof of the elements of a crime—even when no alleged substantive constitutional violation is alleged. The vocational cases manifested this broader sweep. For example, no substantive constitutional violation was at

69. Allgeyer v. Louisiana, 165 U.S. 578, 591–92 (1897); *see also* Williams, *supra* note 21, at 20 (discussing the Court's extension of liberty interests during the period from 1897 to 1925 to include occupational liberty, the liberty of parents to educate their children, and the freedom of speech and the press); *id.* at 31 (treating occupational liberties as "securely within the class of negative liberties analogous to freedom from incarceration"); Timothy P. Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861, 904 (1982) (contrasting, based on his government as monopolist theory, government employment where government is not a monopolist to other areas including professional licensing).

70. *Allgeyer*, 165 U.S. at 589. James Ely has shown the close relationship between the right to work in one's chosen field and the right to contract. Ely, *supra* note 20, at 948; *cf.* Monaghan, *supra* note 11, at 434–35 (observing that nineteenth century theorists placed more emphasis on liberty than property in protecting economic interests); *id.* at 436 (indicating the Court treated interests in gainful employment as property as well as liberty).

71. *Allgeyer*, 165 U.S. at 579 (statement of the case).

issue when the federal court disbarred the attorney in *Ex parte Robinson* for allegedly directing a grand jury witness to disappear, but process was required to determine whether he had engaged in the alleged unprofessional conduct.[72] Similarly, in *Missouri ex rel. Hurwitz v. North*, the Court reviewed a state court decision affirming a licensing board's revocation of a physician's license for allegedly performing abortions, and held that the agency process met procedural due process requirements for determining whether the violation occurred.[73] Subsequent cases would reinforce the due process protected status of occupational interests—sometimes treated as liberty and sometimes property for purposes of the due process clauses.[74]

B. Additional Natural Law Interests

Like occupational liberty, parental rights in the "care, custody, and management of their child"[75] may be viewed as originating, to a significant

72. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 513 (1873).

73. Missouri *ex rel.* Hurwitz v. North, 271 U.S. 40, 41–52 (1926) (rejecting, inter alia, a Fourteenth Amendment procedural challenge).

74. In many of the 1950s cases, it was difficult to tease out procedural due process claims from substantive claims, particularly First Amendment claims. *See, e.g.*, Konigsburg v. State Bar of Cal., 353 U.S. 252, 273 (1957) (holding that the evidence, including that of past communist party membership, was insufficient to show bad moral character, but not deciding whether a state could deny bar admission for advocating violent overthrow of the government); Schware v. Board of Bar Examiners of N.M., 353 U.S. 232, 239 (1957) (holding as a matter of due process that the bar had not shown bad moral character based on prior communist affiliations and political and union activities). In *Greene v. McElroy*, however, substantive First Amendment interests were attenuated, because the government had revoked Greene's security clearance based on his ex-wife's views—views he disclaimed. Greene v. McElroy, 360 U.S. 474, 478 (1959). The loss of the clearance effectively excluded Greene from working as an aeronautical engineer. *Id.* at 487. The Court did not squarely decide the procedural due process issue, but rather ruled that the power to revoke the clearance without fair processes had not been delegated to the Defense Department. *Id.* at 507. The Court, however, stated, "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Id.* at 492 (internal citations omitted); *cf.* Barry v. Barchi, 443 U.S. 55, 66 (1970) (holding that a horse trainer had a property interest in his license and had to be accorded a prompt post-suspension hearing). The Court later characterized government employment protected by for-cause removal restrictions as involving property interests protected by procedural due process. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 599–601 (1972) (holding that the plaintiff's allegations that the college had a de facto tenure program, if proven, would give him a property interest in continued employment similar to a formally tenured teacher). For discussions of the cases from the 1950s and following, see generally William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Rubin, *supra* note 9.

75. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982) (citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)) (referring to the "fundamental liberty interests of natural parents in the care, custody, and management of their child").

extent, apart from the statute or common law of any state.[76] They thus, along with occupational liberty, fit within the category of other natural rights—that is, other than natural liberty and traditional property.

During the *Lochner* era, the Court recognized a substantive constitutional right "to establish a home and bring up children."[77] Based on that right, the Court in *Meyer v. Nebraska* invalidated a state law forbidding teaching the German language to children who had not passed the eighth grade.[78] In addition to substantive constitutional protections, parental rights also are protected by procedural due process even in some contexts where substantive constitutional rights are only distantly involved, as in disputes over custody allocations between divorcing parents. Because parental rights to a large extent involve substantive constitutional rights, as well as procedural protections in some contexts that may extend beyond substantive constitutional determinations, this Article returns briefly to parental rights after the discussion of the status of substantive constitutional rights as procedural due process liberty interests in the following section.

III. Substantive Constitutional Rights

Thus far this Article has discussed procedural due process liberty as natural liberty. It also has added the category of other natural law interests, including vocational and parental rights. This section focuses on the question whether substantive constitutional violations give rise to required procedures akin to those accompanying government's deliberate deprivations of natural liberty and traditional property. Stated differently: Are substantive constitutional rights procedural due process liberty interests? In particular, does an act by a government official that the Constitution prohibits the law from authorizing give an affected person an entitlement to process? As noted above, courts' requiring either judicial or

76. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (indicating that rights to family privacy had origins apart from the state); *cf. id.* at 847 (failing to reach the question whether the status of being foster parents created a liberty interest protected by procedural due process, because the procedures were not constitutionally defective even assuming such an interest).

77. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see generally* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN RIGHTS (1994) (tracing history of rights of children, and discussing fathers' common law rights of custody and control, and moves to greater emphasis on children's and mothers' interests).

78. *Meyer*, 262 U.S. at 397 (providing the statute); *id.* at 400 (seeing the defendant's "right thus to teach and the right of parents to engage him so to instruct their children . . . as within the liberty of the Amendment").

agency process when government impairs a particular interest indicates that the interest is procedural-due-process protected.[79]

This Article's initial answer was that a violation of the Constitution in and of itself did not give rise to a cause of action (or a claim for agency process). Rather, one needed a case in which the Constitution provided law to apply as a prerequisite to having any procedural entitlement to raise the constitutional issue. As to actions between citizens and government, it was generally the violation of interests in natural liberty and traditional property that gave one the cause of action in which one could raise constitutional arguments.[80] A constitutional violation standing alone, absent impairment of interests in natural liberty or traditional property, did not generally give rise to a cause of action or other claim for process; thus, one can say that a violation of a person's substantive constitutional rights was not equivalent to a deprivation of natural liberty for purposes of procedural due process.

A Expansion of Causes of Action to Raise Constitutional Claims

An expansion of causes of action occurred with the rise of the "anticipatory action," exemplified by *Ex parte Young*.[81] The parties subject to regulation anticipated state-initiated enforcement actions that would deprive them of traditional property and natural liberty.[82] But as noted above, anticipatory actions do not necessarily expand the liberty and property interests that count for procedural due process purposes.[83] Rather,

79. *See supra* text accompanying notes 12–14.

80. *See supra* notes 43–48 and accompanying text.

81. *Ex parte* Young, 209 U.S. 123 (1908).

82. *See supra* text accompanying notes 35–37. The Court answered the objection that equity courts would not enjoin a criminal proceeding by noting an exception where the equity court got jurisdiction first, and by adverting to the need to protect property rights. 209 U.S. at 161–62; *id.* at 162 ("'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity'" (quoting Dobbins v. Los Angeles, 195 U.S, 223, 241 (1904)). The Court at the time had doubts as to corporations' ability to raise liberty, as distinguished from property, concerns. *See, e.g.*, Adair v. United States, 208 U.S. 161, 172 (1908) (in reversing a criminal conviction of an individual for violating a federal law forbidding common carriers and their agents from discriminating based on union membership, stating that the Court was not "stopping to consider what would have been the rights of the railroad" under the Fifth Amendment); *cf.* Grosjean v. American Press Co., 297 U.S. 233 (1936) (enjoining a tax on newspapers on first amendment grounds, and holding that corporations were persons for purposes of equal protection and due process); Santa Clara Cnty. v. So. Pac. R.R., 118 U.S. 394, 396 (1886) (in a challenge to state taxation, stating that the equal protection clause applies to corporations).

83. The Court in *Ex parte Young* treated bringing the enforcement actions as analogous to an extrajudicial trespass. *Ex parte Young*, 209 U.S. at 167. Teasing out the basis for the action is complicated by the Court's treating a fair return on the property devoted to the public service as a highly protected property interest, such that its deprivation was in the nature of a taking. One

the expansion of anticipatory actions was more an expansion of the process that might be accorded, and perhaps required, when natural liberty or traditional property were at stake.[84]

The Court, however, sometimes allowed equity actions raising constitutional claims when the party bringing the claim was not the potential object of an enforcement action. In *Truax v. Raich*, for example, the Court sustained a Fourteenth Amendment equal protection challenge to a state law requiring employers to employ no less than eighty percent qualified voters or native born Americans.[85] Criminal penalties were directed to employers who violated the law.[86] In *Truax*, an employee threatened with discharge—not an employer threatened with enforcement—brought an action in equity to enjoin enforcement of the state statute.[87] The Court alluded to the novelty of the action, but allowed it to proceed, in part by analogizing the right to earn a living to property.[88] Of course, one might treat the plaintiff's standing to raise the equity claim

could thus conceptualize the cause of action as forestalling a potential extrajudicial deprivation of this property interest, particularly given that the penalties attached to eliciting an enforcement action might compel compliance. *See id.* at 163 (responding to the argument that the company could disobey the act one time to test the constitutionality of the act, noting that "several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid the property of the company would have been taken during that time without due process of law, and there would be no possibility of its recovery"). The property interest extrajudicially impaired, moreover, could include a loss of value rather than merely title and possession. *See* Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 213 (1984) (discussing move from merely protection of title and possession to protection of the value of property).

From a modern perspective (and putting aside utility rate regulation), an economic interest such as lost profits gives one an injury in fact which, when combined with an alleged violation of law by the defendant, may give one a cause of action quite apart from potential government enforcement actions. But economic injury in itself is not the equivalent of traditional property for purposes of procedural due process. Nor, according to Professor Merrill, are lost profits necessarily some other form of constitutional property. *See infra* note 163.

