The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees

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NOTE

The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees

By Geoffrey Jones*

"The history of liberty has largely been the history of the observance of procedural safeguards."1

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Introduction

On September 30, 1991, Haiti's democratically elected government, headed by President Jean Bertrand Aristide, was overthrown by a violent military coup. The new government and its supporters took immediate retribution upon Aristide’s many supporters. Human rights abuses skyrocketed and an exodus from Haiti began.

On May 23, 1992, ostensibly because the Guantanamo Bay detention center had become overcrowded, George Bush issued the “Kennebunkport Order.” This executive order altered United States' policy by providing for the interdiction and forced repatriation of Haitian refugees without making any effort to determine whether they were fleeing political persecution. Thus, Haitian refugees were interdicted by the boat load and returned against their will to a country with an infamous history of human rights abuses, and which was experiencing arguably its worst period of political strife and violence.

Haitian refugees interdicted at sea have Fifth Amendment rights to political asylum hearings, rights which the Immigration and Naturalization Service has conspicuously violated since May of 1992. The new administration has not yet alleviated the Haitian refugees’ situation; President Clinton has continued the Bush Administration’s policy despite campaign promises to the contrary. Only recently, Clinton vowed to end this policy and to give asylum hearings to inter-
dicted Haitian refugees. It remains to be seen how this policy change will be implemented and whether meaningful hearings will be given.

There is widespread concern that the policy change will be a facade like the asylum screening procedures the Bush Administration employed prior to the Kennebunkport Order, under which a very small proportion of refugees were found eligible for political asylum, although a large proportion are fleeing political persecution. The Clinton Administration has not placated this concern by asserting that it expects not more than five percent of the refugees interviewed to be eligible for political asylum. The rest will be returned to Haiti.

Until the Clinton Administration gives meaningful hearings to interdicted Haitian refugees before they are repatriated, it is violating the Due Process Clause of the Fifth Amendment. The applicability of due process protection to Haitian refugees cannot be fully understood, however, without reference to Haiti's chaotic political history.

I. An Overview of Haitian History

Haiti has a long and unfortunate history of violent political oppression which has caused episodes of widespread emigration. Haitian immigration to the United States has occurred at significant levels for more than twenty years. As a result, the previous two decades have seen much litigation on behalf of Haitian refugees.

A. A History of Political Oppression

Haiti occupies the western third of Hispaniola, sharing the island with the Dominican Republic. Haiti is a predominantly agrarian society with a population of less than 7 million. It is the poorest

13. See Haiti: Policy Shift Is Only A Partial Measure, supra note 8, at 12A.
nation in the western hemisphere, with an average income of less than $425 U.S. per year.\textsuperscript{17}

Spain colonized Haiti in 1492 when Columbus landed on the northwestern tip of Hispaniola.\textsuperscript{18} In the first fifty years of their rule, the Spanish exterminated the indigenous Taino Arawak people,\textsuperscript{19} killing half a million by forcing them to work in Spanish gold mines.\textsuperscript{20} The Spanish then replaced them with African slaves.\textsuperscript{21} The western portion of Hispaniola, which is now Haiti, was settled by French immigrants after the gold mines were depleted and the Spanish lost interest in the region.\textsuperscript{22} The French settlers established permanent settlements and named the area Saint Domingue.\textsuperscript{23} French control of Saint Domingue was formalized in 1697 when Spain ceded it to France.\textsuperscript{24} The French controlled Saint Domingue for a century, importing their language and culture, which still remain strong influences in Haiti.\textsuperscript{25} The French also imported many African slaves.\textsuperscript{26}

The slaves revolted against the French in 1791, and after a struggle of thirteen years, in 1804, they defeated the troops of Napoleon Bonaparte and won their freedom.\textsuperscript{27} Haiti thus became the second independent state in the Western Hemisphere and the first free black republic in the world.\textsuperscript{28} Haiti's experiment with democracy, however, achieved chaotic results over the next century and ended when the United States invaded and occupied Haiti in 1915 to stabilize the island and protect American interests.\textsuperscript{29} The occupation lasted for 19 years, until 1934.\textsuperscript{30} During this period, Haiti retained only a facade of autonomous self-government as the United States controlled Haitian customs houses and administrative institutions and held veto power

\textsuperscript{17} Id. at 290.
\textsuperscript{19} Norman Lockman, Haití—No Respite From a Turbulent History, Gannett News Serv., Oct. 28, 1993.
\textsuperscript{20} Ferguson, supra note 18, at 1-2.
\textsuperscript{21} Id. at 2.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Federal Research Division of the Library of Congress, supra note 15, at 206.
\textsuperscript{25} Ferguson, supra note 18, at 2-3.
\textsuperscript{26} Id. at 3
\textsuperscript{27} Id. at 6-7.
\textsuperscript{29} Id. at 223.
\textsuperscript{30} Ferguson, supra note 18, at 37.
over the few decisions Haitians still made. Only small-scale local government institutions remained entirely in Haitian hands. In order to help the Marines police the country, the American advisors created the Garde d’Haiti, the nation’s first national army, which would later play a dominant role in the nation’s politics. Aside from training and equipping the Garde, however, the United States did little to prepare the Haitians to govern themselves when the time came for independence. Thus, when the American occupation forces withdrew in 1934, the only cohesive institution left in their wake was the Haitian military.

Haiti held democratic elections in 1934, but in 1937 the military seized control of the country. In 1946, the military acquiesced to public clamor for democratic elections and an aggressive anti-elite named Dumarsais Estime won the presidency through the support of the peasantry and urban working class. As Aristide would fifty years later, Estime thoroughly alienated the elites and military and, like Aristide’s, his tenure was short. The military deposed him after less than four years, and held a new election in which a member of the military-elite, Paul Magloire, was elected president amid allegations of election fraud. When his four year term ended, Magloire refused to allow constitutionally mandated elections, declaring himself “President for Life.” The populace promptly revolted and Magloire fled the country. Once again, the military seized control of the tiny nation. The next elections took place in 1957 and appeared to be fair, despite a heavy military presence at the polling places. These

32. Id.
33. Id. at 353-55.
34. See id. at 227-29, 353-54.
35. Id. at 335; see generally id. at 353-364.
36. Id. at 226-27.
37. Id. at 228-29.
38. Id. at 230.
39. Ferguson, supra note 18, at 34-35.
40. Foreign Area Studies, American University, supra note 14, at 37.
43. Ferguson, supra note 18, at 36.
45. Id.
elections were also Haiti’s first exercise in universal suffrage. Unhappily, however, a taciturn country doctor named Francois Duvalier won the election. Duvalier prevailed through a mixture of patriotism, racism, and mysticism. He also enjoyed the support of the military, in addition to maintaining the loyalty of the masses of impoverished Haitians. Soon after his election, he consolidated his power through ruthless purges of his political opponents, suspected and real. Although Duvalier’s first election was a fair one, four years later he was reelected by the suspicious margin of 1,320,748 votes to zero. He then declared himself “President for Life,” as his last seven predecessors had done. Unlike Haitian leaders before him, however, Duvalier had successfully destroyed all organized opposition in his first term, and his claim to a permanent presidency went largely unopposed.

A key factor in the Duvalier autocracy was his creation of a local militia, the Tontons Macoutes. The Tontons Macoutes were not under the auspices of the military; they answered only to Duvalier and achieved his twin goals of offsetting the political power of the military and consolidating his control of the populace, especially in rural areas.

46. Ferguson, supra note 18, at 36-37.
48. Ferguson, supra note 18, at 37.
49. Id. at 37.
50. Id. at 38-39. It is estimated that during Francois Duvalier’s reign the Tontons Macoutes killed more than 30,000 suspected political opponents. Federal Research Division of the Library of Congress, supra note 15, at 326.
52. Id.
53. Id.
54. In Haiti’s national language, Creole, Tonton Macoute is literally translated as “Uncle Knapsack.” Uncle Knapsack is a dark figure of Haitian folklore who swept up errant children, tossing them in a sack carried on his back. He is the Haitian version of the Boogieman. See The Bogieman’s Back, Striking Fear Into Haitians, N.Y. Times, Jan. 21, 1994, at A4; Ferguson, supra note 18, at 40. In an interview with a New York Times reporter, a former Tonton Macoute who is now a neo-Duvalierist thug and member of FRAPH elaborated on his career as a Macoute and the origin of that group’s name. “[Uncle Knapsack] doesn’t begin to express what I was,” he said laughing, “I didn’t bother with children. I carried a big enough sack to sweep up anyone who got in my way.” The Bogieman’s Back, Striking Fear Into Haitians, supra, at A4. The acronym FRAPH stands for the French translation of Haitian Front for Advancement and Progress. It is a recently-formed, reactionary political group that has engaged in extensive violent repression of Aristide’s supporters and other reformists. FRAPH consists largely of former Tontons Macoutes. See Haiti Gang Warning of More Raids, Name of Slum Becomes Issue, Chi. Trib., Jan. 3, 1994, at 4.
In time, the *Tontons Macoutes* evolved to assume the function of a draconian secret police as well.\textsuperscript{56}

When Francois Duvalier died in 1971, his son, Jean-Claude, succeeded him, as the elder Duvalier had mandated.\textsuperscript{57} Jean-Claude Duvalier,\textsuperscript{58} like his father, controlled a parasitic "kleptocracy" which siphoned off international aide and exploited the population, keeping the citizenry in a state of endemic poverty.\textsuperscript{59} The United States was the primary source of financial aid to both Duvalier regimes,\textsuperscript{60} and supplied a majority of weapons used by the national army and the *Tontons Macoutes*.\textsuperscript{61} The United States supported the Duvalier regimes, despite extensive human rights abuses and flagrant misappropriation of aid, because of Haiti's strategic location near Soviet-bloc Cuba.\textsuperscript{62} Jean-Claude Duvalier was less politically adept than his father and more avaricious.\textsuperscript{63} His mismanagement of the government, along with the greed of the ruling class, caused the already abysmal quality of life in Haiti to fall sharply during his reign.\textsuperscript{64} The increasing poverty and economic chaos of the country,\textsuperscript{65} as well as epidemics in

\textsuperscript{55} Ferguson, supra note 18, at 40-41.

\textsuperscript{56} Id. at 41; see Federal Research Division of the Library of Congress, supra note 15, at 233. The *Tontons Macoutes* were formed during Duvalier's first term by a loyal lieutenant, Clement Barbot. In order to neutralize the power of the Haitian national military, Barbot created the *Tontons Macoutes* to be loyal only to Duvalier. In addition to using *Tonton Macoute* as a local militia to offset the power of the Army, they were used as a secret police force. In this function they gathered information, detected subversion, and ruthlessly spread terror among all non-Duvalierist segments of Haitian society. Their targets were anyone disloyal to Duvalier, and included the Boy Scouts, the Catholic Church, and trade unions. By 1963, Duvalier had used the *Tontons Macoutes* to silence all detractors: the army was impotent, and all opposition leaders, perceived or real, were in exile or dead. See Ferguson, supra note 18, at 40-44.


