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NO INSTRUCTIONS REQUIRED: DUE PROCESS AND POST-DEPRIVATION REMEDIES FOR PROPERTY SEIZED IN CRIMINAL INVESTIGATIONS

City of West Covina v. Perkins, 119 S. Ct. 678 (1999)

I. INTRODUCTION

In *City of West Covina v. Perkins*,[1] the Supreme Court considered whether the Due Process Clause[2] of the Fourteenth Amendment requires state or local law enforcement officers to notify property owners of the state law remedies available for recovering property lawfully seized in criminal investigations.[3] The Court ruled that the Due Process Clause does not require officers to give property owners notice of the state law remedies available to retrieve the seized property.[4]

To arrive at this holding, Justice Kennedy, writing for a seven-person majority, relied heavily on the fact that state law remedies are well established by published and widely available statutes and case law.[5] The Court also noted the lack of support for such a notice requirement in Supreme Court precedent and federal and state criminal laws.[6]

This Note begins by examining the development of the concept of "notice" as it pertains to the Due Process Clause. This Note argues that Perkins correctly rejected the Ninth Circuit's expansive notice requirement because it is unwarranted and unsupported by precedent. The Court properly concluded

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[1] 119 S. Ct. 678 (1999).

[2] The Due Process Clause provides, in relevant part: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, § 1.

[3] *Perkins*, 119 S. Ct. at 679.

[4] *Id.* at 681.

[5] *Id.* at 681-82.

[6] *Id.* at 682.

that law enforcement officers have no obligation under the Due Process Clause to notify property owners of the procedures for recovering their seized property. This Note further argues that the Court's decision will not have a detrimental impact on future judicial decisions regarding deprivation of property. Finally, this Note argues that the majority was erroneous in its assertion, in dicta, that due process requires officers to give notice that property has been seized pursuant to a search warrant. This suggestion by the Court constitutes an unwarranted expansion of due process principles into an area historically governed by the Fourth Amendment.

II. BACKGROUND

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property without due process of law."[7] The concept of "Due Process" encompasses rights not only to judicial procedures and judicial remedies, but also to administrative procedures and to judicial review of administrative decisions.[8] The Supreme Court recognizes rights to both procedural and substantive due process.[9]

A. PROCEDURAL DUE PROCESS

Procedural due process is based on the theory that the protection against deprivation of life, liberty, and property is not absolute, and that such deprivation is permissible when accompanied by procedural steps that ensure fairness.[10] To satisfy the requirements of procedural due process, the state must provide the injured party with notice and a meaningful opportunity to be heard prior to depriving that party of life, liberty, or property.[11] In situations where pre-deprivation notice is impractical

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[7] U.S. CONST. amend. XIV, §1.

[8] *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993).

[9] *See id.* at 310.

[10] Todd G. Cosenza, Note, *Preserving Procedural Due Process for Legal Immigrants Receiving Food Stamps in Light of the Personal Responsibility Act of 1996*, 65 FORDHAM L. REV. 2065, 2069 (1997).

[11] *Id. See also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

or impossible, such as a search warrant or the necessity of quick action by the state, the Supreme Court has found that the existence of post-deprivation remedies satisfies due process requirements.[12]

There is no bright-line rule that governs the question of the particular procedural protection that due process requires.[13] The Supreme Court established a three-part balancing test in *Matthews v. Eldridge*[14] to determine entitlement to particular procedural safeguards.[15] Under *Matthews*, a court must consider: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[16]

B. DEVELOPMENT OF THE CONCEPT OF NOTICE WITHIN THE PROCEDURAL COMPONENT OF THE DUE PROCESS CLAUSE

The concept of notice is a fundamental element of the right to procedural due process.[17] To meet the requirements of due process, the notice must be "reasonable and adequate for the purpose, [with due regard afforded] to the nature of the pro-

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circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

[12] *See* Hudson v. Palmer, 468 U.S. 517, 531 (1984) (quoting Parratt v. Taylor, 451 U.S. 527, 539 (1981)).

[13] *See* Fallon, *supra* note 8, at 331.

[14] 424 U.S. 319 (1976). In *Matthews*, the Supreme Court weighed a disability claimant's interest in continued disability benefits, the fairness and reliability of existing pre-termination procedures, the probable values of additional procedural safeguards, and the burden of such additional safeguards, and concluded that due process does not require an evidentiary hearing prior to the discontinuance of disability benefits. *Id.* at 349.

[15] *See* Fallon, *supra* note 8, at 330-31.