84. *Ex parte Young*, 209 U.S. at 164–65 (discussing the inadequacy of remedies at law). Because remedies by way of defense to enforcement actions may in some cases be constitutionally adequate, not all anticipatory actions are necessarily constitutionally required.

85. Truax v. Raich, 239 U.S. 33, 35 (1915).

86. The employee could be liable if he misrepresented his status. *Id.* at 35; *cf.* Wisconsin v. Constantineau, 400 U.S. 433, 434–35 (1971) (contesting a statute that forbad others to sell liquor to the plaintiff).

87. *Truax*, 239 U.S. at 36.

88. *Id.* at 37–38. The Court noted that injunctions against enforcement of criminal proceedings were allowed "when the prevention of such prosecutions is essential to the safeguarding of rights of property." *Id.* (citations omitted). In the cases cited, however, the challengers were enforcement objects. The Court continued, "The right to earn a living unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of an adequate remedy at law." *Id.*

as owing to the Court's view that the ability to work was a procedural-due-process-protected liberty or property interest in its own right,[89] as discussed in the previous section. But one may also see *Truax* as part of the gradual move toward allowing causes of action based to a large extent on the substantive constitutional violation itself.

The Court faced a similar problem in *Pierce v. Society of Sisters*, in which the Court allowed private schools to obtain an injunction against enforcement of a state law that penalized parents who failed to send their children to public schools.[90] The Court noted that the private schools were not enforcement objects under the state laws, and that loss of patronage was generally not a ground to challenge government action.[91] The Court thus did not consider the economic loss from loss of customers as the equivalent of traditional property under procedural due process. Nevertheless, said the Court, "the injunctions here sought are not against the exercise of any proper power."[92] Thus, even without alleging a threat to natural liberty or traditional property, the injunction against enforcement of the unconstitutional law was proper.

Similarly, in administrative review cases the Court sometimes allowed challenges to agency action by those who were not enforcement objects, particularly when regulations forbad the enforcement objects from engaging in certain dealings with the plaintiffs.[93] The administrative cases employed a concept of "legally protected interest" for standing, that could give claims to persons with common law interests such as contractual

89. *See id.* at 41 (on the merits of the equal protection claim, stating, "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.").

90. Pierce v. Society of Sisters, 268 U.S. 510 (1925). The Court, however, did say that the school corporations had "business and property." *Id.* at 535.

91. *Id.* at 535–36.

92. *Id.*

93. For example in CBS v. United States, 316 U.S. 407 (1942), the FCC promulgated regulations indicating that it would refuse to license broadcast stations that had certain types of contracts with broadcasting networks. *Id.* at 408. The network brought the action, although the stations were the immediate regulatory objects. The statute provided for judicial review of refusals to grant licenses. *Id.* at 416. The majority held that CBS had stated an action in equity. *Id.* at 425. (Frankfurter, J., joined by Reed, J.) Douglas, J., dissented from allowing the suit to proceed. *Id.* at 429, 446. He argued that no immediate legal sanctions followed from the order, and that "irreparable injury" or "serious damage" did not imply reviewability. *Id.* at 434, 441. He noted, however, that the network could intervene if the FCC initiated proceedings to revoke a station's license. *Id.* at 444–55; *see also* ICC v. Diffenbaugh, 222 U.S. 42 (1911), *discussed in* Stewart, *supra* note 13, at 1723 (describing *Diffenbaugh* as a case in which "grain elevator dealers were held to have standing to seek review of a Commission order forbidding the railroads to carry out certain contracts with the dealers").

interests, as well as to persons with interests a statute was designed to protect.[94]

The expansion of plaintiffs' ability to challenge governmental action without interests in natural liberty or traditional property has been ably traced by others.[95] For purposes of this article, the Justices' varying opinions in *McGrath v. Joint Antifascist Refugee Committee* ("JAFRC")[96] provide a window on remaining uncertainty at midcentury with respect to equity cases brought by those who were not potential objects of enforcement. A majority held that JAFRC could challenge, based on the First Amendment and other constitutional grounds, the Attorney General's listing it as a subversive organization.[97] Justice Frankfurter in concurrence noted that no traditional liberty or property interest was at stake,[98] and that the "the injury asserted does not fall into any familiar category."[99] He nevertheless found support for allowing the suit by nonobjects of enforcement in *Truax* and *Pierce*.[100] Justice Burton's opinion also cited

94. *See, e.g.*, Stewart, *supra* note 13, at 1725–26 (noting the rise of a legally protected interest concept, which included a notion of statutory beneficiaries such as "competitors in a regulated sector where the prevention of destructive competition was a major purpose of the administrative scheme"); Cass Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 181 (1992) (indicating that in administrative cases, people could suffer a legal wrong by showing that a common law interest or a statutorily protected interest was at stake).

95. *See generally* Stewart, *supra* note 13, at 1723–47 (describing expansions of standing); Sunstein, *supra* note 94, at 68–86 (providing standing history). Professor Van Alstyne traced the increasing ability to raise First Amendment claims through the demise of the right/privilege distinction during the mid-twentieth century, which may be seen as extending review of government actions when natural liberty and traditional property were not at stake. According to Van Alstyne, the right/privilege doctrine was primarily a substantive limit on the reach of the First Amendment, whereby government could hire and fire from public employment or withhold certain other beneficial relations based on associations and speech that it could not have punished by fines or imprisonment. Van Alstyne, *supra* note 11, at 447 (indicating that the demise of the right/privilege distinction meant "simply that a person foreclosed from some connection with government on grounds he might deem constitutionally doubtful would not be barred from testing his claim solely on basis that government is literally exempt from the Bill of Rights in administration of any public enterprise"); *see also* Terrell, *supra* note 69, at 880 (noting that the rejection of the right/privilege distinction involved the Court's determination "that other rights embodied in the Bill of Rights were paramount to any governmental interest in being able to act with a free hand").

96. McGrath v. Joint Antifascist Refugee Committee, 341 U.S. 123 (1951).

97. On the merits, a majority held the Attorney General's actions invalid, with opinions variously relying on nondelegation, *id.* at 135 (Burton, J. joined by Douglas, J.); lack of constitutional power, *id.* at 143 (Black, J. concurring); procedural due process, *id.* at 165–71 (Frankfurter, J. concurring); *id.* at 186 (Jackson, J., concurring); *id.* at 143 (Black, J. concurring); and the First Amendment. *Id.* at 143 (Black, J., concurring); *id.* at 176 (Douglas, J. concurring).

98. *Id.* at 164 (Frankfurter, J., concurring).

99. *Id.* at 157.

100. *Id.* at 154.

Truax and *Pierce*.[101] In addition, Burton relied on the notion of legally protected interests developed in administrative review cases, and treated the right of the organization to carry on its business free of defamation as such an interest.[102] Justice Jackson indicated that the JAFRC could rely on the injury to its members, who would be foreclosed from government employment.[103] The dissenters had a simpler approach. They indicated that standing would follow if the plaintiffs alleged a viable First Amendment violation, but concluded that the claim was wanting on the merits.[104]

The *McGrath* dissenters perhaps came closest to the course that the Court would eventually take as to standing. In *Association of Data Processing Service Organizations v. Camp*, the Court allowed the plaintiff organization to challenge the Comptroller of Currency's purported violation of federal banking laws in allowing national banks to sell certain data processing services. The organization alleged economic injury to their members from national banks' competing with them in the provision of such services.[105] The Court allowed the action under the Administrative Procedure Act[106] so long as the plaintiff could allege, in addition to the defendant's violation of the law, the constitutional minimum of injury-in-fact, and that the claimed injury fell within the zone of interests arguably protected by the statute.[107]

It should be noted, however, that an interest's impairment counting as an injury-in-fact—such as the economic injury from increased competition relied on in *Data Processing*—does not mean that the interest is necessarily classified as procedural due process liberty or property. Government may license a competitor or inflict other individualized injuries to future

101. *Id.* at 141 (Burton, J., joined by Douglas); *see also id.* at 143 (Black, J., concurring) (agreeing with Justice Burton as to standing based on the right to conduct their operations "free from unjustified governmental defamation").

102. *Id.* at 140–51 (Burton, J., joined by Douglas, J.).

103. *Id.* at 184–86 (Jackson, J., concurring). Jackson noted that "To be deprived not only of present government employment, but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." *Id.* at 185.

104. *Id.* at 198–99 (Reed, J., dissenting, joined by Vinson, C.J., and Minton, J.) ("If there should be a determination that petitioners' constitutional rights are violated . . . it would seem they would have standing to seek redress."). As to the procedural due process claim, the dissent similarly said there would be standing if the plaintiffs had a good claim for under the Fifth Amendment. *Id.* The plaintiff, however, had shown no deprivation of property or liberty. *Id.* at 202.

105. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152, 155, 157 n.2 (1970).

106. 5 U.S.C. §§ 551, 553-559, 701–06 (2012).

107. *Data Processing*, 397 U.S. at 152–53, 155.

profitability without the Constitution's requiring procedures in the agency or by way of judicial review.[108] Rather, in administrative review cases, it is generally the alleged violation of federal statutory law together with the APA's providing judicial review for persons aggrieved,[109] that give rise to the cause of action.

Equity actions alleging substantive constitutional violations followed *Data Processing*'s lead.[110] Effectively a plaintiff could state a claim by an allegation of a substantive constitutional violation and an injury in fact (presumably of the type the constitutional provision was designed to obviate); there was no need to allege injury to natural liberty or traditional property to state a cause of action for a substantive constitutional violation.

B. Are Substantive Constitutional Rights Themselves Liberty Interests Protected by Procedural Due Process?

How much did the standing/cause-of-action expansion mean that constitutional rights had become liberty interests for purposes of procedural due process? It is necessary to make some distinctions in discussing the extent to which causes of action create procedural due process interests. Any cause of action, so long as it is recognized by the legislature and the courts, tends to bring procedural due process protections along with it.[111] For example, if a state recognizes a cause of action for breach of a promise to marry, then the plaintiff as well as the defendant will have procedural due process rights if the plaintiff pursues the action. Some causes of action, however, are themselves constitutionally required in the sense that legislatures could not easily abrogate them without adequate substitutes either already existing or being created. This article has treated the availability affirmative causes of action (for which agency process may

108. *See* Coll. Savings v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (holding that the state's causing competitive harm by engaging in false advertising in violation of the Lanham Act was not a deprivation of property addressable by Congress under § 5 of the Fourteenth Amendment); *cf.* FCC v. Sanders Bros. Ration Station, 309 U.S. 470 (1940) (holding that a licensee could complain of the grant of a license to another, but not because the licensee had a property interest but rather because Congress made parties aggrieved able to bring suits).