\textsuperscript{58} Jean-Claude Duvalier became popularly known as "Baby Doc." See id.

\textsuperscript{59} Id. at 235-36.

\textsuperscript{60} Id. at 234-37.

\textsuperscript{61} Id. at 390.

\textsuperscript{62} Id. at 235. The Duvaliers consistently spent foreign aid money earmarked for Haiti's poor on their secret police force, the military, the elites, and their own excessive lifestyles. Id. at 233-34.

\textsuperscript{63} Ferguson, supra note 18, at 69-70.

\textsuperscript{64} Id. at 235.

\textsuperscript{65} United Nations, supra note 16, at 432-33. The growth of Haiti's gross national product lagged significantly behind population growth in the 1980s. Id. As a result, per capita income fell steadily during the 1980s, with Haiti already being the poorest nation in the Americas. Id. at 433; see Federal Research Division of the Library of Congress, supra note 15, at 281. Furthermore, inflation during the 1980s caused instability and contributed to the overall bleak picture. United Nations, supra note 16, at 429, 432.
rural areas, led to Jean-Claude's forced abdication in February of 1986. The popular revolt that ousted Jean-Claude Duvalier sought to destroy the very foundations of Duvalierism, but supporters of "Baby Doc" have nonetheless remained a powerful force in Haitian politics. The junior Duvalier's departure left the country economically ravaged, devoid of democratic political institutions, and without any tradition of peaceful self-rule. The only stable institution remaining was the Haitian military, and the Tontons Macoutes were hunted and killed in large numbers by angry mobs. On February 10, 1986, the Tontons Macoutes were formally disbanded, but the groups members were protected by the military.

After Duvalier's fall in 1986, a series of short-lived governments ruled the country. Eventually, amid violent election tampering, Leslie Manigat was elected President in 1988. The military promptly deposed him, however, for trying to enforce Haiti's constitutional limits on the army's power and not serving as a mere figurehead. The military faction that deposed Manigat took control of the government, with general Henri Namphy at its head, and rescinded the 1987 Constitution in July of 1988. Human rights abuses escalated as Duvalierist factions took revenge upon their rivals with tolerance from the new government. Namphy himself was ousted in a coup by the elite presidential guard on September of 1988. The orchestrator of the coup,

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67. Id. at 328; 237-38.
68. Id. at 328-29.
69. Id. at 238.
70. Ferguson, supra note 18, at 122-23.
71. Id. at 123.
72. The period from February, 1986 to September, 1988 witnessed five successive governments, the election of a constituent assembly, the popular ratification of a new constitution and the repeated massacre of citizens by military factions, including the Tontons Macoutes, for exercising political rights such as voting in free elections. Federal Research Division of the Library of Congress, supra note 15, at 325.
73. Id. at 329.
74. Id.
76. Id. In a notable incident, a group of Tontons Macoutes entered a church in Port-au-Prince where there was a well-known anti-Duvalierist minister, murdered a number of worshipers and set fire to the church. Id.
Lieutenant General Prosper Avril, succeeded Namphy as President and purged the Haitian officer corps to solidify his position.\textsuperscript{78}

Popular unrest broke out and escalated through the early months of 1989.\textsuperscript{79} Avril’s government became increasingly unstable,\textsuperscript{80} and finally acquiesced to the public’s demand for popular elections. On December 16, 1990, the long-awaited elections took place, and a Catholic priest\textsuperscript{81} named Jean Bertrand Aristide was elected president.\textsuperscript{82} Father Aristide enjoyed widespread popularity among the poor Haitian masses, but lacked the support of the elites and the military.\textsuperscript{83} He had barely begun his promised program of progressive reforms when a bloody coup by the military forced him from office and into exile on September 30, 1991.\textsuperscript{84} General Raoul Cedras, once Aristide’s most trusted advisor and ally in the military, engineered the coup.\textsuperscript{85} Cedras became the de facto leader of Haiti,\textsuperscript{86} setting up a series of puppet civil governments that ostensibly ruled the country.\textsuperscript{87} A violent backlash against Aristide’s supporters followed.\textsuperscript{88} Human rights abuses escalated\textsuperscript{89} as the military and Duvalierist factions such as FRAPH,\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{78} Federal Research Division of the Library of Congress, supra note 15, at 359-61.
\item \textsuperscript{79} Id at 360.
\item \textsuperscript{80} Wilentz, supra note 77, at 372.
\item \textsuperscript{81} Ben Barber, Schism Over Aristide Pits Haiti’s Catholics In War Of Ideology; Poor Fear Violence; Rich Fear Marxism, Wash. Times, Nov. 10, 1993, at A1.
\item \textsuperscript{82} J. Taylor Wentges, A Grisly Walk Through Haiti's Killing Fields; A Few Military Police Maintain a Reign of Terror With Routine, Relentless Murders, Toronto Star, Dec. 18, 1993, at C5; see Haitians Delivered to Danger, supra note 2, at A18. Aristide won the election with 67 percent of the popular vote. Id.
\item \textsuperscript{83} See Barber, supra note 81; Steven A. Holmes, Aristide Seeks The Removal Of Army And Police Chiefs, N.Y. Times, Sept. 22, 1993, at A3; see also Lockman, supra note 19.
\item \textsuperscript{84} Kathie Klarreich, Haiti-The Pressure Mounts; Unchecked Violence Haunts Port-au-Prince Streets, Houston Chron., May 7, 1994, at A22. The coup took place at night and the Army immediately shot anyone who came outside to protest. Nonetheless, many still attempted to protest the ouster of Aristide. Dump trucks were used to remove their bodies, and fire hoses to wash away their blood. Ben Barber, Sanctions Force Little Progress in Haiti, Wash. Times, Nov. 14, 1993, at A12.
\item \textsuperscript{85} Isabel Hilton, Aristide’s Dream of Haiti, The Independent, Oct. 30, 1993, at 28.
\item \textsuperscript{87} Howard W. French, In Haiti's Army, Business Is the Order of the Day, N.Y. Times, Nov. 12, 1993, at A21.
\item \textsuperscript{88} Howard W. French, Haitian Police Chief Emerges From the Shadows, N.Y. Times, Sept. 9, 1993, at A5; Wentges, supra note 82, at C5.
\item \textsuperscript{89} Linda Diebel, Waiting for Aristide, Montreal Gazette, Sept. 18, 1993, at B3.
\item \textsuperscript{90} See supra note 54.
\end{itemize}
took revenge. An exodus from Haiti began as Aristide's supporters took to the sea in any thing that would float.

Since the September 1991 coup, General Cedras has ruled the country, and human rights abuses have occurred at levels comparable to the worst years of the Duvaliers. The military, Tontons Macoutes, FRAPH, and other supporters of Cedras' government have engaged in a campaign of terrorism and persecution based on their victims' political opinion, religion, social group, and sex.

Recently, politically motivated violence against Aristide's supporters has escalated dramatically, with FRAPH blamed for at least 75 political murders during February and March of 1994 alone. In addition to becoming more widespread, politically motivated violence in recent months has become more vicious, with the rise of apparently unprecedented practices such as political rapes, burning of entire neighborhoods, and "facial scalping," where the victims face is removed with a machete.

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91. See Wentges, supra note 82, at C5.
92. See Haitians Delivered to Danger, supra note 2, at A18.
93. Since the coup it is estimated that over 4000 Haitians have been killed in politically motivated violence. Marcus Stern, Haiti Cops Intensify Political Brutality; Repression Targets Pro-Aristide Slums, SAN DIEGO UNION-TRIB., May 14, 1994, at A1.
94. Any intimation that Aristide is the legitimate ruler of Haiti is a basis for severe persecution. Diebel, supra note 89, at B3; see, e.g., Howard W. French, For Haitians The Carnival Must Go On, N.Y. TIMES, Feb. 13, 1994, at A4 (documenting one such instance of persecution). For instance, it is illegal to put up a poster of Aristide, or to pass out flyers with Aristide's name or picture on them. This infraction of Haiti's criminal code has been punished by death. Deibel, supra note 89, at B3.
95. Barber, supra note 81, at A1.
96. One such social group is the poor. Wentges, supra note 82, at C5. Another is those living in areas perceived as reformist strongholds by Duvalierists and other reactionaries. Haiti Gang Warning of More Raids, Name of Slum Becomes Issue, supra note 54, at 4. More generally, those living in rural areas have been persecuted because they are perceived as political enemies of the current regime. Howard W. French, Fearful Rural Haitians Yearn for Aristide's Return, N.Y. TIMES, Oct. 25, 1993, at A3. Other identifiable social groups that have experienced persecution are students, trade unionists, peasant leaders, and journalists. Deibel, supra note 89, at B3.
97. Deibel, supra note 89, at B3.
100. Id.
102. Watson, supra note 99, at 40.
Haitians first left their homeland by sea for the United States in significant numbers in 1972. In response to escalating migration throughout the 1970s, the Reagan Administration entered into an agreement with the Duvalier government in 1981 under which the United States would interdict Haitian vessels suspected of carrying refugees to the United States. American vessels interdicted Haitians and gave them informal hearings in which immigration agents evaluated their claims of persecution. Claimants who passed were "screened in" to the United States, where they then went through a formal application process. Those identified as economic rather than political refugees were repatriated to Haiti. This policy continued until May 23, 1992, when George Bush issued the Kennebunkport Order, providing for the interdiction and repatriation of Haitian refugees without a hearing to determine whether they have legitimate claims to refugee status. The initial justification for the Kennebunkport Order was that the detention camp at Guantanamo Bay had become overcrowded, but as the crowding eased, and even after the detention facility was emptied, the policy remained in effect. Subsequently, the Bush Administration attempted to justify the forcible repatriation policy as a necessary measure to protect Haitian refugees by discouraging them from setting sail in unseaworthy vessels.

Despite campaign promises made during his 1992 presidential campaign, President Bill Clinton retained for over a year what he had called during the campaign the "cruel" policy of returning Haitian refugees without an asylum hearing. Recently, on May 8, 1994, Clinton promised to end the policy of repatriating Haitians without an asylum hearing. It remains to be seen whether meaningful hearings

106. Id.
110. Haitians Delivered to Danger, supra note 2, at A18.
111. Greenhouse, supra note 8, at A6.
will be afforded to interdicted refugees, but for the time being it appears unlikely that the interdiction policy will undergo anything but the most superficial alteration.

