

VOL 7 ISS 2 | I | THE AMERICAN CONCEPT OF DUE PROCESS

The Fourteenth Amendment was enacted soon after the Civil War as a reaction to abuses by Southern officials.⁷ Its effect was no less than a revolution in American law. For the first time, the states were obligated to observe a minimum standard of justice imposed by the federal courts. Previously, the Bill of Rights had bound only the federal government. Absent a direct affront to federal powers, the pre-Civil War Supreme Court had refused to interfere in the judicial proceedings of any state, even to preserve due process rights created by the Fifth Amendment.⁸ If state courts ignored personal liberties, no redress was possible in the federal courts.

When adopted in 1868, the Fourteenth Amendment expressly bound state officials to observe the minimum standards of justice being developed by the federal courts. In time, the Supreme Court held that the amendment's due process clause obligated state courts to obey virtually every provision of the Bill of Rights. Under this evolving concept, due process embodied at least the specific liberties guaranteed by the Constitution.⁹ By the centennial of the Fourteenth Amendment in 1968, state courts were required at a minimum to provide adequate notice and a right to be heard through counsel before deciding the rights or liabilities of any person.

In effect, the Fourteenth Amendment integrated the federal and state courts into a single judicial system adhering to a uniform minimum standard. This new system immediately generated problems without precedent in American law. When state courts asserted jurisdiction over out-of-state residents or their property, the federal courts frequently found themselves called upon to decide the validity of such acts. Ignoring the underlying due process concerns at first, the Supreme Court tried to resolve the problem with a theory of jurisdiction based largely on pre-Civil War notions of state sovereignty. Under this conception, the right of a court to exercise its authority over specific persons – its “personal jurisdiction” – extended only as far as the state borders and were of no force beyond them.¹⁰

As the 20th century progressed, the Supreme Court soon found the state-sovereignty theory inadequate. New forms of transportation and communication blurred the significance of state boundaries. An increasingly integrated national economy soon made it possible for activities in one state to produce profound disruption in another. Moreover, the Supreme Court was unable to resolve a perplexing inconsistency in its theory: if state sovereignty was the only issue, then an out-of-state resident could never confer

jurisdiction on a state court merely by giving consent. In theory, sovereignty could be waived only by the sovereign that possessed it.¹¹ Yet the Supreme Court, bowing to a rule of practicality, consistently had held that a litigant could confer personal jurisdiction on any state court by consent, even if the consent was implied by out-of-court activities.¹²

Finally in 1982, the Supreme Court swept aside the sovereignty theory and held that the jurisdiction of state courts was circumscribed solely by the due process clause.¹³ A state court's authority over anyone, including out-of-state residents, was restricted not by political boundaries but by the conception of fair play and procedural justice embodied in the Constitution.¹⁴ Thus, personal jurisdiction was an aspect of due process. State judicial power was directly limited by individual liberties guaranteed by the Bill of Rights. As an important consequence, the right to challenge improper activities of a state court took on a new and as yet unexplored constitutional dimension.

(Copyright © Cato Institute. All rights reserved. Robert Craig Waters)

Footnotes

⁷ See *Pierson v. Ray*, 386 U.S. 547, 559 (1967) (Douglas, J., dissenting) (1871 Act passed in response to Southern lawlessness).

⁸ See, for example, *Barron v. The Mayor & City of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833), holding that the Fifth Amendment does not apply to state action.

⁹ See *Duncan v. Louisiana*, 391 U.S. 145 (1968), holding that the Fourteenth Amendment “incorporates” specific provisions of the Bill of Rights.

¹⁰ See, for example, *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878).

¹¹ See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 10 (1982).

¹² See, for example, *McDonald v. Mabee*, 243 U.S. 90 (1917).

¹³ 456 U.S. at 702 n. 10 and accompanying text.

¹⁴ *Id.* at 703.