109. 5 U.S.C. § 702 (2012). For a discussion of the Court's misinterpretation of the APA's person aggrieved language, *see* Sunstein, *supra* note 94, at 181–86.

110. *See* Stewart, *supra* note 13, at 1731–34, 1737 (discussing the injury in fact test in the administrative setting); *id.* at 1740 (discussing its use in constitutional cases). In the constitutional setting the Court did not rely on explicit statutory authorization for the suits, although the Court would later rely on 42 U.S.C. § 1983 as the basis for most constitutional actions against state and local officers.

111. *See infra* text accompanying notes 159–89.

provide an adequate substitute)[112] to remedy deliberate deprivations of natural liberty and traditional property as generally compelled by procedural due process.

Because many implied constitutional actions anticipate threatened government enforcement suits, they fit within the largely required set of remedies for deprivations of natural liberty and traditional property. In such anticipatory cases, one could continue to treat substantive constitutional rights as constraints on the reasons for which government may deprive a person of natural liberty or traditional property, rather than themselves as procedural due process liberty interests. The question, however, is whether constitutional actions not involving deprivations of natural liberty or traditional property, but some other form of injury in fact, are similarly constitutionally required. The modern answer seems to be that to a large extent they are.[113] This is particularly true for injunctions against ongoing governmental unconstitutional behavior. For example, the Constitution probably requires a court to entertain an action to enjoin a government officer's repeatedly drowning out a political opponent's speeches in the public square—a violation of First Amendment rights—even though neither natural liberty nor traditional property are threatened.

At least to the extent courts treat such violations of constitutional rights as often requiring process (whether by requiring causes of action or agency procedures), substantive constitutional violations resemble deprivations of natural liberty and traditional property for which processes are often required. A deprivation of one's First Amendment rights, for example, will frequently require process.[114] In other words, substantive constitutional rights are not merely limitations on the reasons that government may deprive one of natural liberty or traditional property. Rather, the violation coupled with an injury in fact—that need not constitute an injury to natural liberty or traditional property—often gives a right to adequate procedures.

112. Agency processes and judicial processes may be substitutable for one another, and the courts' requiring either judicial or agency process when government impairs a particular interest indicates that the interest is procedural due process protected. *See* text accompanying notes 12–14. The extent of such substitutability is primarily an issue of the process due, and is not a principal focus of this article.

113. *Cf. Monaghan*, *supra* note 29, at 1369 ("It is quite possible that a part of the constitutional guarantees of freedom of speech and religion, or more generally, of "liberty" and "property" as now understood, include a right to complain about the *existence* of unconstitutional legislation." (footnote omitted)).

114. *Cf. Fallon*, *supra* note 9, at 311–12 (noting that "the conventional assumption about the necessity of judicial review [of all constitutional claims] retains a substantial core of validity"); *id.* at 313 n.22 (citing authority for this assumption).

Nevertheless, the government only "deprives" (or threatens to deprive) a person of a substantive constitutional right for procedural due process purposes if the government has violated the substantive right (or threatens to violate it). It follows that procedural rights surrounding substantive constitutional liberty interests are centrally addressed to determining whether there has been, or is about to be, a constitutional violation.[115] This is a principal function of implied constitutional causes of action. By contrast, one may ultimately be "deprived" of natural liberty or traditional property without there being a violation of constitutional or nonconstitutional law. The procedural due process requirements for these interests are directed to determining whether nonconstitutional, as well as constitutional, conditions for the deprivation have been met.[116]

As a matter of the process due, the procedural due process requirements for a plaintiff's claims of substantive constitutional violations generally include the availability of judicial process.[117] Where government regulates close to a substantive constitutional line, however, the Court may require administrative procedures, in addition to potential judicial remedies, to prevent the government from crossing that line. For example, in *Speiser v. Randall*, California gave a property tax exemption to honorably discharged veterans.[118] To obtain the exemption, the veteran had to sign a state legislatively prescribed form attesting that he did not advocate the overthrow of the United States or California governments by violent or unlawful means.[119] California tax assessors denied the tax exemption to taxpayer/veterans who did not sign the loyalty oath form. The United States Supreme Court assumed that tax exemptions constitutionally might be denied to those who engaged in certain forms of

115. *See Van Alstyne*, *supra* note 74, at 1453 (under an unconstitutional conditions doctrine, "it would seem to follow that a person whose status in the public sector is threatened by administrative action should have a right to a fair hearing to make certain that the administrative action is not in fact being taken for reasons which are constitutionally improper"); *cf.* Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CALIF. L. REV. 146, 148–59 (1986) (noting that in cases after World War II, "the [Supreme] [C]ourt established that even ephemeral expectations of government benefits" could not be denied on substantively unconstitutional bases, but that these decisions were meant to protect the substantive constitutional right, not the government benefit).

116. Thus natural liberty in some ways receives broader procedural due process protections than substantive constitutional rights. Takings property, however, receives all the protections of procedural due process property, plus additional substantive protections. *Cf. Merrill*, *supra* note 7, at 959 (indicating that takings property is a narrower, more protected subset of procedural due process property).

117. *See supra* note 1144. This may be by way of judicial review of agency process.

118. Speiser v. Randall, 357 U.S. 513, 523 (1958).

119. *Id.* at 514–15.

subversive speech.[120] Nevertheless, it held that when the state "undertakes to restrain unlawful advocacy it must provide adequate safeguards to prevent infringement of constitutionally protected rights."[121] The validity of the assessors' denial of the tax exemption would "depend[] on the careful analysis of the particular circumstances" making the "procedures by which the facts . . . are adjudicated" of special importance.[122]

Procedures that protect against the crossing of constitutional lines, moreover, may focus on determining whether government officials have complied with statutory standards. For example, parental rights to the "companionship, care, custody, and management" of their children are substantively protected under the Constitution—as noted above.[123] One manifestation of these substantive rights is that states undertaking to terminate parental rights of an objecting parent must show some version of unfitness or neglect.[124] This substantive constitutional constraint, however, gives some range for legislative variation, such that standards for parental

120. *Id.* at 519–20 (assuming without deciding that the state "may deny tax exemptions to persons who engaged in the proscribed speech for which they might be fined or imprisoned" (footnote omitted)).

121. *Id.* at 521; *see also id.* at 523 (indicating that the state procedures could not put the burdens of proof and persuasion on the taxpayer); *id.* at 525 ("As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn . . . . The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied").

122. *Id.* at 520.

123. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion) (providing cases recognizing such rights); *id.* at 67 (holding that the state statute allowing anyone to apply for child visitation rights and for a court to allow such rights based on a best-interest-of-the-child standard unconstitutionally infringed fundamental parental rights); *id.* at 75 (Souter, J., concurring) (indicating that he would have affirmed the state court's facial invalidation of the statute); *see also* Prince v. Massachusetts, 321 U.S. 158, 161, 166 (1944) (although upholding the aunt's conviction for allowing her niece—of whom the aunt had legal custody—to sell on the streets, stating, "[i]t is cardinal with us that the custody, care and nurture of the child rests first with parent"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (indicating that liberty included the right "establish a home and bring up children").

124. *See* Stanley v. Illinois, 405 U.S 645, 651 (1972) (procedural due process as well as equal protection forbad terminating parental relationship without a determination of unfitness); *cf.* Smith v. Organization of Foster Families, 431 U.S. 816, 847 (1977) (declining to decide if foster parents had liberty interests in continuing their relationship with foster children, given that procedures were adequate).

A variety of circumstances may affect underlying claims of substantive and procedural entitlements in the parental setting. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 262 (1983) (approving an adoption proceeding lacking notice to a natural father who had not developed a significant relationship with his child prior to the proceedings); Michael H. v. Gerald D., 491 U.S. 110, 117–18 (1989) (plurality opinion) (rejecting a challenge by the alleged natural father who had a relationship with the child, to a state statute that more or less conclusively presumed that a child of cohabiting married parents was the child of the husband).

unfitness vary from state to state.[125] The procedural rights that attend application of the states' different statutory standards nevertheless to a large extent help to maintain the underlying substantive constitutional limits.[126]

IV. Hybrids of Substantive Constitutional Rights and Other Categories

This Article has thus far looked at three main categories of procedural due process liberty interests: natural liberty, other natural law interests, and substantive constitutional rights. Some interests, however, fit partly within the category of substantive constitutional rights and partly within the categories of natural liberty or other natural law interests. Rights to retain citizenship and attendant rights to enter and remain in the country are substantive constitutional rights that include aspects of freedom from physical restraint. Parental rights similarly have substantive constitutional dimensions and also count as "other natural law interests" for procedural due process purposes.

One might ask what difference it makes if a liberty interest falls into more than one category. But to the extent a right is a substantive constitutional right only, procedural due process protections are primarily directed to assuring that substantive constitutional law is not violated. By contrast, procedural due process requirements for deprivations of natural liberty and other natural law interests extend to assuring governmental

125. *See* HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.6, at 894 (2d ed. 1988) (noting that statutes as to involuntary termination are varied, but most include only serious parental misconduct as grounds); WALTER WADLINGTON ET AL., DOMESTIC RELATIONS LAW 815 (7th ed. 2013) (termination of parental rights is governed by state law, subject to federal constitutional constraints).

It should be noted, however, that requirements of procedures for application of statutes operating near to constitutional lines do not mean that "near miss" substantive constitutional rights receive procedural due process protection. For example, if freedom from age discrimination is not a constitutional right, the courts will not order procedures to assure that government policies do not result in age discrimination. *Cf.* Kerry v. Din, 135 S. Ct. 2128, 2133 (Scalia, J., plurality opinion) (noting that although the plaintiff did not claim that her substantive implied rights were violated, she nevertheless argued that she was entitled to procedures because the law affected her enjoyment of an implied fundamental liberty); *id.* at 2137 (criticizing Justice Breyer's dissent for arguing that liberty "includes implied rights that, although not so fundamental as to deserve substantive-due-process protection, are important enough to deserve procedural due process protection").