C. Prior Litigation on Behalf of Interdicted Haitian Refugees

Litigation on the behalf of Haitian refugees began in the 1970s when they first immigrated to the United States in significant numbers. When the United States hardened its attitude toward Haitian immigration in 1981 under the Reagan Administration, civil rights advocates increased their efforts challenging the executive's policies toward Haitian refugees. Until recently, however, few cases have challenged the Immigration and Naturalization Service policy of interdicting Haitian refugees, which began in 1981. One case that did so was Haitian Refugee Center v. Baker, which challenged the interdiction policy that existed prior to Bush's Kennebunkport Order, whereby interdicted Haitian refugees received asylum screenings at the Guantanamo Bay Naval Base in Cuba. The primary constitutional claim asserted in Baker was the First Amendment right of attorneys seeking to provide pro bono representation to interdicted Haitian asylum applicants at Guantanamo. The Eleventh Circuit held that the policy barring attorneys' access to the refugees did not violate the lawyers' First Amendment rights because the prospective clients had no underlying substantive right under the laws or Constitution of the United States. The Supreme Court denied certiorari on February

114. See id.; Barbara Kessler, Haitians In Dallas Back Policy; Immigrants Fear Political Refugees Top Clinton's Limit, DALLAS MORNING NEWS, May 13, 1994, at 34A.
115. See supra text accompanying note 103.
119. Id. at 1503.
24, 1992, only twenty days after the Eleventh Circuit decision, with Justice Blackmun dissenting.\textsuperscript{121}

The only Supreme Court case addressing the interdiction policy implemented by Bush's Kennebunkport Order is \textit{Sale v. Haitian Centers Council}.\textsuperscript{122} The Second Circuit had ruled that the executive branch violated section 243(h)(1) of the Immigration and Nationality Act\textsuperscript{123} by repatriating Haitian refugees without giving them a meaningful opportunity to apply for political asylum.\textsuperscript{124} The Supreme Court reversed the Second Circuit, holding that executive's interdiction policy was not contrary to the Act.\textsuperscript{125}

Regardless of the legality of the INS' actions under the Immigration and Nationality Act, the denial of a meaningful opportunity to apply for political asylum is a violation of the due process rights of interdicted Haitian refugees.

\section*{II. The Due Process Right to a Meaningful Asylum Hearing}

The high levels of political violence in Haiti insures that a large portion of the refugees fleeing that island meet the criteria for refugee status and political asylum under the United States' immigration laws. The executive's refusal to apply the immigration laws in an unbiased manner to interdicted Haitian refugees violates the procedural and substantive component of the Due Process Clause. Federal court precedent applying these doctrines requires that interdicted refugees be given a fair hearing to determine if they are fleeing political persecution before they are repatriated.

\textit{Primus}, 436 U.S. at 439. The \textit{Baker} court reasoned that \textit{Button} and \textit{Primus} should be distinguished because "[i]n the present case, the interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States. Thus, it would be nonsensical to find that HRC possesses a right of access to the interdicted Haitians for the purpose of advising them of their legal rights." \textit{Baker}, 953 F.2d at 1513.

\textsuperscript{121} \textit{Baker}, 112 S. Ct. 1245 (1992). Justice Blackmun stated that "whether the Haitians may challenge the adequacy of procedures employed by the United States Government to identify those facing political persecution is difficult and susceptible to competing interpretations. A quick glance at this Court's docket reveals not only that we have room to consider these issues, but that they are at least as significant as any we have chosen to review today. If indeed the Haitians are to be returned to an uncertain future in their strife-torn homeland, that ruling should come from this Court, after full and careful consideration of the merits of their claims." \textit{Id}. (Blackmun, J., dissenting).

\textsuperscript{122} 113 S. Ct 2549 (1993), \textit{rev'd} McNary v. Haitian Centers Council, 969 F.2d 1350 (2d Cir. 1992). Chris Sale was the acting commissioner of the INS when the Supreme Court heard the case, having replaced Gene McNary in that office with the change in administrations.

\textsuperscript{123} Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1988).

\textsuperscript{124} \textit{McNary}, 969 F.2d at 1361.

\textsuperscript{125} \textit{Sale}, 113 S. Ct. at 2562.
A. American Refugee and Asylum Law

Asylum is theoretically available to any person who flees his or her homeland because of persecution based on race, political opinion, religion, social group, or national origin. The Immigration and Nationality Act provides two avenues through which foreigners who would face persecution if forced to return to their homeland may be given sanctuary in the United States. First, section 243(h)(1) of the Act prohibits the Attorney General from returning "any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." To receive the protection of this statute, the foreigner must demonstrate that it is more likely than not that he or she would be subject to persecution upon return.

Second, in contrast to section 243(h)(1)'s mandatory proscription of the return of any qualifying foreigner, section 208(a) of the Act allows the Attorney General, in her discretion, to grant asylum to a foreigner who meets the criteria for a "refugee" under section 101(a)(42). That section defines a refugee as "any person who is outside any country of such person's nationality . . . and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." The discretionary relief of section 208(a) is available to a broader class of foreigners than the mandatory relief of section 243(h)(1). The "well-founded fear" language of the section 101(a)(42) requires a significantly lower level of proof than section 243(h)(1) requires. Thus, Congress has provided for an absolute right to sanctuary in the United States for foreigners who can demonstrate a probability of persecution if returned to their homeland and discretionary relief to a broader class of foreigners, those able to demonstrate only that they have a reasonable, well-founded fear of persecution should they be returned to their place of origin.

The federal courts have broadly interpreted the types of persecution covered by sections 208(a) and 243(h)(1) of the Act. For instance, persecution on account of the victim’s sex, though not explicitly covered in the Act, has been found to invoke the Act’s protection as persecution based on political opinion. Similarly, persecution based on social group has been defined to include persecution on account of any immutable characteristic or shared experience.

Another court has described social group persecution as persecution on account of a characteristic that is either beyond the control of the individual to change or so fundamental to the individual’s identity that he or she ought not be expected to change it. Furthermore, persecution based on one’s refusal to take sides in a conflict has been deemed political persecution, neutrality being the political opinion held by the persecuted applicant. There are also cases in which victims have suffered persecution based on political opinion even though they had no political opinion or did not have one contrary to their persecutors. In Lazo-Mujano v. INS, the Ninth Circuit held that an applicant who suffered persecution due to a political opinion not actually held, but imputed by her persecutors qualified for the protection of the statute. The liberal manner in which refugee status and asylum have been afforded to applicants, combined with the recent incidence of human rights abuses in Haiti, strongly suggests that a large proportion of Haitian emigrants are refugees eligible for asylum status.

Under current law of due process, these refugees have a right not to be repatriated without a fair hearing to determine if each emigrant’s experiences meet the criteria for refugee status under the Immigration and Nationality Act.

132. See Lazo-Mujano v. INS, 813 F.2d 1432, 1434-35 (9th Cir. 1987).
134. See Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).
135. See Maldonado-Cruz v. INS, 883 F.2d 788, 791 (9th Cir. 1989) (finding political persecution where neutral was persecuted by guerrillas); Bolanos-Hernandez v. INS, 767 F.2d 1277, 1286 (9th Cir. 1984) (finding political persecution where neutral was persecuted by government).
136. 813 F.2d 1432 (9th Cir. 1987).
137. See Id. at 1435.
138. In defending the current interdiction policy before the Supreme Court in Sale v. Haitian Centers Council, 113 S. Ct. 2549 (1993), the government conceded that there was widespread political persecution in Haiti and that a “significant minority” of those fleeing Haiti had facially valid asylum claims. See Patrick, supra note 107, at 3.
B. Procedural Due Process

The Due Process Clause of the Fifth Amendment provides that no one may be deprived "of life, liberty, or property, without due pro-
cess of law." An interest which reaches the level of "property" or "liberty" merits procedural protection under this clause. Throughout the first part of the Twentieth Century, the Supreme Court defined "liberty" and "property" interests very narrowly, relying on a distinction between some interests deemed "rights" and others deemed "privileges." While the government could not deny someone a right without providing due process, a privilege could be denied an individual for any reason without constitutional implications. Justice Holmes gave this rigid distinction between rights and privileges its definitive statement while he still sat on the Supreme Judicial Court of Massachusetts. Dismissing the claim of a person who had been fired for violating a police department regulation that forbade off-the-job political activity, Holmes wrote that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech, as well as of idleness, by the implied terms of the contract. The servant cannot complain, as he takes the employment on the terms which are offered him."

Under this rigidly categorical doctrine, the Due Process Clause protected chattel, real property, and bodily integrity from interference by the state. Due process did not, however, protect a person denied government benefits such as employment, welfare, or other intangible interests. Thus, the right-privilege distinction held "relations with the government [to be] mere 'privileges' or 'gratuities,' not legally

139. U.S. Const. amend. V.
141. See 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 17.2, at 581 (2d ed. 1992); see also Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950) (holding public employment a "privilege" rather than a "right" and so the procedural protection of Due Process Clause not available to claimant), aff'd by an equally divided Court, 341 U.S. 918 (1951) (per curiam).
142. 2 Rotunda & Nowak, supra note 141, § 17.2, at 581.
protected rights."146 This reflected the economically libertarian concept of government associated with the Court’s decisions in the early part of the Twentieth Century.147

The laissez-faire jurisprudential philosophy that gave rise to the right-privilege distinction came under assault in the 1930s with the New Deal’s expansion of the regulatory state, and a corresponding change in the role of the Supreme Court.148 The right-privilege distinction itself survived a few years longer in procedural due process jurisprudence, not being fully eliminated until the 1960s. A major factor in the demise of the right-privilege distinction was the doctrine of “unconstitutional conditions.”149 This doctrine established generally that the government may not do indirectly what the Constitution forbids it to do directly.150 Thus, even “privileges” cannot be denied for reasons which violate the Constitution, and the government cannot make status or other benefits conditional upon forgoing constitutional rights.151 The right-privilege distinction was also undermined by substantive due process and equal protection cases which limited the government’s power to arbitrarily restrict freedoms not explicitly listed in the Bill of Rights.152

In the 1960s, the last nails were finally driven in the coffin of the right-privilege distinction. An article by Professor William Van Alstyne153 pointed out that the distinction was circular because it allowed the government to be constrained only by those rights it chose to recognize and thus provided chimerical protection for individual liberties.154 Similarly, in a pair of articles published in the Yale Law


150. 2 Rotunda & Nowak, supra note 141, § 17.2, at 582.