[16] *Matthews*, 424 U.S. at 335. Substantive due process claims, by contrast, arise when statutory or regulatory schemes, on their face, infringe on a personal constitutional right. *See* Craig W. Hillwig, Comment, *Giving Property all the Process That's Due: A Fundamental Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703, 713-14 (1992). The trial court in *Perkins* found that there was no substantive due process violation, and the parties did not address the issue on appeal. *See* City of West Covina v. Perkins, 119 S. Ct. 678, 681 (1999).

[17] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *See also* 16B AM. JUR. 2D *Constitutional Law* § 934 (1998).

ceedings and the character of the rights which may be affected by it."[18] To determine whether a particular method of notice is reasonable for due process purposes, a Court must weigh the state's interest against the interest of the individual seeking protection under the Fourteenth Amendment.[19]

1. The Purpose of the Notice Requirement

The primary purpose of the procedural due process notice requirement is to ensure the "deprived person" a meaningful opportunity to be heard.[20] In *Mullane v. Central Hanover Bank & Trust*,[21] the Supreme Court held that notice by publication in a newspaper to beneficiaries whose interests and addresses were known regarding judicial settlement of accounts did not satisfy the requirements of due process because there was no meaningful opportunity to be heard.[22] The Court reasoned that the fundamental right to be heard "has little reality or worth unless one is informed that the matter is pending, and can choose for himself whether to appear or default, acquiesce or contest."[23] In the pre-deprivation context, the Court has developed and consistently applied the *Mullane* standard, namely the requirement

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[18] 16B AM. JUR. 2D, *supra* note 17, § 934.

[19] *Id.*

[20] *See Mullane*, 339 U.S. at 314 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

[21] 339 U.S. 306 (1950).

[22] *See Mullane*, 339 U.S. at 319. In this case a New York statute permitting trust companies to pool small trust estates into one common fund for administration purposes also allowed the trust company to notify beneficiaries by publication in a local newspaper of petitions for judicial settlement of the trust companies accounts. *Id.* at 308-10. The Court found that notice by newspaper publication to beneficiaries whose addresses were known did not satisfy due process, but such notice was satisfactory with respect to beneficiaries whose addresses were unknown. *Id.* at 317-18. The Court went on to clarify that personal service to individual beneficiaries is not required due to the large number of interests and substantial similarities within large classes of interests. *Id.* at 319. Rather, notice reasonably certain to reach most of the beneficiaries interested in objecting would satisfy the notice requirement since any objections sustained would inure to the benefit of all. *Id.* Although the court did not specify the type of notice required, it stated that the notice must be reasonably calculated to inform the interested parties of the pending action and afford them an opportunity to object. *See id.* It is important to point out that this case addresses the notice requirement in the pre-deprivation context, where there is still an opportunity to object to the deprivation.

[23] *Id.* at 314.

of notice reasonably calculated to provide interested parties with an opportunity to be heard.[24]

However, when meaningful pre-deprivation process is impractical or impossible,[25] the Supreme Court has established a major exception to the pre-deprivation procedural requirements of notice and a meaningful opportunity to be heard by allowing the existence of adequate post-deprivation remedies to satisfy procedural due process.[26] Under this exception, established in *Parratt v. Taylor*,[27] the deprivation of property without prior notice or hearing satisfies due process requirements if adequate state law post-deprivation remedies are available.[28] In *Parratt*, a state prison inmate sued prison officials under 42 U.S.C. § 1983,[29] alleging that the officials' negligent loss of his mail-order hobby materials deprived him of his property with-

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[24] *See* Hillwig, *supra* note 16, at 708. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Parham v. J.R., 442 U.S. 584, 606-07 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978).

[25] Situations where pre-deprivation process is impractical include seizures that (1) are necessary to advance an important public interest; (2) present a special need for prompt government action; and (3) utilize legitimate force over which the government has strict control. *See* Fuentes v. Shevin, 407 U.S. 67, 90-91 (1972). In particular, the Court has allowed seizures without pre-deprivation process for search warrants, for collecting the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs. *See id.* at 91-92 (citing cases in which such seizures have been allowed). With respect to search warrants, the Court stated:

> [A] search warrant is generally issued to serve a highly important governmental need—e.g., the apprehension and conviction of criminals . . . . Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the state will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause.

Id. at 93 n.30.

[26] *See* Parratt v. Taylor, 451 U.S. 527, 540-41 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986) (overruling *Parratt*'s application of 42 U.S.C. § 1983 to negligent deprivations). *See also* Hillwig, *supra* note 16, at 704 (citing *Parratt*, 451 U.S. at 541).