126. *Cf.* Santosky v. Kramer, 455 U.S. 745, 747–58 (1982) ("[B]efore a State may sever completely and irrevocably the rights of parents in their natural children, due process requires that the State support its allegations by at least clear and convincing evidence."); *id.* at 768 (requiring such a showing for the parental neglect alleged in the case); Lassiter v. Department of Social Services, 452 U.S. 18 (1981) (holding that due process did not require provision of counsel for indigent parents in all parental termination proceedings).

compliance with nonconstitutional, as well as constitutional, law. For example, procedural due process may require an agency seeking to bar an attorney from practice before it to provide a hearing on whether the attorney has engaged in statutorily forbidden conduct such as knowingly failing to cite adverse controlling authority.[127] There may be no issue of substantive constitutional law presented by the case, but rather only an issue of whether the agency has shown the statutorily forbidden conduct. The attorney's procedural due process protections would be narrower if they only extended to determining whether the attorney were being disbarred for a substantively forbidden purpose, such as for exercising First Amendment rights.[128]

A. Interests in Avoiding Removal from the Country

As mentioned above, the Court during the early twentieth century recognized some procedural rights associated with exclusion at the border and deportation (collectively "removal") of persons making colorable claims of citizenship, as well as for certain resident aliens whom the government proposed to deport.[129] Those who make colorable claims of citizenship in removal proceedings are entitled to procedural due process. The process provided to a person with a colorable claim of citizenship is generally with respect to the determination of the substantive constitutional issue of whether he is a citizen[130]—a favorable determination of which will

127. *See* text accompanying notes 63–66.

128. I.e., if one counterfactually supposed that there were no liberty or property interest in pursuing one's occupation, the attorney would not be constitutionally entitled to procedures for being barred from practice before the agency for failing to cite adverse controlling authority. He would, however, be constitutionally entitled to procedures if he alleged a substantive violation such as a violation of the First Amendment or equal protection in excluding him from practice. Of course in some ways substantive constitutional protections provide greater protections than procedural protections, because substantive protections often forbid the government from certain actions no matter what process is used. *Cf.* Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (Scalia, J., plurality opinion) (stating that implied liberties "have been given *more* protections that 'life, liberty, or property,' properly understood. While one may be dispossessed of property, thrown in jail, or even executed so long as proper procedures are followed, the enjoyment of implied constitutional rights cannot be limited at all, except by provisions that are 'narrowly tailored to serve a compelling state interest.'") (citations omitted).

129. *See supra* text accompanying notes 53–56.

130. For example, the Court has held that the government expatriation of a citizen—that is, proceedings to deprive him or her of citizenship including rights to remain—generally requires a showing of deliberate commission of an expatriating act with the specific intent to renounce citizenship. *See* Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (holding that Congress could not provide for automatic loss of citizenship by voting in a foreign election). Procedural protections attend the determination. *See* Vance v. Terrazas, 444 U.S. 252, 266 (1980) (holding that procedural due process did not require that the government prove the intentional expatriating act by clear and convincing evidence), *discussed in* David A. Martin, *Due Process and Membership*

release him from both physical detention pending possible removal as well as the physical restraint of removal from the country. For citizens, then, the procedural rights attending removal proceedings can be counted as principally directed to preserving the substantive constitutional rights surrounding citizenship.

In contrast to those with colorable citizenship claims are aliens detained at the border.[131] Unlike citizens, their exclusion from the country—although a kind of physical restraint—is not considered to be denial of a constitutional liberty interest.[132] The physical detention required to effectuate exclusion, however, does implicate natural liberty. Despite the physical detention necessary to effectuate exclusion, however, the Court has held that procedural rights of such immigrants detained at the border are statutory, not constitutional.[133]

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in the National Community Political Asylum and Beyond, 44 U. PITT. L. REV.165, 208–09 & n.157 (1983). *But cf. Vance*, 444 U.S. at 266 (while treating procedural due process as applicable, stating that "expatriation proceedings are civil in nature and do not threaten a loss of liberty").

Naturalized citizens generally receive the same protection as other citizens. *See* Schneider v. Rusk, 377 U.S. 163 (1964) (holding that Congress could not provide that naturalized citizens could lose their citizenship by three years' residence in a foreign state, given that native born citizens could reside abroad indefinitely without losing citizenship). Congress, however, can provide that fraud or illegality in obtaining naturalization can lead to denaturalization, and the Court has indicated that Congress has some leeway in prescribing defects in the initial application for naturalization that can lead to denaturalization. *See* Fedorenko v. United States, 449 U.S. 490, 506 (1981) (indicating that denaturalization was required because the statute required strict compliance with the conditions for naturalization). While the decisions prescribing procedures for denaturalization have been largely determined as a matter of statutory interpretation, Professor Martin has said they have constitutional overtones. *See* Martin, *supra* at 210. One may see the procedures as protecting some presumptive constitutional limits on denaturalization to defects that relate to the person's claim to have met the statutory standards for naturalization.

131. The discussion above puts aside questions as to persons with a previously granted a status such as permanent residency. *See infra* text accompanying notes 156–57; Landon v. Plasencia, 459 U.S. 21 (1982) (indicating that constitutional procedural due process rights were implicated for a permanent resident stopped at the border for attempting illegally to bring in immigrants). The immigration statute now provides that those stopped at the border and swearing to having been previously admitted to permanent residence, admitted as a refugee, or having been granted asylum, receive additional procedures over the baseline for expedited removal. *See* 8 U.S.C. § 1225(b)(1)(C) (2012). A determination of a credible fear of persecution by a person not claiming a previously granted status also evokes additional statutory procedures. 8 U.S.C. § 1225(b)(1)(B) (2012). It is unclear whether asylum claims evoke constitutional procedural due process. *Cf.* Munaf v. Geren, 553 U.S. 674, 701–03 (2008) (holding that the claim of American citizen petitioners being held by American forces in Iraq for crimes committed there, that they might be tortured on transfer to the Iraqi government, was properly for executive branch determination).

132. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("An alien who seeks admission to the country may not do so under any claim of right.").

133. *Id.* at 544; Nishimura Ekiu v. United States, 142 U.S. 651, 660, 663 (1892) (while the alien prevented from landing was entitled to habeas to determine if her restraint was lawful, a decision in conformity with congressionally provided procedures was lawful); Wong Wing v.

Nevertheless, the Court in the early twentieth century held that constitutional procedural due process applied to certain aliens already residing in the United States when the government proposed to deport them.[134] Unlike in cases of alleged citizenship, however, the procedures are not directed to protecting a substantive constitutional right to citizenship and the accompanying right to remain in the country. But such aliens' having taken up residence combined with the government's proposed removal (and possible detention) give those aliens a procedural due process liberty interest—one not tied to a substantive constitutional right. And the procedures accordingly are primarily directed to statutory compliance, not to protection of underlying substantive constitutional rights.[135] Thus it is possible to say that the interests of certain persons resident in the country in avoiding removal is a form of liberty interest even apart from constitutional protections surrounding citizenship.

B. Parental Interests

Part II of this Article noted that parental rights were procedural due process liberty interests. Parental rights fall into the categories of both substantive constitutional rights as well as other natural rights for procedural due process purposes.

As noted above, the Constitution provides substantive protections to parental rights to the care and custody of their children. Accordingly,

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United States, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation."); *id.* at 237 (distinguishing such temporary confinement from imprisonment at hard labor, the latter requiring judicial trial); *see generally* Zadvydas v. Davis, 533 U.S. 678, 687–88 (2001) (describing various provisions for, and restrictions on, judicial review of immigration decisions, including restrictions on the availability of habeas). Extended detention where removal to another country is no longer foreseeable may evoke constitutional protections. *See Zadvydas*, 533 U.S. at 684 (involving the attempted deportation of a resident alien based on his criminal record); *id.* at 690 (holding that habeas was available in the particular case); *id.* (holding that in light of constitutional concerns, a statute providing for detention of aliens not removed within ninety days should not be read to allow indefinite detention of a previously admitted alien when removal was no longer foreseeable); Clark v. Suarez Martinez, 543 U.S. 371 (2005) (granting similar habeas relief on statutory grounds to inadmissible aliens). *See generally* Brandon Garrett, *Habeas and Due Process*, 98 CORNELL L. REV. 47, 72, 96 (2012) (arguing that the Court's entertaining habeas petitions by aliens who have limited procedural due process rights indicates that habeas provides broader protections than procedural due process).

134. *See supra* text accompanying note 56.

135. *See* Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101–02 (1903) (indicating that a person who had been admitted subject to a determination within a year that she was a pauper was entitled to (constitutional) procedural due process), *discussed in* Motomura, *supra* note 53, at 1637. As noted above, uncertainty remains as to the degree of connection with the United States that will evoke constitutional procedural due process protections for persons beyond the border. *See supra* note 58.

procedures are required to protect constitutional limits on divesting those rights—for example in state-initiated proceedings to terminate parental rights for abuse and neglect. Parental rights, however, presumably evoke procedural protections even when substantive constitutional limits are much further in the background—for example, with respect to issues of allocating child custody in divorce.[136] Procedures in custody determinations seem more directed to determining the application of standards supplied by state law regarding custody than to maintaining substantive constitutional limits such as the abuse and neglect limits for state termination of parental rights. Parental interests thus may be characterized as a hybrid for procedural due process purposes of constitutional rights and other natural law interests.[137]

V. Positive Liberty Interests

None of the liberty interests discussed so far—natural liberty, natural law interests besides natural liberty, substantive constitutional rights, hybrids—are at their core statutorily created. By contrast, property interests tend to derive more from statutes. Even traditional property, often seen in the past as more presocietal, is now treated as largely deriving from state law.[138] Professor Merrill thus defines "takings property"—generally corresponding to what this article calls traditional property—as existing where "nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from interfering with specific assets."[139] Even more clearly deriving from statutory sources is what Merrill calls entitlement or procedural due process property. In the mid-twentieth century, the Court in cases such as *Goldberg v. Kelly*[140] and *Perry v. Sindermann*[141] determined that certain statutory entitlements such as welfare payments and tenure-protected government employment were property rights that could evoke procedural due process protections. Merrill placed such interests within his category of entitlement property, existing where "nonconstitutional sources of law confer on the claimant an

136. *See* May v. Anderson, 345 U.S. 528, 534 (1953) (holding that Ohio was not required to give full faith and credit to an ex parte decree awarding custody of children). *See generally* 28 U.SC. §§ 1738A–1738B (2012) (prescribing requisites for child custody and support orders to be given full faith and credit). A parent, moreover, generally would have rights to the intercession of the courts were another person to abscond with a child.