151. Id.

152. Id., § 17.2, at 583.


154. See Rotunda & Nowak, supra note 141, § 17.2, at 583.
Journal, Professor Charles Reich pointed out the illogical and outmoded nature of the right-privilege distinction.  

In addition to his criticism of the right-privilege distinction, Professor Reich offered a proposal to fill the gap in due process jurisprudence left by its demise. He noted that in an age of rapidly expanding administrative power, various forms of status conferred by the government had come to serve in our society as the "boundary between individual man and the state," that had been provided by real property and chattel in times gone by. Professor Reich wrote, "it must be recognized that we are becoming a society based upon relationship and status [rather than upon ownership of property]—status deriving primarily from source of livelihood. Status is so closely linked to personality that destruction of one may well destroy the other. Status must therefore be surrounded with the kind of safeguards once reserved for personality." Thus, in order for the Due Process Clause to protect individual interests as the Framers intended, government-conferred status, such as welfare and employment, must be considered the "new property" and must be afforded the protections of procedural due process.  

In 1970, Reich's proposal for treating status as a "new property" became law when the Supreme Court adopted it in Goldberg v. Kelly. In Goldberg, the Court held that a welfare recipient's interest in the continued receipt of benefits was a "statutory entitlement" that amounted to a property interest within the meaning of the Due Process Clause. The Court held that the statute creating the welfare scheme also created a vested constitutional property interest in the continued receipt of benefits which could only be divested through certain constitutionally mandated procedures. Without such safeguards, the increasing number of people dependent on government programs in areas such as welfare and employment would be subject

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156. Reich, The New Property, supra note 155, at 785.
158. Id. at 785.
159. See Reich, The New Property, supra note 155 at 785.
161. Id. at 264 n.8; see Stone, supra note 145, at 986.
162. Goldberg, 397 U.S. at 266.
to the arbitrary will of public officials. Changing times dictated a new, more expansive interpretation of the Due Process Clause in order for it to serve its traditional functions.

Soon after Goldberg, the Court extended the requirements of procedural due process to the government's activities in its relations with prisoners, parolees, students, automobile drivers, debtors, and employees, among others. For instance, the expansive and flexible Goldberg procedural due process analysis was applied to the termination of government employees in Perry v. Sindermann and its companion case, Board of Regents v. Roth. In these two cases, the Court held that government employment can be a property interest subject to due process protection and that in such cases termination can occur only through certain constitutionally mandated procedures. In Roth, the Court held that Roth possessed no property interest because the terms of his employment with the state college were defined by administrative rules in such a way that he had no reasonable, non-unilateral expectation of continued employment once his contract expired. Thus, although the respondent obviously had an "abstract concern" in being rehired, there was no statutory entitlement sufficient to trigger due process protection.

In Perry v. Sindermann, however, the Court found that the unwritten practices and customs of the state college gave rise to a reasonable mutual expectation of continued employment, giving the plaintiff a "legitimate claim of entitlement to job tenure." The col-

163. See Reich, The New Property, supra note 155, at 786-87; Stone, supra note 145, at 986.
164. See Reich, The New Property, supra note 155, at 733; see also Goldberg, 397 U.S. at 263 n.8 (quoting Reich, Emerging Legal Issues, supra note 155, at 1255).
172. 408 U.S. 593 (1972).
173. 408 U.S. 564 (1972). But see Van Alstyne, supra note 143, at 457-58 (arguing that Roth and subsequent cases are a retreat from the procedural due process doctrine announced in Goldberg).
174. Roth, 408 U.S. at 577-78; Perry, 408 U.S. at 599-600.
175. Roth, 408 U.S. at 578.
176. Id.
177. Perry, 408 U.S. at 602.
lege could not terminate Sindermann, depriving him of this property right, without due process.\textsuperscript{178}

\textit{Goldberg, Roth} and \textit{Perry} significantly altered the nature and meaning of procedural due process. After \textit{Goldberg}, constitutionally protected interests could arise from agency rules, customs, or statutes that conferred what had once been considered mere privileges rather than rights. The Court picked up the gauntlet laid before it by critics such as Professor Reich, and created a "new property." As the Court stated in \textit{Roth}, "\textit{p}roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."\textsuperscript{179}

Once a property interest protected by the Due Process Clause has been identified, the next step in procedural due process analysis is to determine precisely how much procedural protection the Constitution requires the property interest be given or, in other words, what process is due.\textsuperscript{180} There are two basic schools of thought regarding this phase of procedural due process analysis. These two approaches are clearly exemplified in the majority and dissenting opinions of \textit{Cleveland Board of Education v. Loudermill}.\textsuperscript{181} In finding that a government employee had a property interest in continued employment, the majority in \textit{Loudermill} held that the substantive entitlement created by the relevant statute is separate from any procedures provided in the statute.\textsuperscript{182} Thus, once a statute establishes an entitlement, the Constitution dictates the procedures by which the recipient can be deprived of it, and any procedures provided in the statute or administrative rule must meet constitutional standards.\textsuperscript{183}

Justice Rehnquist's dissent in \textit{Loudermill} illustrates the opposing view. According to Justice Rehnquist, the procedures provided in the entitlement-creating statute are part and parcel of the property interest created.\textsuperscript{184} Therefore, courts cannot logically separate substantive

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\textsuperscript{178} \textit{Id.} at 603. \\
\textsuperscript{179} \textit{Roth}, 408 U.S. at 577. \\
\textsuperscript{180} \textit{See} Town Court Nursing Ctr., Inc., v. Beal, 586 F.2d 280, 290 (3d Cir. 1978); Esco-\textit{bar} v. INS, 896 F.2d 564, 570-71 (D.C. Cir. 1990). \\
\textsuperscript{181} 470 U.S. 532 (1985). \\
\textsuperscript{182} \textit{Id.} at 548 (citations omitted). \\
\textsuperscript{183} \textit{Id}. \\
\textsuperscript{184} \textit{Id}. at 563 (Rehnquist, J., dissenting).
\end{flushright}
In Justice Rehnquist's words, the applicant "must take the bitter with the sweet." While this view is undeniably logical, its practical effect would be to nullify the doctrine of procedural due process as it has developed since *Goldberg*. If the process constitutionally due is merely whatever procedure the agency or legislature already provides in the statute or regulation in question, then the Due Process Clause would have little practical effect. Such a narrow view of procedural due process is antithetical to the expansive and flexible understanding of procedural due process brought to life by *Goldberg*, and would return procedural due process to the "wooden distinction between rights and privileges that once seemed to govern the applicability of procedural due process rights." 

Rehnquist's "bitter with the sweet" approach has never commanded a majority. Accordingly, once a court finds a constitutional property interest, it must then determine whether the interest has been afforded adequate procedural protection. If the statute does not provide adequate procedural protection, then the court must determine what additional procedural safeguards the Constitution requires. The framework for making such determinations was definitively articulated in *Mathews v. Eldridge*. Under *Mathews*, a court looks first at the private interest affected by the government action; second, it examines the risk that an erroneous deprivation of the interest will occur due to the procedures currently employed and the utility, if any, of affording additional procedural safeguards; finally, it considers the burden that would be imposed on the government by requiring additional procedural protection.

These principles of due process dictate that interdicted Haitian refugees have a property interest in not being repatriated before they receive a meaningful asylum hearing.

III. The Procedural Due Process Rights of Interdicted Haitian Refugees

For over a hundred years, the Supreme Court has intimated that Congress and the executive share plenary power to regulate immigra-
Before the Act of March 3, 1875 barred the admission of convicts and prostitutes, neither Congress nor the President had made any consistent efforts to regulate immigration. Seven years later, Congress passed the first general immigration statute, the Act of August 3, 1882. In 1889, the Supreme Court heard a challenge to an immigration statute that forbade the entry of Chinese laborers in the Chinese Exclusion Case. Although Congress was engaging in invidious racial discrimination, the Court held that the decision of Congress was outside the scope of judicial scrutiny, the political branches of the federal government sharing plenary authority over the admission of foreigners to the United States.

This broad dicta giving the political branches “plenary power” to control immigration subsequently became limited according to whether the foreigner whose immigration was being controlled was facing exclusion or deportation proceedings.

Several years after plenary power over immigration was ascribed to Congress in the Chinese Exclusion Case, the Court substantially limited that power in the deportation context in the Japanese Immigrant Case. The Court has since held that “aliens [facing deportation] may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”

While remaining in the United States has been deemed a constitutional property interest for foreigners facing deportation, the due

193. 18 Stat. 477.
194. See Kleindienst, 408 U.S. at 761.
195. 22 Stat. 214; see Kleindienst, 408 U.S. at 761.
197. See Kleindienst, 408 U.S. at 770 (Douglas, J., dissenting); see also Chae Chang Ping, 130 U.S. at 605.
198. See Chae Chang Ping, 130 U.S. at 609.
199. A foreigner will face deportation proceedings if he or she has made an “entry” into the United States, either with a valid visa or illegally. See 3 ROTUNDA & NOWAK, supra note 141, § 22.2, at 598 n.1. A foreigner will face exclusion proceedings only if he or she is attempting to gain admission at the border or a port of entry. See Landon v. Plasencia, 459 U.S. 21, 25 (1982). This may include a foreigner who is detained at the border and granted parole whereby he or she may remain in the United States pending a determination of his or her admissibility. If found inadmissible, the paroled foreigner will be excluded rather deported despite his or her physical presence in the United States. See 3 ROTUNDA & NOWAK, supra note 141, § 22.2, at 599 n.1.
202. See Kwong Hai Chew, 344 U.S. at 597.
process rights of foreigners facing exclusion is less clear. In contrast to the deportation context, the Supreme Court has on several occasions following the Chinese Exclusion Case reaffirmed in broad dicta Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." For example, in *United States ex rel. Knauff v. Shaughnessy*, the Court held that the Attorney General could legally exclude a foreigner without a hearing, based on his individualized finding that the foreigner's admission would be prejudicial to the interests of the United States. In refusing to review the Attorney General's exclusion decision, the Court wrote that "[w]hatever the procedure authorized by Congress is, it is due process as far as an Alien denied entry is concerned." 

Similarly, three years later in *Shaughnessy v. United States ex rel. Mezei* a foreigner was excluded from the United States on the ground that he was a threat to national security. Because no other nation would accept him, the would-be immigrant remained confined on Ellis Island. The Court agreed with the Attorney General that Mezei's continued detention did not violate the Constitution, quoting with approval the Court's statement in *Knauff* that whatever procedure Congress chooses to provide an excludable foreigner is due process. During the same period, in *Kwong Hai Chew v. Colding*, the Court heard a foreigner's claim that he had been improperly subjected to exclusion, and instead should have been afforded a deportation proceeding. Finding that he was properly subject to deportation rather than exclusion, the Court held that he was entitled to due process. The Court echoed the sentiments of *Knauff* and *Mezei*, however, writing that if Kwong Hai Chew had been properly subject to exclusion instead of deportation, he could have found no refuge in the Constitution.