137. The status of marriage is discussed in Part VI, *infra*, which addresses the Court's decision in Kerry v. Din, 135 S. Ct. 2128 (2015).

138. *See supra* note 15.

139. *Id.* at 893, 969.

140. Goldberg v. Kelly, 397 U.S. 254 (1970).

141. Perry v. Sindermann, 408 U.S. 593 (1972).

entitlement having a monetary value that can be terminated only upon a finding that some specific condition has been satisfied."[142]

The recognition of statutorily created (or "positive") entitlements that are protected as procedural due process property raises the question of the extent to which "positive" liberty interests exist. A positive liberty interest, as used in the due process literature, means a liberty interest that derives from nonconstitutional law, and particularly from statutes (although to an extent from common law sources as well).[143] A related question is the extent to which statutorily created causes of action should be treated as procedural due process interests.

A. Recognized Positive Liberty Interests

The fact that protection of recognized liberty interests frequently involves assuring that statutory criteria for deprivation are met does not mean that the statutory criteria themselves are positive liberty interests. For example, if one is required to have a license to drive a car, the processes associated with licensing and suspension of licensing may be seen as tied to the criminal and civil punishments that attend driving without a license rather than to a positive liberty interest in driving a car if one meets the statutory criteria.[144] Similarly, one would not ordinarily say that, because the state requires certain qualifications to be licensed as a barber, there is therefore a positive liberty interest created by statute in being a barber if one meets those qualifications. Such a formulation would tend to suggest that all individualized statutory interests hedged by limits on official discretion are constitutional procedural due process interests.[145]

142. *Merrill*, *supra* note 7, at 893, 961.

143. *See id.* at 948 (discussing positive liberty interests).

144. *Cf.* Bell v. Burson. 402 U.S. 535 (1971) (invalidating as violative of procedural due process a state's requiring an uninsured driver to put up a bond or face suspension of his license if, after an accident, someone filed a report indicating a claim for damages, when the state did not allow the licensee to present evidence of lack of fault at the administrative hearing on suspension). Several scholars have treated *Bell* as a manifestation of the Court's treating matters sufficiently important to individuals as protected by procedural due process, an approach that the Court soon abandoned. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 833, 844, 859 (6th ed. 2013); *Monaghan*, *supra* note 11, at 407 (treating *Bell* as the "high-water mark" of using a pragmatic assessment of importance to the individual as critical to procedural due process); *id.* ("*Bell* wholly eschewed a tight, textually-oriented examination of the interests secured by the due process clause."); *cf.* Wooley v. Maynard, 430 U.S. 705. 715 (1977) (referring to driving an automobile as "a virtual necessity for most Americans"). *But cf.* Rubin, *supra* note 9, at 1064 n.102 (characterizing *Bell* as "an irrebuttable presumptions case, not a true procedural due process case").

145. *But cf. Rubin*, *supra* note 9. As discussed *infra* note 181, Rubin would treat interests as to which the governmental determination was sufficiently individualized and nondiscretionary as procedural due process protected.

Rather, it seems preferable to say that a person has an occupational liberty interest, that the state has substantial leeway to restrict that liberty by statute, and that the application of those restrictions to individuals gives rise to procedural due process protections.

Of course there are some recognized positive liberty interests. As discussed below, however, the interests that clearly fit in that category arguably reinforce the generally nonstatutory nature of liberty interests. Positive liberty interests tend to arise in circumstances where the normal presumptions of freedom from physical restraint have been dramatically altered. Even in such contexts, the Court has kept positive liberty interests within narrow bounds, to avoid the problem of converting statutory limits on discretion into broad sources of constitutional procedural rights.

The principal manifestation of positive liberty interests is in the prisoner context. In that setting, the judicial system has already deprived the convicted person of natural liberty, presumably in accordance with procedural due process.[146] When, however, state statutes or regulations prescribe nondiscretionary standards as to some significant alteration of the constraints of imprisonment,[147] procedural due process may require the state to provide procedural safeguards to assure compliance with those standards.[148] For example, if the state accords parole which can be revoked under statutory conditions, the prisoner's statutorily created interest in the

146. *See* Meachum v. Fano, 427 U.S. 215, 222–23 (1976) (holding that not all adverse changes in the conditions of confinement evoke due process protections, given that conviction means that the prisoner has constitutionally been deprived of his liberty).

147. The Court's cases generally have involved prisoners' complaining about increased levels of constraint, or of the loss of a previously granted reduction of constraint such as parole or good time credits. *See, e.g., id.* at 225 (unsuccessful claim as to transfer to a higher security prison); Wolff v. McDonnell, 418 U.S. 539 (1974) (holding revocation of good time credits was subject to constitutional procedural due process); Olim v. Wakinekona, 461 U.S. 238 (1983) (unsuccessful claim as to interstate transfer because the transfer decision remained discretionary). The Court has also indicated that statutes or regulations providing for nondiscretionary reductions of current constraints, as by parole, could evoke procedural due process protections. *See* Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 9–11 (1995) (noting that parole release as opposed to revocation was often no more than a hope, but that a statute may establish protectable expectations of parole release); *see also id.* at 12, 16 (accepting that "the expectancy of release provided in this statute is entitled to some measure of constitutional protection," but holding that the inmates received the process due); *but cf.* Ky. Dept. of Corrs. v. Thompson, 490 U.S. 454 (1989) (holding that regulations were not sufficiently mandatory to give inmates an interest in receiving certain visitors).

148. *See Merrill, supra* note 7, at 948 n.247 ("The basic idea is that even in circumstances in which individuals have no natural liberty because, for example, they have been convicted of a crime and sentenced to prison, independent sources such as state law can give rise to liberty interests protected by due process."); Comment, Thomas O. Sargentich, *Two Views of Due Process: Meachum v. Fano*, 12 HARV. C.R.-C.L. L. REV. 405 (1977) (discussing an entitlement and an impact view of inmate due process rights).

restoration of his natural liberty entails that the state provide adequate process for revocation.[149]

But it is not every nondiscretionary standard for altering the physical constraints of imprisonment that gives rise to positive liberty interests, although Court decisions for a time suggested as much.[150] The Court abandoned that approach in *Sandin v. Conner*, in which it held in the prison discipline setting, that positive liberty interests would only attach when regulations limiting discretion impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[151] Thus routine prison discipline such as the segregated confinement at issue in *Sandin*—as distinguished from more significant alterations of constraints such as loss of good time credits—does not generally give rise to constitutional procedural protections.[152] The *Sandin* decision responded to the problem of creating "too much liberty"[153] by too readily attaching constitutional process to regulations limiting prison officials' discretion. The Court reasoned that focusing on nondiscretionary standards alone would discourage states from codifying prison management procedures,

149. *See* Morrissey v. Brewer, 408 U.S. 471 (1972) (prescribing procedures for parole revocation).

150. *See* Sandin v. Connor, 515 U.S. 472, 479–81 (1995) (discussing the approach of the Court that emphasized mandatory versus discretionary nature of state regulations).

151. *Id.* at 484.

152. *Id.* at 473–74, 486. *Sandin* indicated that there was a three-tiered structure for prison liberty interests: (1) Prison regulations that limit discretion as to various forms of routine discipline and punishment will not create liberty interests; (2) Statutes and regulations that limit discretion as to sufficiently significant interests, e.g., the revocation of good time credits and parole, entail "positive" liberty interests; (3) State actions that would subject the prisoner to conditions outside the range of conditions of confinement entailed in the prison sentence—such as when the state proposes to transfer a prisoner to a mental hospital—affect residual constitutionally-protected liberty interests. *See id.* at 484 ("We recognize that the state may under certain circumstances create liberty interests which are protected by the due process clause.... But these interests will be generally limited to freedom from restraint which, while not exceeding the sentences in such an unexpected manner as to give rise to protections by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."); Vitek v. Jones, 445 U.S. 480 (1980) (holding that transfer of a prisoner to a mental hospital gave rise to constitutional procedural due process); *cf.* Swarthout v. Cooke, 131 S. Ct. 859 (2011) (indicating that although parole was a state created liberty interest, the process due was judged by federal criteria rather than state-law procedural criteria); *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 520 (7th ed. 2015) (analogizing to Merrill's treatment of property interests).

153. *See Merrill*, *supra* note 7, at 966. The problem of too much liberty or property can result if a proposed definition of protected interests extends procedural claims more broadly than the Court considers desirable, and particularly when seemingly trivial claims would be included. *See id.* at 931–32; *see also id.* at 892, 923 (noting that overreliance on positive law sources can create problems of both too much and too little liberty or property).

and would involve federal courts in the day-to-day management of prisons.[154] Now, a prisoner needs to show not only nondiscretionary standards, but also that they relate to a very significant alterations of constraints.[155]

It might also be possible to characterize some due process interests in the context of immigration as positively created. As discussed above, many aliens stopped at the border and detained pending removal fall outside of constitutional procedural due process protection. They lack the baseline of freedom of access to the country and freedom from physical restraint (at least pending removal) that citizens enjoy. Those admitted to permanent residency, however, have constitutional procedural due process rights even when stopped at the border for alleged illegality.[156] The removal determination will ultimately turn on statutory criteria, but constitutional procedural rights will attend the determination. Thus, one could characterize their interests as positive liberty interests protected by procedural due process.[157]

The Court, however, has not generally treated statutes limiting immigration officials' discretion as creating positive liberty interests. Attaching constitutional procedural due process to such statutes would give potential constitutional procedural claims to most aliens seeking entry into the United States. The specter of "too much liberty" looms in the immigration context[158] as it does in the prison context, and procedural rights associated with immigration thus remain primarily statutory.

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154. *Sandin*, 515 U.S. at 482.

155. *See* Merrill, *supra* note 7, at 966 (stating that positive liberty interests in the prison context now require that the interest must be "(1) protected by non-constitutional rules that cabin official discretion, and (2) the change in status with respect to the interest must entail a 'grievous loss' to the inmate").

156. Landon v. Plasencia, 459 U.S. 21 (1982) (indicating that constitutional procedural due process rights were implicated for a permanent resident stopped at the border for attempting illegally to bring in immigrants); *see also* Martin, *supra* note 58, at 102–09 (arguing that lawful permanent residents have higher claims for procedural protections than the other noncitizen categories); Martin, *supra* note 131, at 215 n.190 (noting that Congress could eliminate the category of permanent residence and thereby vitiate any liberty or property interest); *cf. supra* note 131 (indicating that under the statute, those claiming a prior grant of refugee status are treated similarly to those claiming a prior grant of permanent residence).

157. Meeting statutory standards in some circumstances will put one in a category of those who have substantive constitutional rights, with the procedures that attend substantive constitutional rights. For example, naturalization entitles one to constitutionally based rights of citizens. *See supra* note 130. As indicated above, the standards for determining that there was fraud or illegality in the initial grant of naturalization appear to be somewhat less substantively constitutionally constrained than are governmental attempts to take away citizenship for acts subsequent to naturalization. *Id.*

158. Professor Martin has discussed problems with giving to excludable aliens the same procedural rights as apply to others: "We are talking about literally everyone in the world. . . .

B. Purely Statutory and Other Legislatively Abrogable Causes of Action

1. Causes of Action Generally

It might be supposed that statutory causes of action often create positive liberty interests. Professor Merrill addressed the extent to which causes of action should be considered property interests, and concluded that generally one should look through a cause of action to see if the underlying interest it protects meets one of his definitions for property.[159] He also instructed that the underlying interest needs to meet a property definition without taking into account the processes for its protection provided by statute.[160] Under Merrill's framework, then, the grant of process entailed in the legislature's supplying a cause of action does not in itself mean that an underlying property interest has been created.

It would seem to follow from Merrill's analysis that if the legislature were to abrogate the cause of action for trespass to real property, that abrogation would raise constitutional takings and due process issues, because the cause of action protects underlying takings property.[161] But many causes of action do not implicate underlying property interests. For example, Merrill stated that the plaintiff/competitor's Lanham Act false advertising claim at issue in *College Savings v. Florida Prepaid Postsecondary Education Expense Board*[162] was not constitutional property

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Even with an augmented border patrol or wider use of interdiction at sea, setting foot within the United States will remain a distinct possibility for potentially huge numbers of the world's populace whenever poverty, overcrowding, oppression, disappointment, hope, advertising, or adventurousness makes them sufficiently determined. Moreover, procedural cumbersomeness probably only makes the numbers problem worse, by increasing the attraction of migration for those who would test the limits of the system." *See* Martin, *supra* note 130, at 180–81 (footnote omitted).

159. Merrill, *supra* note 7, at 989 ("Perhaps a sounder approach would focus not on the cause of action, but rather on the underlying interest that the cause of action seeks to vindicate, and would ask whether the underlying interest is itself property. Only if the underlying interest is property would abrogation of a cause of action (without affording equivalent protection) trigger substantive due process review based on a deprivation of property." (footnotes omitted)).

160. *Id.* at 960 ("[T]he definition is couched so as to exclude nonconstitutional procedural rules associated with statutory entitlements, and hence avoids the positivist trap associated with the bitter-with-the-sweet thesis."); *see also id.* at 924 (indicating that the notion "that due process rights should expand and contract with nonconstitutional procedural provisions" would "transform due process into the principle of legality"); *id.* at 928 (indicating that the laws prescribing procedures are not relevant to the patterning definitions). Presumably, however, procedures and causes of action may help generate expectations that may influence decisions as to what counts as property. *Cf. id.* at 937–39, 955, 961, 963, 978 (describing role for societal expectations in recognition of property interests).

161. *See supra* note 8.

162. Coll. Savings v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

under his definitions.[163] He also concluded that the statutorily created interest in being free from handicap discrimination at issue in *Logan v. Zimmerman Brush*[164] was not property. He suggested, however, that plaintiff's claim to be free from handicap discrimination might implicate a liberty interest.[165]

One can conclude—using Merrill's methodology—that causes of action vindicating underlying liberty interests that fall into the previously discussed categories (natural liberty, other natural law rights, constitutional rights, and hybrids) implicate liberty interests. The question with respect to this section, however, is whether statutorily created causes of action—causes of action that do not vindicate underlying liberty or property interests—should be seen as some form of positive procedural due process protected interest (whether denominated liberty or property).

Court actions generally put defendants at risk of either monetary liability or injunctions with potential contempt sanctions, and thus defendants ordinarily have traditional property and liberty interests at stake in litigation. Therefore, requirements of procedural due process—as to defendants—are a given. The question here is to what extent a plaintiff's statutory claim should be seen as an interest protected by constitutional procedural due process.[166]

For an example of a cause of action with little apparent pretense to vindicating liberty or property, consider a suit seeking judicial review of an agency's decision to approve logging on public lands, brought by an individual who enjoys hiking on those lands and who is the beneficiary of federal laws that the agency's decision allegedly violates. While Merrill

163. *See* Merrill, *supra* note 7, at 988–90 ("Because the Bank had no entitlement protected by nonconstitutional law to any share of future customers or revenues, its cause of action under the Lanham Act protected at most an interest sounding in tort. On this view . . . the Court correctly concluded that the College Savings Bank had no property at stake in the controversy . . . ."); *cf. id.* at 967 n.299 (indicating that procedural due process would only be present as to benefits claims when the "state seeks to terminate a presently existing entitlement").

164. Logan v. Zimmerman Brush, 455 U.S. 422 (1982).

165. Merrill, *supra* note 7, at 989 n.373.

166. *See* Beerman, *supra* note 11, at 302 (arguing that "all causes of action are property"); *id.* ("A cause of action is something of value which in some circumstances may be sold; it is property for purposes of the takings and due process clauses, first, because the holder of a cause of action has a legitimate expectation that the claim will be recognized by state law, and second, because all property is defined by the cause of action that is available to assert the property right."). Edward Rubin has argued that causes of action are the paradigm for procedural due process interests without the necessity of employing separate categories of liberty or property. Rubin, *supra* note 9, at 1046 (arguing that procedural due process inquiries should ask if interests are sufficiently like causes of action); *cf.* Van Alstyne, *supra* note 11, at 487 (stating that "the ideas of liberty and of substantive due process my easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means").

directs that an interest should fit one of his definitions of property apart from statutorily provided processes,[167] the aesthetic plaintiff would have little claim to constitutional procedural due process were it not for statutes and court decisions thereunder giving her a cause of action.[168] What is more, the legislature could deprive the plaintiff of both agency and court procedures, even retroactively, while leaving in place laws requiring preservation of forests to be administered by an agency without aesthetic interest challengers.[169]

Nevertheless, so long as the legislature and courts recognize the aesthetic plaintiff's cause of action, the courts will accord her judicial process.[170] And if she has such a cause of action, constitutional procedural due process may add to the procedures that courts or legislatures have given her. She could complain of due process violations if, for example, the rules or rulings of a court failed to provide her with adequate notice of hearings or opportunities to argue her case.[171]

Perhaps one should see the procedural protections accompanying such causes of action as merely meaning that judicial bodies are only authorized to proceed in ways that are fair—no matter what interest the plaintiff seeks to vindicate.[172] Alternatively, one could treat purely statutory causes of action as a *sui generis*, limited form of procedural due process interest, even if a common and significant one. As between classifying the interest as property or liberty, property may be a somewhat better fit because well-accepted forms of property often take their origins in statutes.[173] Whether one calls the interest liberty or property, its limited nature means that the

167. *See supra* note 160.

168. *See* Rubin, *supra* note 9, at 1133–34 (treating statutory grants of process as giving a constitutional procedural due process interest).

169. *See* Battaglia v. General Motors Corp., 169 F.2d 254 (2d Cir. 1948) (holding that retroactive termination of a statutory claim did not violate due process protections); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1057 (2006) (indicating that purely statutory claims can be retroactively divested); *cf.* Merrill, *supra* note 7, at 958 (indicating that entitlement property is legislatively abrogable).

170. *See* Rubin, *supra* note 9, at 1044 (observing that the interests protected by due process seem clear enough for civil and criminal trials).

171. For example, if a court were to dismiss plaintiff's claim without notice, lawyers would likely say that due process was not accorded, not merely that the Federal Rules of Civil Procedure were violated. If legislation governing the conduct of judicial review of the agency's decisions provided for dismissal without notice and an opportunity to respond, lawyers would likely view the legislation as violating procedural due process. *See infra* note 182.

172. One might try to source the requirements of process in Article III rather than in procedural due process clauses. The Court, however, has indicated that procedural due process applies to a plaintiff's purely state statutory claim that proceeds in state agencies and courts, as in Logan v. Zimmerman Brush, 455 U.S. 422 (1982).