In the forty years following these cases, a split has developed among lower courts as to the extent to which unadmitted foreigners have due process rights. Some courts have interpreted the *Knauff*,

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204. 338 U.S. 537 (1950).
205. Id. at 542-43.
206. Id. at 544.
207. 345 U.S. 206 (1953).
208. Id. at 207.
209. Id. at 212.
211. Id. at 597.
212. Id. at 596 n.5.
Mezei and Kwong Hai Chew line of cases broadly, giving effect to these cases' most extravagant dicta and thus placing unadmitted foreigners categorically outside the Bill of Rights' protections with regard to the government's immigration decisions.213 Other courts have interpreted Mezei, Knauff and Kwong Hai Chew much more narrowly and held that unadmitted foreigners enjoy significant constitutional protection even in matters related to immigration.214 The weight of logic, Supreme Court precedent, and commentators' opinions support the latter line of cases, and mandate that the broad dicta of Knauff, Mezei, and Kwong Hai Chew cannot be properly considered to deny excludable foreigners all due process rights in the immigration context.215

The critical language in Mezei, Knauff and Kwong Hai Chew is clearly dicta.216 The narrow question addressed in Mezei and Knauff was whether, during wartime, the denial of a hearing to foreigners whom the Attorney General had deemed threats to national security, violated due process of law.217 The question decided in Kwong Hai Chew was whether Kwong Hai Chew's expulsion should be properly effected through deportation rather than exclusion proceedings and whether a deportable foreigner had due process rights.218

Dicta generally is entitled to "no more deference than logic and principle would accord it."219 Under this standard, the broad dicta in Mezei, Knauff and Kwong Hai Chew deserves no deference whatsoever.220 As a matter of logic, it is difficult to accept their suggestion

213. See, e.g., Haitian Refugee Center v. Gracey, 600 F. Supp. 1396, 1405 (D.D.C. 1985) (holding that foreigners have no constitutional right to enter United States), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987); Jean v. Nelson, 727 F.2d 957, 967-75 (11th Cir. 1984) (holding that excludable foreigners have no due process right to notice of right to seek asylum and no equal protection rights regarding the INS's decisions whether to grant them parole); cf. Haitian Refugee Center v. Baker, 953 F.2d 1498, 1514 (11th Cir. 1992) (holding that civil rights lawyers have no First Amendment right of access to Haitian Refugees).
215. See 3 ROTUNDA & NOWAK, supra note 141, § 22.2, at 599.
220. Id.
that excludable aliens are outside the Constitution’s protection. This would imply that the Attorney General could, for example, invoke immigration goals to justify a decision to stop feeding all detained excludable foreigners, arguing that scarce immigration resources would be better spent patrolling borders than providing food for detainees.\textsuperscript{221} Such conduct by the Attorney General would surely violate the Due Process Clause.\textsuperscript{222} Indeed, in his dissent in \textit{Mezei}\textsuperscript{223} Justice Jackson asked, “[b]ecause the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?”\textsuperscript{224} Commentators, as well as Supreme Court justices, have long felt that the dicta of \textit{Mezei}, \textit{Knauff}, and \textit{Kwong Hai Chew} defy logic.\textsuperscript{225}

A fairly recent Supreme Court case supports the proposition that excludable foreigners may make constitutional challenges to the operation of the immigration laws. In \textit{Landon v. Plasencia},\textsuperscript{226} the Court began its constitutional analysis by citing \textit{Knauff} and \textit{Kwong Hai Chew} with approval, stating that “an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”\textsuperscript{227} The Court then implicitly rejected the broad dicta in \textit{Mezei}, \textit{Knauff}, and \textit{Chew} by granting due process rights to an excludable foreigner who was challenging the INS’ decision not to admit her.\textsuperscript{228}

\textsuperscript{221} This question was asked and answered by Justice Marshall in his dissent in \textit{Jean}, 472 U.S. at 874.
\textsuperscript{222} \textit{Id.}
\textsuperscript{223} Also dissenting were Justices Black, Frankfurter and Douglas. See \textit{Mezei}, 345 U.S. at 216, 218.
\textsuperscript{224} \textit{Mezei}, 345 U.S. at 226-27 (Jackson, J., joined by Frankfurter, J., dissenting).
\textsuperscript{226} 459 U.S. 21 (1982).
\textsuperscript{227} \textit{Id.} at 32 (citing \textit{Knauff}, 338 U.S. at 542).
\textsuperscript{228} \textit{Landon}, 459 U.S. at 334.
The most accurate statement of the law in this confused area is probably that of the Second Circuit in *Yiu Sing Chun v. Sava.* The court stated there that while foreigners seeking admission for the first time can assert only limited rights concerning their entry, ones who claim rights to more than mere admission, such as a right to apply for political asylum, can bring constitutional claims. The court specifically held that the excludable Chinese stowaways seeking relief had a due process right to apply for political asylum "[b]ecause the severity of harm to the erroneously excluded asylee outweighs the administrative burden of providing an asylum hearing."  

The view of the Second Circuit in *Chun*—that excludable foreigners can bring due process challenges to the Attorney General’s enforcement of the immigration laws—is supported by several Supreme Court decisions besides *Landon.* For instance, in *Fong Yue Ting v. United States,* the Supreme Court wrote that Congress’ immigration power must be exercised “consistent[ly] with the Constitution” and must yield to the intervention of the judiciary where “required by the paramount law of the Constitution.” Similarly, the Supreme Court in *Galvan v. Press* observed that “since he is a ‘person,’ an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen.” Accordingly, as Justice Marshall wrote in *Jean,* both pure logic and Supreme Court precedent demonstrate the “acceptance of a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens.”  

Because they are protected by the Due Process Clause, interdicted Haitian refugees, like the plaintiffs in *Goldberg* and *Perry,* can make constitutional claims based on their reasonable reliance on the Immigration and Nationality Act, on the United Nations Protocol Relating to the Status of Refugees, on INS regulations governing

229. 708 F.2d 869 (2d Cir. 1983).
230. *Id.* at 876-77.
231. *Id.*
232. 149 U.S. 698 (1893).
233. *Fong Yue Ting,* 149 U.S. at 712-13.
political asylum and refugee status,239 and on the customs of the INS and other government agencies.240 Following the Goldberg analysis, these laws and modes of government conduct create a reasonable expectation that refugees will not be repatriated if they have legitimate asylum claims. The reasonable expectation arising out of statutes, treaties, regulations, and practices creates a property interest of which Haitian refugees cannot be deprived without due process. Because Haitian refugees with valid asylum claims have a property interest in not being repatriated, Supreme Court precedent requires that a meaningful asylum hearing be given before this property interest is taken away.

A. United Nations Protocol Relating to the Status of Refugees and Section 243(h) of the Immigration and Nationality Act

In 1968, the United States became a party to the United Nations Protocol Relating to the Status of Refugees.241 With the other participants at the Convention, the United States agreed not to "return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."242 The term "refugee" is defined by the Protocol as "[a]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group, or political opinion . . . ."243 When reforming the United States' refugee and asylum law in 1980, Congress adopted the Protocol's definition of a "refugee" verbatim in section 101 of the Immigration and Nationality Act,244 demonstrating Congress' intent to honor its commitments under the Protocol agreement.245 At the same time,

239. See infra notes 288-90 and accompanying text discussing 8 C.F.R. §§ 207.2(a) and 207.2(b).
240. See infra notes 303-08 and accompanying text.
242. Id.
245. See INS v. Stevic, 467 U.S. 407, 421 (1984); see also Baker, 953 F.2d at 1500-01.
Congress amended section 243(h) of the Act in three important respects. These changes fundamentally altered American refugee and asylum law, bringing it into compliance with the Protocol.\textsuperscript{246} First, Congress deleted the words "within the United States" from the clause defining the class of aliens to which the statute applies.\textsuperscript{247} Second, Congress added "return" to the statute, thus barring the government not merely from deporting, but also from returning foreigners who have valid asylum claims.\textsuperscript{248} Third, Congress removed the Attorney General's discretion in deciding whether or not a foreigner will receive asylum.\textsuperscript{249} Since 1980, the prohibition against returning or deporting a foreigner with a valid asylum claim has been absolute.\textsuperscript{250}

As amended in 1980, section 243(h) gives the Attorney General discretion only in the sense that the provision of asylum status is contingent on her good faith determination "that such alien's life or freedom would be threatened."\textsuperscript{251} The Attorney General is obligated to determine in good faith whether there is a viable claim of persecution, political or otherwise, in each case.\textsuperscript{252} Once this determination is made, the Attorney General, or her agent, shall not deport or return any foreigner with a valid claim.\textsuperscript{253}

\textbf{B. Haitian Refugee Center v. Smith}

In \textit{Haitian Refugee Center v. Smith},\textsuperscript{254} a class of Haitian refugees present in the United States who had applied for asylum claimed that the procedures employed to evaluate their asylum claims were unfair
and violated their due process rights. Specifically, they alleged that the INS conducted their asylum applications in an arbitrary manner by intimidating claimants, by refusing to process asylum claims and maintain records of asylum interviews, and by failing to hold private asylum interviews. The Fifth Circuit held that the Haitians had a statutorily-created right to make a meaningful application for political asylum, a right triggering the protection of the Due Process Clause. The court found that the Haitians had a constitutional property interest derived from a combination of three sources. The court found that the United States' commitment to resolution of the world refugee problem as expressed in the United Nations Protocol Relating to the Status of Refugees, read in conjunction with section 243(h) of the Immigration and Nationality Act, express intent on the part of Congress to grant foreigners the right to make a meaningful application for political asylum. In addition to section 243(h) and the Protocol, the court found that the INS regulations setting forth the procedures by which foreigners apply for refugee status and political asylum create a reasonable expectation that deportable Haitians would receive a meaningful and fair hearing to determine their eligibility for asylum. Thus, according to the Fifth Circuit, there is a procedural due process right to make a meaningful asylum application. Under Smith, the INS cannot deport Haitians who may have bona fide claims to political asylum status without first providing them with a meaningful and fair chance to apply.

Smith involved the rights of Haitians present in the United States and facing deportation, rather than those interdicted in international waters. While the reasoning applied by the court in Smith applies with equal force to interdicted refugees, the recent Supreme Court case, Sale v. Haitian Centers Council, profoundly affects the application of Smith to refugees who are outside the borders of the United States.
C. Sale v. Haitian Centers Council

In Sale, the Haitian Centers Council (hereinafter "HCC") challenged the current interdiction program as violating section 243(h) of the Immigration and Nationality Act and the Protocol. Although no constitutional issues were before the Court, the decision makes it impossible to use section 243(h) or the protocol as due process triggers.