173. *See supra* text accompanying notes 138–42.

plaintiff primarily gets what the legislature gives her: a cause of action with attendant processes. But beyond what the legislature provides, constitutional procedural due process may add to those procedures for as long as the cause of action is recognized.[174]

Logan v. Zimmerman Brush provides a possible illustration of the due process status of statutory causes of action.[175] In *Logan*, the state legislature had granted individuals a statutory entitlement to be free from handicap discrimination in employment—to be determined in formal agency adjudicative process with judicial review and with possible remedies of back pay and reinstatement.[176] There, the plaintiff began the process by filing a handicap discrimination complaint against his employer in the state agency. The Illinois Supreme Court held that the agency's failure to convene a hearing within the 120 days provided by the state statute required dismissal of plaintiff's claim.[177] The United States Supreme Court, however, held that the dismissal violated the plaintiff's procedural due process rights.[178]

Some commentators have suggested that the Court's decision indicated that the plaintiff's individualized statutory entitlement to be free of handicap discrimination in private employment was a positively granted liberty interest, to which the state must accord adequate process.[179] The Court, however, treated the plaintiff's claim as implicating a legislatively

174. One may add that even while such statutorily created actions are recognized, the interests protected by the action do not generally give rise to freestanding causes of action other than that conferred. *Cf.* O'Bannon v. Sec'y of Pub. Welfare, 447 U.S. 773 (1980) (holding that the Medicaid statutes and regulations did not give patients a right to be heard before the facility they were in was disqualified from receiving payments). Nor does Congress's purporting to create a cause of action create something sufficiently like property or liberty to allow Congress to confer standing without an injury in fact. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Town of Castle Rock v. Gonzalez, 545 U.S. 748, 764 (2005) (stating that a statutory entitlement merely to procedures cannot support standing). *But cf.* Sunstein, *supra* note 94, at 235 (arguing that congressional creation of a cause of action is sufficient for constitutional standing).

175. Logan v. Zimmerman Brush, 455 U.S. 422, 425 (1982).

176. *Id.* at 424–25.

177. *Id.* at 426–27.

178. *Id.* at 429, 434.

179. *See supra* text accompanying notes 164–65. Professors Stewart and Sunstein suggest that *Logan* presented an example of the Court's treating a statutorily protected interest as a procedural due process interest, when the statute gave an unambiguous entitlement but the private rights was totally inadequate. Stewart & Sunstein, *supra* note 26, at 1287–88; *see also id.* at 1288–89 (suggesting that private parties may have due process rights to demand agency enforcement (an initiation right), when statutory rights are contemporary equivalents of core common law rights, such as freedom from racial discrimination); *id.* at 1308 (also suggesting the possibility of constitutional protection for regulatory entitlements, akin to protections for new property entitlements).

granted cause of action, which the Court treated as property.[180] *Logan* thus may merely represent an example of a statutorily granted cause of action calling for procedural due process—a process that may go somewhat beyond what the legislature afforded.[181] If even the aesthetic plaintiff discussed above has procedural due process interests when she pursues a court action based on federal environmental laws,[182] then the plaintiff in *Logan* would have similar interests. One need not conclude that the *Logan* decision reflects a special positively created liberty interest in being free from handicap discrimination. Rather, one could say that causes of action create a limited form of procedural due process interest.

2. *Arguments for Treating Causes of Action and Related Statutory Entitlements as Less Limited Forms of Due Process Interests*

Some commentators, however, would treat causes of action less as limited-purpose procedural due process interests, but rather as bringing along more of the attributes of traditional property and natural liberty. Professor Jack Beerman in particular has argued that a cause of action is a species of takings property. If a tort action would be available against private parties for a particular harm, but there is no action available against the government or its officers when they inflict similar harm, government has taken property under the Fifth Amendment as applied through the

180. *Logan*, 455 U.S. at 429–30, 433–34.

181. This analysis comports with Professor Rubin's approach to procedural due process interests. He treats the cause of action as the paradigmatic interest protected by procedural due process. Rubin, *supra* note 9, at 1046. Rather than looking for resemblances of statutorily created interests to what he sees as outmoded notions of property or liberty, he would have courts ask if a statute creates interests resembling a cause of action. *Id.* at 1046–47. A statutorily created interest could be protected by procedural due process if the government's determination were sufficiently nondiscretionary and sufficiently individualized. *Id.* at 1078, 1109, 1115–19. Thus, as to *Logan*, he says, "To hold that the cause of action is a property right . . . adds nothing useful to the analysis, since it is the cause of action that creates the property right in the first place. . . . Liberty and property are simply not useful concepts in this context." *Id.* at 1088 (footnotes omitted).

Using his test—sufficiently nondiscretionary and individualized—Rubin sweeps in many interests that are far removed from formal trials and formal administrative hearings. For example, he would extend procedural due process protections to areas of prison discipline and status changes that the Court has held to be outside of constitutional protection. *Id.* at 1132, 1152, 1176. But, as Merrill has argued, relying too much on positive law sources to define interests protected by procedural due process ends up protecting trivial interests, as occurred in prison discipline cases. Merrill, *supra* note 7, at 931–32; *see also supra* notes 150–55 and accompanying text.

182. For example, consider a federal statute providing that aesthetic plaintiffs could file an action to question the agency's logging decisions, but that the action would abate if the government failed to forward the administrative record to the court within a particular time.

Fourteenth.[183] Beerman focused his critique on *Paul v. Davis*,[184] in which the Court held that reputation was not a procedural due process liberty interest. But his reasoning would seem to extend to statutory claims sounding in tort as well, such as the claims against the state for false advertising that were at issue in *College Savings*.[185]

The liability of officers for their common law torts on similar terms as private parties is, as Beerman observes, a classic description of the rule of law.[186] This description, however, best fits with respect to trespass actions for deliberate, extrajudicial invasions of traditional property and natural liberty (and bodily integrity). In many circumstances, due process requires the opportunity for redress for the invasion of such interests whether by private or public parties.

By contrast, common law or statutory causes of action protecting other interests, such as reputation or business relations, tend not to be constitutionally required against either public or private parties. With less constitutional necessity for plaintiffs to have causes of action against anyone at all—as is arguably the case for defamation claims[187]—there may

183. Beerman, *supra* note 11, at 283 ("In this article, I argue that state sovereign and official immunities, insofar as they bar recovery when private parties would be liable for similar conduct, are unconstitutional under the takings clause of the fifth amendment, as applied to the statutes under the fourteenth." (footnote omitted)); *cf.* Monaghan, *supra* note 11, at 427 (stating that Paul v. Davis, 424 U.S. 693 (1976), reversed the presumption that a common law tort is an interference with liberty).

184. *Paul*, 424 U.S. at 693; *cf.* Siegert v. Gilley, 500 U.S. 226, 228, 233 (1991) (while indicating that a government official's stigmatizing an employee at the time of discharging the employee might give rise to a procedural due process liberty interest, the official's later providing an extremely unfavorable report on the plaintiff's job performance did not).

185. *See* Beerman, *supra* note 11, at 306 (treating an interest in reputation that has a cause of action associated with it as equivalent to a new property claim); *see also* Coll. Savings v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). By focusing on tort claims, Beerman avoids the problem of the asymmetry between individuals' contractual remedies against government and private parties.

186. *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 189 (8th ed. 1915) ("With us every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.").

187. *Paul* has been criticized for its treatment of precedents that indicated that reputation was a liberty interest protected by due process. *See, e.g.*, David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 328 (1976) (suggesting that the interest in buying liquor—as distinguished from reputation—was not important in *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)). The case law at the time of *Paul* would have easily supported the plaintiff's due process claim, and reputation could readily fit within this article's "other natural law interests" category. Nevertheless, those precedents were not of ancient vintage. When the Court gave protections to reputation in the 1950s loyalty cases, the inclusion was recognized as somewhat novel. One of the initial cases was *Joint Antifascist Refugee Committee v. McGrath*, 341 U.S. 123 (1953), in which the Court struggled with whether a claim existed where natural liberty and traditional property were not at issue. *See supra* text accompanying notes 95–104.

be more room for legislatures and courts to distinguish among potential classes of defendants. For example, governmental law enforcement necessarily entails more harm to private reputation than acts by private parties, such that courts did not always provide equivalent defamation actions as against public and private parties.[188] Rather, the courts have frequently treated officials as absolutely immune from defamation actions.[189] If many causes of action represent only a limited form of procedural due process interest, then there is no inevitable requirement that a cause of action allowed as against some class of defendants should be allowed against another.

VI. *Kerry v. Din*

In *Kerry v. Din*, the State Department denied Din's husband an immigrant visa, citing a general statutory provision excluding persons who had engaged in terrorist activity. Din's husband, as an unadmitted[190] and nonresident alien,[191] had no liberty interest in access to the United States that would entitle him to constitutional procedural due process.[192] Din, however, claimed that because she was a citizen, she had a procedural due process liberty interest in residing with her husband in the United States, which entitled her to a more specific explanation of the government's reasons for denying her husband a visa.

Although not directly claiming any violation of substantive constitutional rights, Din relied to a large extent on substantive constitutional cases.[193] Indeed, the Court's decisions as to liberty interests

Indeed, Frankfurter's grievous loss formulation seemed to be a way to avoid treating defamatory harms as procedural due process interests. *McGrath*, 341 U.S at 137 (Frankfurter, J., concurring).

188. *See* Armacost, *supra* note 11, at 622 ("A rule of potential liability for every official misstatement, erroneous arrest, or dismissed charge would seriously hamper legitimate law enforcement.").

189. *See* Arno C. Becht, *The Absolute Privilege of the Executive in Defamation*, 15 VAND. L. REV. 1127, 1128–35 (1962) (indicating that English cases sometimes supported absolute immunity and sometimes something less); *id.* at 1135–36 (indicating that there were few federal cases in the nineteenth century, but suggesting that the Court seemed unfavorable to absolute privileges); *id.* at 1136–48 (discussing Spalding v. Vilas, 161 U.S. 483 (1896), as giving a broad reading to absolute executive privilege, and indicating that subsequent cases also gave a broad privilege—which Becht argues was unwarranted).

190. *See supra* text accompanying notes 156–57 (discussing the Court's recognition of constitutional procedural due process rights for those admitted to permanent residency).

191. *See supra* text accompanying note 56 (discussing the Court's recognition of constitutional procedural due process rights for certain aliens already residing in the United States).

192. *See* Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (Scalia, J., plurality opinion); *supra* text accompanying notes 131–33.

193. Brief for Respondent at 33–36, 46, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13–1402).

in marriage are primarily substantive.[194] For example, the Court in *Loving v. Virginia* invalidated prohibitions on interracial marriage.[195] More recently, in *Obergefell v. Hodges*, the Court invalidated prohibitions on same-sex marriage.[196] And in a case involving family cohabitation—*Moore v. City of East Cleveland*—the Court invalidated a statute that allowed only certain relatives to occupy a single dwelling unit.[197] Substantive constitutional claims, however, imply a right to process primarily to determine whether there was a constitutional violation, and Din did not claim that her substantive constitutional rights were violated.[198]

One might, however, see *Kerry* as arguing for a hybrid liberty interest, where some aspects of the interest are substantively constitutionally protected, while other aspects fit another category of liberty that receives procedural protections as to the application of statutory criteria for their impairment. For example, this Article characterized parental rights to custody and control as a hybrid of substantive constitutional and other natural law rights. While the cases addressing procedural protections for parental rights are largely directed to keeping termination of parental rights within substantive constitutional limits of abuse and neglect, procedures are also presumably required for custody allocations that lack such hard-edged substantive limitations.[199] One might see marriage as similarly hybrid—that is, there are substantive constitutional limitations prohibiting certain state restrictions on marriage, and beyond that some procedural due process

194. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 94–95 (1987) (invalidating a regulation that prohibited most prisoners from marrying); Zablocki v. Redhail, 434 U.S. 374, 410–11 (1978) (invalidating a law forbidding marriage by a person in arrears on child support); *cf.* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the substantive privacy right to use contraception was not limited to married persons); Califano v. Jobst, 434 U.S. 47, 58 (1977) (rejecting a Fifth Amendment equal-protection-type challenge to a statute terminating certain Social Security benefits upon marriage).

195. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding Virginia's prohibition on interracial marriages violative of equal protection and (substantive) due process).

196. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (holding prohibitions on same sex marriage violative of equal protection and (substantive) due process).

197. Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1972).

198. *See* Kerry v. Din, 135 S. Ct. 2128, 2133–34 (2015) (Scalia, J., plurality opinion); *id.* at 2142 (Breyer, J., dissenting) (indicating that Din sought procedural, not substantive, protection). In any event, Din more or less obtained a determination that neither her substantive nor procedural constitutional rights were violated. *See id.* at 2134–36 (Scalia, J., plurality opinion) (holding that there was no substantive liberty interest in a citizen's cohabiting in the United States with an alien spouse); *id.* at 2139 (Kennedy, J., concurring) (not deciding if Din had a liberty interest because she had received such process as was due); *see also* Block v. Rutherford, 468 U.S. 576, 586–89 (1984) (holding that even low-risk pretrial detainees had no substantive constitutional right to contact visits with family members, because the prohibition was reasonably related to the security of the facility).

199. *See supra* text accompanying notes 136–37.

limitations when government takes certain other actions affecting marriage.[200]

Supreme Court cases addressing procedural requirements relating to marriage (absent monetary and child custody claims) primarily involve marriage dissolution, and then, primarily the issue of jurisdiction. The domicile of the plaintiff spouse suffices for due process and interstate recognition[201]—a lighter requirement for jurisdiction than is the case for most other judicial decrees. In addition to jurisdiction in the decreeing court, procedural due process requires notice to the defendant and a potential opportunity to be heard.[202]

But even if some aspects of marriage are protected by procedural due process, those protections are with respect to state regulation of marriage itself, such as by a divorce decree. Such procedural protections do not extend to governmental action that incidentally, even if dramatically, affects the marital relationship.[203] Government may take a number of measures affecting a spouse that will affect interests in marital cohabitation for the other spouse, without creating procedural due process interests in the other spouse. For example, government may put Spouse One in prison for violation of the criminal law without invoking procedural due process protections for Spouse Two. Similarly, the government's barring Din's husband from the country did not give rise to procedural due process protections for Din.

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200. Marriage is a legal status, but it might be thought to have its origins outside of the law of the state or federal governments. Therefore, it might be treated as in the category of "other natural law rights."

201. *Cf.* Williams v. North Carolina, 325 U.S. 226, 229–30 (1945) (holding that while an ex parte divorce decree could be based on the domicile of one of the spouses, another state did not violate full faith and credit by allowing collateral attack on the ex parte domicile determination); EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 15.4 (4th ed. 2004) (noting progression from the "matrimonial domicile, to the (separate) domicile of the innocent spouse, to the domicile of either spouse" for allowing a state to apply its law to a divorce).

202. *See* Williams v. North Carolina, 317 U.S. 289, 289–90 (1942) (indicating the defendants received mailed notice of the Nevada actions, and that publication service also occurred); *id.* at 303 (indicating that "when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse," a sister state cannot deny its recognition based on a conflict with sister state policy).

203. *See* O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 787–88 (1988) (in denying procedural due process rights to patients at a nursing home as to decertification of the home for federal funding, reasoning from the fact that family members have no constitutional right to participate in criminal trials); Kerry v. Din, 135 S. Ct. 2128, 2138 (2015) (Scalia, J., plurality opinion) (citing *O'Bannon* for the proposition that hardship caused by government acts directed to another do not give rise to constitutional liberty interests); Brief for Petitioner at 60, Kerry v. Din, 135 S. Ct. 2128 (2015) (No. 13-1402); Reply Brief for Petitioner, *id.* at 7–8.

Din, however, argued that positive law contributed to her liberty interest in process with respect to her husband's visa denial. The immigration statutes' favoring family members, she argued, gave her a constitutional entitlement to notice of more specific reasons for her husband's exclusion, even though the statute explicitly provided that more specificity was not required for exclusions for terrorist activity.[204] She thus relied, in part, on a positive liberty interest.[205]

As discussed above, the Court has recognized positive liberty interests in some contexts.[206] In the immigration context, however, statutes limiting discretion do not generally create positive liberty interests, given the possibility of constitutionalizing processes for a broad swath of unadmitted and nonresident aliens who otherwise have no recognized liberty interest in access to the United States. On the other hand, the Court has held that a prior grant of permanent residence status would entitle the grantee to some procedural due process protections, including for removal at the border—thus recognizing a sort of positive liberty interest.[207]

No equivalent status, however, was present in Din's case. The immigration statutes provide that a citizen may apply for an "immediate relative" classification for certain family members,[208] and the government approved Din's claim of a valid marriage.[209] The statutory provisions that a citizen can petition for close relative status for her spouse, however, did not create an entitlement in Din or her husband to an immigrant visa for him, nor grant him a status comparable to permanent residency under which the alien has already been held to meet the criteria for admission. Rather, the statutory effect of approval of an immediate relative petition is that certain visa quotas are inapplicable.[210] The alien then may apply for a visa and

204. *See supra* note 2.

205. *See Kerry*, 135 S. Ct. at 2142 (Breyer, J., dissenting) (stating that liberty interests may arise from expectations created by statutory law).

206. *See supra* text accompanying notes 144–58.

207. *See supra* text accompanying notes 156–57.

208. *See* 8 U.S.C. § 1154(a)(1) (2012). This step is called a visa petition, but its approval is a preliminary step and not a grant of a visa. Regulations allow for administrative appeal and review by the Board of Immigration Appeals. 8 C.F.R. §§ 103.3(a), 103.5, 1003.1(b)(5), 1003.5(b) (2015).

209. *See Kerry*, 135 S. Ct. at 2132 (Scalia, J., plurality opinion).

210. *See* Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 17 (2013) (discussing family preferences and that immediate relative status allows an alien to bypass certain quotas); *cf.* Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 2003 O.J. (L 251) (seeking to establish common rules of family reunification).

must satisfy State Department officials that he meets the criteria for a visa.[211]

As to procedures in denying the visa, Din's husband—as a nonresident and unadmitted alien—had no procedural due process liberty interest created by statute or otherwise.[212] As noted above, the Court has not generally treated immigration statutes limiting discretion as creating positive liberty interests. Giving citizen spouses and other immediate family members a constitutional right to procedures when their relatives are denied entry would constitutionalize the processes for alien entry that the Court has consistently treated as merely statutory.[213]

To be sure, if the Court defined procedural due process liberty interests by focusing primarily on importance to the individual—as some have argued for[214]—Din's arguments would have been strengthened. The Court, however, has generally rejected an importance test divorced from recognized categories of interests for procedural due process.[215]

Conclusion

The aim of this Article has been to categorize procedural due process liberty interests. Natural liberty and traditional property were the traditional core of procedural-due-process-protected interests, and the procedural protections for them include assuring fairness in the application of statutory, as well constitutional, standards for their deprivation. The Court has also recognized other natural law interests—such as in practicing

211. The statutes and regulations prescribe certain procedures. For example, an interview at a United States consulate is part of the process for a visa applicant outside of the United States. 8 U.S.C. §§ 1202(a)–1202(b) (2012). Under the doctrine of consular nonreviewability, the courts do not generally review the State Department's visa denials. *See* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 220, 294 (2d ed. 2009).

212. This lack of procedural due process liberty is manifested in part by the doctrine of consular nonreviewabilty. *See supra* note 211. Din argued from *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977), that a third-party citizen could raise issues of a visa denial to an alien. Both cases involved the Court's rejecting what were primarily substantive challenges. In *Mandel*, American citizens complained that their First Amendment and due process rights were infringed when the government refused a discretionary waiver of a visa denial to a leftist intellectual who was scheduled to give talks in the United States. 408 U.S. at 760. The Court held that the judiciary would not look behind a facially legitimate refusal of a waiver of exclusion, "nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." *Id.* at 770. In *Fiallo*, the Court rejected a challenge to a congressional statute according family preferences to out-of-wedlock children/mothers but not out-of-wedlock children/fathers. 430 U.S. at 800.

213. *See supra* note 158 (discussing problems with expanding procedural due process rights in the immigration context).

214. *See supra* notes 11, 144.

215. *See supra* note 9.

a vocation and maintaining the custody and control of one's children—as procedural due process liberty interests. Violations of substantive constitutional rights also gained procedural due process status as the Court increasingly required remedies for violations of constitutional rights even when natural liberty and traditional property were not threatened. The procedural due process protections attending constitutional rights, however, are primarily directed to determining the existence of a violation of the Constitution. In addition, the Court has recognized positive liberty interests arising from statutes, but the clearest domain of such interests is where the normal baseline of physical freedom is absent. Even then, the Court has limited its recognition of such interests based on concerns for over-constitutionalizing statutorily created interests—a concern present in *Kerry v. Din*. In addition, this Article recommends that causes of action that do not seek to vindicate underlying liberty or property interests be treated as a limited form of procedural due process interest.