In March, 1992, the HCC filed a class action in the Eastern District of New York challenging various aspects of the United States' interdiction and detention policy toward Haitian Refugees that existed prior to the Kennebunkport Order. The district court issued an injunction prohibiting the government from denying immigration attorneys access to prospective clients at Guantanamo Bay or from processing any refugee who had been denied representation.

While the government's appeal was pending, it altered its policy toward Haitian refugees with the Kennebunkport Order on May 23, 1992. The district court promptly heard the HCC's challenge to the new interdiction policy and denied its request for a temporary restraining order. The HCC appealed to the Second Circuit which reversed the district court's order, holding that the government's repatriation policy violated section 243(h) of the Immigration and Nationality Act. The Second Circuit remanded the case to the district court with instructions to issue an order enjoining the government "from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion."

The Supreme Court reversed the Second Circuit, holding that neither section 243(h) nor Article 33 of the Protocol applies extraterritorially, and thus neither governs the interdiction of Haitian refugees hundreds of miles from United States territory.

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267. Id. at 2556.
269. Id. at 933-34.
270. Id. at 933.
272. Id.
273. Sale, 113 S.Ct. at 2562. Before the case was heard, the Clinton Administration replaced the Bush Administration, and Chris Sale became the acting director of the INS. Accordingly, when oral argument was held in March 1993, the case had been renamed Sale v. Haitian Centers Council.
274. Id. at 2567.
held that section 243(h) does not apply extraterritorially because Congress did not contemplate that asylum screenings would take place beyond the borders of the United States, and thus did not intend section 243(h) to have extraterritorial application. Moreover, the Court held that Article 33 of the United Nations Protocol Relating to the Status of Refugees has a similarly limited geographical scope. The Court’s rationale for this conclusion was largely coextensive with the reasoning underlying its conclusion regarding section 243(h); the Court noted that section 243(h), as amended in 1980, was intended to conform with the Protocol. The Court held that, despite the Protocol’s plain language, the contracting nations did not intend the agreement to restrain their treatment of refugees beyond their borders.

The Court based this conclusion largely upon on scattered remarks during the convention by two delegates, and a curious redefinition of the word “return,” which the Court divorced from its plain meaning, thereby conveniently creating a new term of art. The narrowed legal meaning given the word “return” in the Protocol and section 243(h) is more akin to “expel” or “deport” than the ordinary meaning of “return.” The divestment of the word “return” of its common meaning is curiously based on the distinction in American immigration law between exclusion and deportation.

275. Id. at 2562-63.
276. Id. at 2567.
277. Id. at 2562 (citing INS v. Stevic, 467 U.S. 407, 416 (1984)).
278. Article 33 of the Protocol provides that “[n]o Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” There are no geographic limitations express or implied in the Protocol. Sale, 113 S. Ct. at 2563.
279. Id. at 2567.
280. Id. at 2566.
281. See id. at 2563-64.
282. See id.
283. See id. at 2563. The Court did not contend that the drafters of the Protocol or the nations agreeing to be bound by it made any reference to American immigration law. See id. Instead, the Court’s interpretation of the Protocol violates a fundamental principle of statutory interpretation by making one of the Protocol’s terms redundant. By redefining the word “return” to have the same meaning as “expel,” the Court interpreted the Protocol to say, in essence, “[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” See id. at 2563-64. The Protocol actually states “[n]o Contracting State shall expel or return ("refouler") a refugee . . . .” United Nations Protocol Relating to the Status of Refugees, Art. 33 (1967), 19 U.S.T. 6276, T.I.A.S. 6577.
In his dissent, Justice Blackmun accurately criticized the majority opinion in Sale. He described the decision as holding "that the forced repatriation of the Haitian refugees is perfectly legal, because the word 'return' does not mean return, because the opposite of 'within the United States' is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration." Justice Blackmun further criticized the majority's reliance on the presumption against the extraterritorial application of statutes on the basis of the clarity of the text of section 243 and the protocol. "The presumption runs throughout the majority's opinion," Justice Blackmun wrote, "and it stacks the deck by requiring the Haitians to produce 'affirmative evidence' that when Congress prohibited the return of 'any' alien, it indeed meant to prohibit the interception and return of aliens at sea." Justice Blackmun urged that the presumption that statutes are not applicable outside the United States' territory was irrelevant with regard to the statute the Court was reviewing. Rather, he argued, "It applies only where congressional intent is 'unexpressed.' Here there is no room for doubt: a territorial restriction has been deliberately deleted from the statute."

Although Sale does not address any constitutional issues, the Court's unequivocal holding that the Protocol and section 243(h) do not apply outside of United States territory renders it impossible to use these two laws as property interests to trigger the procedural protection of the Due Process Clause. Under the Goldberg analysis, these laws create a property interest if they give rise to a reasonable, non-unilateral expectation that Haitian refugees will not be intercepted and repatriated without a meaningful asylum hearing. The Sale Court's decision that these laws do not apply outside United States territory would logically defeat any such expectation arising from the Protocol or section 243(h).

284. Id. at 2568. (Blackmun, J., dissenting) (citations omitted).
285. Id. at 2576.
286. Id. (referring to 1980 amendment of section 243). Furthermore, the Sale majority violated the maxim "that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 165 (1951); see Anniston Mfg. Co. v. Davis, 301 U.S. 337, 356 (1937); American Power Co. v. SEC, 329 U.S. 90, 107-08 (1946); Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950).
287. See Roth, 408 U.S. at 577-78 (finding that respondent had no property interest in continued employment because the rules and policies of the university created no legitimate claim to entitlement to continued employment); see also Perry v. Sindermann, 408 U.S. 593, 602 (1972).
D. Other Property Interests: Agency Regulations and Customs

Aside from the Protocol and section 243(h), there are other sources of property interests for interdicted Haitians. The regulations applying to any foreigner who comes in contact with the INS still provide that every foreigner who requests it shall receive a fair asylum hearing.\textsuperscript{288} One such regulation provides that "[e]ach applicant who seeks admission as a refugee shall submit an individual form I-590 (Registration for Classification as Refugee)."\textsuperscript{289} Another regulation provides as follows: "Hearing. Each applicant [for refugee status] 14 years old or older shall appear in person before an immigration officer for inquiry under oath to determine his/her eligibility for admission as a refugee."\textsuperscript{290} These regulations suggest clearly that applicants for refugee status will have the merits of their claim evaluated with some measure of procedural regularity.

Although the Immigration and Nationality Act, as interpreted by the Court in \textit{Sale}, does not require the INS to provide a fair asylum hearing to an interdicted refugee who requests one, the INS regulations still bind the agency until it changes them.\textsuperscript{291} Furthermore, these regulations reflect the INS practice of giving any foreigner, whether encountered outside the territory of the United States or not, a fair asylum hearing if one is requested. The only deviation by the INS from this uniform policy was the Kennebunkport Order, which applied only to Haitian refugees.\textsuperscript{292}

Agency regulations providing that foreigners shall receive a meaningful opportunity to apply for political asylum create a constitu-

\begin{itemize}
  \item \textsuperscript{288} See 8 CFR §§ 207(a)-(b) (1993).
  \item \textsuperscript{289} 8 CFR § 207(a) (1993).
  \item \textsuperscript{290} 8 CFR § 207(b) (1993).
  \item \textsuperscript{291} Although the Court in \textit{Sale} held that the Immigration and Nationality Act did not prohibit the repatriation of Haitian refugees without an asylum hearing, the INS is still bound by its rules and regulations until they are changed. See Morton v. Ruiz, 415 U.S. 199, 235 (1974); Michigan Dep't of Educ. v. United States Dep't of Educ., 875 F.2d 1196, 1202 (6th Cir. 1989). Accordingly, as long as such regulations are on the books, they can provide a constitutional property interest. See Leis v. Flynt, 439 U.S. 438, 456 n.27 (1979) (Stevens, J., dissenting) ("Property interests ... are created and their dimensions are defined by existing rules or understandings that stem from an independent source ... rules or understandings that secure certain benefits and that support claims of entitlement to those benefits") (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).
\end{itemize}
tional property interest under the Goldberg analysis. They support a reasonable expectation on the part of interdicted refugees that the Attorney General will follow them and provide a fair hearing to determine if the refugee is fleeing from political persecution. Such regulations create a property interest that is "defined by existing rules or understandings that stem from" a source independent of the Constitution.\(^\text{293}\)

Indeed, following this analysis, the Fifth Circuit in *Smith* held that deportable Haitians had a property interest created by INS regulations.\(^\text{294}\) The Second Circuit reached the same result in *Augustin v. Sava*,\(^\text{295}\) there relying wholly on INS regulations to find that a deportable Haitian refugee had a property interest in a fair asylum hearing.\(^\text{296}\)

In *Augustin*, a Haitian refugee contested his deportation, alleging that he had been denied due process during his prior application for asylum because he had not been provided with an interpreter or a translator for his asylum hearing.\(^\text{297}\) These services, which the INS refused to provide, were mandated by INS regulations.\(^\text{298}\) Based on these regulations, the refugee had a reasonable expectation that he would receive a fair asylum hearing, complete with services that would allow him to communicate with the agents evaluating his claim. This reasonable expectation created a property interest in not being deported before it was determined by fair procedures whether he was eligible for political asylum. Thus, the INS' failure to comply with its own regulations violated his right to procedural due process.\(^\text{299}\) Regarding the agency regulations requiring translation and interpretation services, the Second Circuit wrote that "constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit. In such a case, limited due process rights attach."\(^\text{300}\)

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293. *Roth*, 408 U.S. at 577.
294. See Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038-40 (Former 5th Cir. 1982).
295. 735 F.2d 32 (2d Cir. 1984).
296. *Id.* at 37.
297. *Augustin* was denied an interpreter for his asylum hearing, a translator for documents he wished to present as evidence, and a translation of the asylum proceedings. *Id.* at 36-38.
298. *Id.* at 36-37 (citing 8 CFR § 242.12 (1983) (interpreter) and 8 CFR § 103.2 (1983) (translator)).
299. *Augustin*, 735 F.2d at 37.
found a property interest, the court determined that the process due was the class of procedures mandated by the regulations which the INS had failed to follow.\textsuperscript{301}

While \textit{Augustin} and \textit{Smith} deal with foreigners who are facing deportation rather than exclusion, the rationale of these cases applies with equal force to interdicted Haitian refugees. As discussed above, the distinction between deportable and excludable aliens is not an adequate basis upon which to deny a class of people the protection of the Constitution.\textsuperscript{302}

Another source of constitutional property interests for Haitian refugees is not any formal rule of law, but rather the customs and practices of the INS and the Coast Guard. It is the custom of the executive branch not to repatriate foreigners without first determining if they have legitimate asylum claims, whether the foreigners are encountered within or without United States territory. This policy was changed in May 1992 only as to Haitian refugees.\textsuperscript{303} This government custom creates a reasonable expectation on the part of Haitian refugees that they, like other refugees whom the United States encounters, will not be repatriated without the opportunity to make a meaningful application for asylum. Supreme Court precedent clearly establishes the creation of a constitutional property interest through such government customs. Most notably, in \textit{Perry v. Sindermann},\textsuperscript{304} the Court held that a university professor had a property interest in continued employment due to the unwritten customs and practices of the institution that employed him.\textsuperscript{305} Although the written rules and policies of the university could not be reasonably interpreted to provide any guarantee of continued employment, it was the custom of the university to renew the contracts of its professors.\textsuperscript{306} The Court held that the university could not discriminate against Sindermann in this regard. Sindermann accordingly had a property interest in being treated in the manner in which the university customarily treated other professors, and his employment could be terminated only through constitutionally-mandated procedures.\textsuperscript{307} The Court wrote that the customs and practices of the university amounted to "an un-

\begin{flushleft}
\textsuperscript{301} \textit{Id.} at 37-38.
\textsuperscript{302} \textit{See supra} notes 192-236 and accompanying text.
\textsuperscript{303} \textit{See supra} note 292 and accompanying text.
\textsuperscript{304} 408 U.S. 593 (1972).
\textsuperscript{305} \textit{Id.} at 602-03.
\textsuperscript{306} \textit{Id.} at 599-600.
\textsuperscript{307} \textit{Id.} at 600-02.
\end{flushleft}
written 'common law' . . . that certain employees shall have the equivalent of tenure.>308

While the government's deviation from its customary practices in Perry occurred as to an individual, the deviation in asylum screening procedures for interdicted Haitians affects an entire class of people. This distinction, however, should not diminish the applicability of Perry: interdicted Haitian refugees have a reasonable expectation that they will not be discriminated against, but be treated in the same manner as refugees from any other country in the world and not be repatriated without a meaningful determination as to whether they are fleeing political persecution. Anything less would violate the procedural due process antidiscrimination principle implicit in Perry. Accordingly, under Perry, interdicted Haitian refugees have a constitutional property interest in receiving a meaningful asylum hearing.

These rights that have been discussed thus far are all firmly grounded in the Supreme Court's procedural due process decisions such as Goldberg and Perry. Each is created by reasonable expectations arising from rules of positive law or other government conduct. They "are created and their dimensions are defined by existing rules or understandings that stem from" a source independent of the Constitution.>309 As such, they cannot be taken away without due process. There is, however, another type of property interest — one that is created independently of any government conduct via legislation, regulation, or custom — upon which interdicted Haitian refugees can base a due process claim.

E. New Liberty Interests and Procedural Due Process

Even if interdicted Haitian refugees could invoke no statute, regulation, or government custom as a basis for a property interest, there are still powerful arguments for giving them recourse in the Due Process Clause from forcible interdiction. In his article, Cracks in 'The New Property': Adjudicative Due Process in the Administrative State,>310 Professor William Van Alstyne writes that, when individuals deal with administrative agencies having the power to determine their future, "personal freedoms [should be] sheltered from the government

308. Id. at 602; see also Leis v. Flynt, 439 U.S. 438, 456 (1979) (Stevens, J., dissenting) (customs of the state of Ohio create an "implicit promise" sufficient to create a constitutionally protected interest in pro ha vice admissions to practice in Ohio courts).

309. Roth, 408 U.S. at 577.

310. Van Alstyne, supra note 143.
in *all* its protean exercises of power."\(^{311}\) Professor Van Alstyne posits that property interests sufficient to trigger the procedural protections of the Due Process Clause should not be identified only by reference to positive law or government custom.\(^{312}\) His thesis is that due process jurisprudence should "treat *freedom from arbitrary adjudicative procedures* as a substantive element of one's liberty."\(^{313}\) This liberty would require the government to adequately justify its interests when it fails to provide fair and reliable procedures, just as it must do when it deprives an individual of tangible property\(^{314}\) or a vested entitlement,\(^{315}\) or curtails substantive liberties such as free speech or privacy.\(^{316}\) Professor Van Alstyne proposes that the ideas of liberty and procedural due process "easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means."\(^{317}\)

Central to Professor Van Alstyne's proposal is his argument that current procedural due process doctrine is arbitrary and overly rigid. He writes that the requirement that property interests be created by positive law carries with it "notions of personal entitlement and sin-curism that no constitutional court since *Lochner* should desire to encourage."\(^{318}\) He forcefully argues that the current mode of procedural due process analysis has no logically consistent way of distinguishing between the substantive rights which the laws are said to create and the procedures to protect those rights, which are alone the subject of constitutional review.\(^{319}\) This is true because "the aggregate of procedural protections may well describe the very substance of a given freedom or liberty."\(^{320}\) The Court's method of reviewing the procedural, but not the substantive, aspects of legislation upon which claimants base their due process claims is based on an inherently arbitrary and illogical distinction.\(^{321}\) Accordingly, Professor Van Alstyne asserts

\(^{311}\) *Id.* at 487 (emphasis in original).

\(^{312}\) *See id.* at 487.

\(^{313}\) *Id.* (emphasis in original).

\(^{314}\) *See id.*


\(^{317}\) Van Alstyne, *supra* note 143, at 487.

\(^{318}\) *Id.* at 484.

\(^{319}\) *See id.*

\(^{320}\) *Id.*

\(^{321}\) *See id.*
that a constitutionally protected interest in being free from procedural unfairness "does not lack text, logic, flexibility, or precedent." \[322\]

Professor Van Alstyne's ideas build on those of Professor Reich which spawned a procedural due process evolution when the Court adopted them in *Goldberg*. \[323\] Professor Reich, like Professor Van Alstyne after him, argued for the evolution of procedural due process. He proposed that the protection provided by procedural due process must be expanded if it is to satisfy its traditional role in our society as a buffer between state power and individual autonomy. \[324\] Perhaps the Court will take a cue from Professor Van Alstyne as it did twenty-four years ago from Professor Reich. \[325\]

Professor Van Alstyne's criticism of current procedural due process jurisprudence has been echoed by Professor Laurence Tribe and several other commentators. These scholars criticize the identification of property interests only by reference to affirmative government conduct as internally inconsistent and too narrow and rigid a conception of the rights guaranteed by the procedural component of the Due Process Clause. \[326\]

Professor Tribe has noted, for instance, that the Court's current procedural due process analysis relies on an insupportable distinction between substance and procedure. \[327\] The distinction between a statute's provision of a substantive right and its provision of procedures to protect that right is illusory. Professor Tribe concludes that the Court must therefore move toward less deference on matters of substance or more deference on matters deemed procedural. \[328\] Because the latter course would nullify the Due Process Clause in an era where the government's role in the lives of its citizens has expanded dramatically, the former course is necessary if the Due Process Clause is to retain any force as a guarantor of individual freedom. \[329\] Accordingly, Pro-

\[322\] Van Alstyne, *supra* note 143, at 488.

\[323\] Id. at 446-48.

\[324\] See id. at 453; *see also id.* at 455-60 (discussing Reich's import in the procedural due process evolution surrounding *Goldberg*); *Roth*, 408 U.S. at 571.

\[325\] See Van Alstyne, *supra* note 143, at 455-56; *see also Goldberg*, 397 U.S. at 261-62 n.8 (quoting *Emerging Legal Issues, supra* note 155, at 1255).


\[327\] Tribe, *supra* note 326, § 10-12, at 712.

\[328\] Id., § 10-12, at 713.

\[329\] *See id.*
Professor Tribe advocates abolishing the requirement that protectable interests be created by positive law. With two modifications, Professor Tribe echoes Professor Van Alstyne's suggestion that the Due Process Clause be interpreted to encompass a freedom from arbitrary adjudicative procedures. The first modification, that procedural due process be viewed as having a participational as well as an instrumental goal, is discussed below. Professor Tribe's second modification is to include the rule-making, as well as adjudicative, functions of administrative agencies. Thus, according to Professor Tribe there would be a freedom from fundamentally unfair agency rule-making as well as the "freedom from arbitrary adjudicative procedures" promoted by Professor Van Alstyne.

Professor Tribe's first modification, advancing the participatory function of due process, has particular relevance to the predicament of interdicted Haitian refugees. Procedural due process should be viewed as having "participatory" as well as "instrumental" goals. Professor Tribe notes that once the doctrine of procedural due process is unhinged from the notion of what "belongs" to the person, it becomes apparent that unfairness inheres in the very act of disposing of an individual's situation without allowing him or her to participate in some meaningful way. If procedures are inadequate, then there is unfairness not merely because a mistake is more likely to occur, as the instrumental view of procedural due process suggests, but also "because such treatment seems incompatible with the person's claim to being treated as a human being." A participational as well as an instrumental purpose is served by affording procedural due process protection; due process can regularize "the interaction between the individual and the state through requiring an interchange of views before the state does the individual grievous harm."

Professor Tribe's understanding of the participational goals of procedural due process would afford far greater protection to Haitian refugees than does current due process doctrine. The participational function of due process takes the Haitians' claim to a meaningful hearing to determine if they qualify as political refugees beyond the

330. Id.
331. Id. (citing Van Alstyne, supra note 143, at 483, 487).
332. Tribe, supra note 326, § 10-12, at 714.
333. Van Alstyne, supra note 143 at 487; see Tribe, supra note 326, § 10-12, at 714.
334. Tribe, supra note 326, § 10-12, at 713.
335. Id.
336. Id.
337. Id. at 714.
level of a merely results-oriented emphasis on fairness.\(^{338}\) The participational interest involved in Professor Tribe’s concept of procedural due process places constitutional value on the Haitian refugees as human beings who deserve to participate in the process and understand the basis for the agency’s decision, whether they ultimately qualify for political asylum or not. Professor Tribe’s approach would demand that if interdicted refugees do not qualify for refugee status, and are therefore returned to Haiti, they should know why. An individual’s right to participate in and understand an agency determination having such a profoundly adverse affect on their life is a liberty interest that requires procedural fairness and regularity.\(^{339}\)

Like the ideas of Professor Van Alstyne, those of Professor Tribe apply with great force to the situation of interdicted Haitian refugees. They are presently subjected to “procedural grossness” that is “profoundly unfair and objectionable.”\(^ {340}\) Haitian refugees have a liberty interest in “freedom from arbitrary adjudicative procedures,” which affords them uniform procedural protection under the Due Process Clause to apply for political asylum in a meaningful manner.

IV. Substantive Due Process Rights of Interdicted Haitian Refugees

A. Introduction

The doctrine of procedural due process dictates that the government can achieve certain objectives only by providing those whose interests are affected with specified procedural protection,\(^ {341}\) whereas the doctrine of substantive due process holds certain government objectives impermissible regardless of the procedures employed in achieving them.\(^ {342}\) Thus, the former mode of review examines the procedural fairness of government action, while the latter focuses on whether the government action is itself constitutional, regardless of the fairness of procedures employed.\(^ {343}\) In this manner, “the due pro-

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338. For example, under a wholly instrumental view of procedural due process, one might only be concerned with the percentage of Haitian refugees awarded political asylum as a proxy for whether the procedures employed are fair. Whether a reasonable refugee felt they had been given a fair chance to present their claim for asylum would be of no consequence.


340. Van Alstyne, supra note 143, at 484.


343. See NOWAK, ET AL., supra note 341, §10.6, at 324.
cess clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure."

The substantive protection provided by the Due Process Clause includes those individual rights explicitly described by the Bill of Rights, but is not limited to them. Similarly, while the substantive protection afforded by the Due Process Clause includes some individual liberties because they were outside the realm of permissible governmental intrusion when the Fourteenth Amendment was ratified, it is not limited to such rights. Rather, "the full scope of liberty guaranteed by the Due Process Clause . . . is a rational continuum which, broadly speaking, includes a freedom from all substantive arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." As such, substantive due process represents "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

In contrast to procedural due process analysis, substantive due process analysis requires identifying a "fundamental right." If the government is intruding on a fundamental right, then the government's actions must survive strict scrutiny. Accordingly, if the interdiction and forced repatriation of Haitian refugees threaten a fundamental interest, then the interdiction policy must pass strict scrutiny review, under which the government bears the burden of showing that it is employing necessary means in furtherance of a compelling or overriding government interest. The implications of

346. Casey, 112 S. Ct. at 2804-05.
348. Casey, 112 S. Ct. at 2805.
350. Casey, 112 S. Ct. at 2805.
352. NOWAK, ET AL., supra note 341, §10.6, at 370.
353. See id. at 690.
strict scrutiny review upon the current interdiction policy are discussed below.

B. Substantive Due Process in the Context of Haitian Refugees

One interest possessed by Haitian refugees that is clearly fundamental is life. The United States government, of course, does not kill Haitian refugees as a matter of policy. Many repatriated Haitians are returned, however, to waiting oppressors where politically-motivated violence resulting in death or serious injury is very likely. The United States does not merely fail to rescue Haitian refugees. Rather, they are moving away from Haiti under their own power, sometimes headed for America, sometimes elsewhere.354 The United States intercepts these refugees and forces them to return to Haiti, in a very real sense depriving many of them of life.

The government can, of course, take human life in certain circumstances, such as capital punishment, without violating the Constitution if certain procedures are followed.355 In instances where the government has the power to deprive an individual of life when it employs the proper procedures, the proper mode of analysis to evaluate the individual's constitutional rights is procedural, rather than substantive, due process.356

In other situations, however, the government may not have the constitutional power to deprive an individual of life, regardless of the procedures it employed in doing so. For instance, when an individual has committed no crime that would justify capital punishment, the provision of fair procedures would be irrelevant to the constitutionality of the government's action.357 In such cases, therefore, substantive due process is the proper mode of analysis to determine if the government is violating the Constitution.358 In this context, Haitian refugees fleeing political persecution who are returned to their persecutors

354. See Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549, 2572 (1993) (Blackmun, J., dissenting) (pointing out that the executive "has gone forth to seize aliens who are not at its borders and return them to persecution") (emphasis in original); see also William Booth, 400 Haitians Let Ashore in U.S., S.F. CHRON., April 23, 1994, at A14 (stating that 40,000 Haitians have migrated to the Bahamas).


358. Cf. 2 ROTUNDA & NOWAK, supra note 141, § 17.3, at 588 n.9.
clearly fall under a substantive due process analysis. Because the individual refugee stands accused of no crime or other conduct that merits death, no procedures could validate the government's action. By interdicting and repatriating Haitian refugees without an asylum hearing, the executive branch affirmatively deprives them of the fundamental interest to life; accordingly, Supreme Court precedent requires the application of strict scrutiny to the interdiction program.

Haitian refugees also possess a fundamental right to be free from government conduct that "shocks the conscience." While this substantive due process standard usually applies in the criminal setting, it also applies to the conduct of the INS toward Haitian refugees.

In *Wang Zong Xiao v. Reno*, a district court held that the INS violated the substantive due process rights of an excludable Chinese immigrant by attempting to repatriate him without affording him a fair asylum hearing. The court found that the government's conduct shocked the conscience because Xiao would be persecuted in China due to testimony he had given in a trial in the United States, and because the INS had attempted to manipulate the assignment of immigration judges in the asylum adjudication procedures in order to reduce Xiao's chances of successfully applying.

The conduct of the executive branch in forcibly repatriating Haitian refugees to violent political persecution similarly "shocks the conscience" and "exceeds all constitutional norms." This conduct shocks the conscience in the same manner as the Allies' forcible return of Jewish refugees to Nazi concentration camps during World War II. The forced repatriation of Jewish refugees with full knowledge of the fate awaiting them so shocked the conscience of the United States and other nations that, in the 1951 Convention Relating to the Status of Refugees and other conventions, they promised that "[n]o contracting state shall expel or return ('refouler') a refugee in
any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.  

Similarly, the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948 states that people of all nations have the right to be free from political repression and to leave their country.  

Several other international instruments also unequivocally impose a strict obligation of non-refoulement upon contracting states. For instance, the 1967 Declaration on Territorial Asylum of the United Nations General Assembly forbids subjecting any person seeking sanctuary to rejection at the frontier or forcible repatriation to any state where he or she might be persecuted. Similarly, the Convention of the Organization of African Unity prohibits rejection at the frontier or return of a refugee to a country "where his life, physical integrity or liberty would be threatened." Finally, the Convention on the Status of Stateless Persons noted that the principle of non-refoulement of those who would face political persecution upon return is a "generally accepted principle" of international law.

Such international agreements and statements of principle provide evidence that the forced repatriation of political refugees shocks the conscience of civilized nations. They also can serve, in substantive due process analysis, as a basis for determining whether a right is fundamental. The appropriate parameters of substantive due process are properly drawn not by arbitrary lines, "but rather from careful respect for the teachings of history [and] solid recognition of the basic values that underlie our society." International agreements to which the United States was a party, such as those mentioned above,

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370. See King, supra note 117, at 790.


have been employed by federal courts to discover the values that underlie our society, and thus determine whether a right is fundamental. For instance, in *Lipscomb v. Simmons* the Ninth Circuit found that foster children have a fundamental right to be placed with fit relatives, in part by referring to international treaties and declarations which supported the importance of this right.

In the case of interdicted Haitian refugees, the *Lipscomb* decision supports finding a fundamental right not to be returned to political oppression with reference to the principles articulated in international treaties and declarations. At the very least *Lipscomb* provides a legitimate basis for referring to principles expressed in international treaties and declarations in order to determine whether interdicted Haitian refugees have fundamental rights that have been violated by the government's conduct.

Under the "shock the conscience" standard recently applied in *Wang Zong Xiao*, informed by the principles articulated in international declarations and treaties in which the United States has participated, interdicted Haitian refugees have clearly been deprived of a fundamental interest. With regard to the repatriation of Haitians facing political persecution, "under any formulation of the judicial conscience, the governmental conduct . . . shocks it, and does so flagrantly."

A reasonable court could find that interdicted Haitian refugees possess any of the aforementioned fundamental interests. Government interference with such interests merits strict scrutiny analysis, which requires that the government demonstrate that it is using "narrowly focussed" means to achieve a "compelling and legitimate" state interest.

In a situation such as the interdiction of Haitian refugees, strict scrutiny analysis under Supreme Court precedent would require an individualized determination that each refugee would not face political persecution upon his or her return. Fair asylum proceedings

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375. 884 F.2d 1242 (9th Cir. 1988).
376. *See Lipscomb*, 884 F.2d at 1244 n.1. (stating that "[t]he constitutional right to associate with family members is protected by the due process clause of the fourteenth amendment. No right is more sacred. This right is so fundamental that it has been recognized in the Universal Declaration of Human Rights . . . among other international human rights agreements.").
379. Id. at 1468-71.
would be the only appropriate way to accomplish this, making it unlikely that a refugees with a legitimate claim to political persecution would be repatriated. Indeed, the only time the Court has upheld a serious infringement of liberty without requiring a case-by-case, individualized determination regarding whether the infringement was necessary to effect the government’s compelling interest was in *Korematsu v. United States*\(^\text{380}\) where the Court upheld the internment of Americans of Japanese decent during World War II.\(^\text{381}\)

**Conclusion**

Interdicted Haitian refugees have a right to a meaningful hearing to determine whether they would face political persecution if repatriated. This right can be found in both the procedural and substantive components of the Due Process Clause if federal courts will apply Supreme Court precedent without bias. The need for judicial intervention may be obviated, however, by President Clinton’s promise to change the no hearing policy begun by President Bush with the Kennebunkport Order in May, 1992. If Clinton gives each interdicted refugee a meaningful opportunity to show that they qualify for political asylum, then the executive’s violation of the Constitution will have ended. However, such a course is unlikely because while providing meaningful procedures is the morally and constitutionally correct path, it is politically dangerous as long as the military government headed by Raoul Cedras remains in power. The incidence of persecution by Cedras’ government and factions allied with it is so great that the provision of a meaningful asylum hearing would spawn an exodus from Haiti, just as Clinton’s campaign promises did in the Fall of 1992. Such an exodus could have disastrous political consequences for Clinton, and so providing meaningful asylum determinations without taking serious steps to reduce persecution in Haiti is an unlikely course. Meaningful asylum hearings should be given to any interdicted refugee before he or she is repatriated, but for this to be politically feasible Cedras’ government must be ousted. Then it will be politically feasible to provide any interdicted Haitian refugee with a meaningful asylum hearing, or to suspend interdiction altogether, because many fewer will be motivated to flee Haiti and few of those who do flee will be doing so to escape persecution.

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381. *Flores*, 113 S. Ct. at 1469 n.30 (Stevens, J., dissenting).