[27] 451 U.S. 527, 539 (1981).

[28] *Id.* at 539. *See also* Hudson v. Palmer, 468 U.S. 517, 531 (1984).

[29] Section 1983 provides a civil cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." 42 U.S.C. § 1983 (1999).

out due process of law.[30] The Supreme Court held that although the prisoner had been deprived of property under the color of state law, he did not state a claim for relief under § 1983 because there was no violation of his due process rights under the Fourteenth Amendment.[31] In deciding that the prison officials did not violate the prisoner's due process rights, the Supreme Court stated:

> [E]ither the necessity of quick action by the State or the impracticality of providing any meaningful pre-deprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's actions at some time after the initial taking, can satisfy the requirements of procedural due process.[32]

The Court found that pre-deprivation process was impossible in this case because the loss of the prisoner's property was a result of random and unauthorized acts by a state employee.[33] In such a case, a state cannot predict precisely when the loss will occur.[34] The Court also found that the state tort claims act provided an adequate post-deprivation remedy, and thus satisfied procedural due process.[35]

Similarly, in *Hudson v. Palmer*,[36] a prisoner alleged that during the search of his cell, a prison guard deliberately destroyed some of the prisoner's personal property, including legal materials and letters.[37] The Court, applying the *Parratt* rule, held that an unauthorized intentional deprivation of property by a state employee does not violate procedural due process when a meaningful post-deprivation remedy exists.[38] The Court reasoned that intentional conduct by a state employee can be as

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[30] *Parratt*, 451 U.S. at 530. The prisoner was in solitary confinement at the time his package arrived and was unable to collect it. *Id.* at 530. After being released from solitary confinement, the prisoner contacted several prison officials regarding the whereabouts of his packages, but the officials were unable to locate them or determine the cause of their disappearance. *Id.*

[31] *Id.* at 543.

[32] *Id.* at 539.

[33] *Id.* at 541.

[34] *Id.*

[35] *Id.* at 543.

[36] 468 U.S. 517 (1984).

[37] *Id.* at 519-20.

[38] *Id.* at 533. The Court accepted the lower courts' findings that state post-deprivation remedies, such as judicial remedies under tort law, were available and were adequate to compensate the prisoner for his property loss. *Id.* at 534-35.

random and unauthorized as the negligent conduct discussed in *Parratt* since the state cannot anticipate or control either action in order to provide a practical pre-deprivation procedure.[39]

However, in *Logan v. Zimmerman Brush Co.*,[40] the Court reaffirmed its holding in *Parratt*, but held that post-deprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to an established state procedure, rather than random and unauthorized action.[41] In *Logan*, the Court considered whether the terms of an Illinois employment discrimination statute deprived the petitioner of an opportunity to pursue his employment discrimination claim.[42] The Court held that the petitioner was deprived of a protected property interest in violation of the Due Process Clause because the statute's 120-day limitation for convening a fact finding hearing precluded the petitioner's opportunity for a hearing.[43] The Court distinguished *Parratt* on the ground that it addressed random and unauthorized acts for which no pre-deprivation process was practical, whereas in *Logan*, the state system itself, by operation of law, would destroy a complainant's property interest whenever the Commission fails to convene a timely conference.[44]

With respect to *Perkins*, the California Penal Code provides two post-deprivation remedies for property seized pursuant to a search warrant.[45] Section 1536 states:

> All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in

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[39] *Id.* at 533.

[40] 455 U.S. 422 (1982).

[41] *Id.* at 436.

[42] *Id.* at 424-25. The Illinois Fair Employment Practices Act, 775 ILL. COMP. STAT. 5/2-102 (West 1993), allows claimants to bring allegations of employment discrimination before the Illinois Fair Employment Practices Commission within 180 days of the occurrence of the discriminatory act. *See Logan*, 455 U.S. at 424. The statute also gives the Commission 120 days within which to convene a fact finding conference. *See id.* The Commission's representative scheduled the conference five days after the expiration of the statutory period expired. *Id.* at 426.

[43] *Logan*, 455 U.S. at 434 ("[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.").

[44] *Id.* at 436.

[45] *See* CAL. PENAL CODE §§ 1536, 1540 (West 1999).

which the offense respect to which the property or things taken is triable.[46]

Section 1540 of the California Penal Code states:

> If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.[47]

Both remedies require the property owner to file a motion with the court.[48]

2. Statutory Notice

The principle that a well-established and publicly available statute is sufficient notice of the information contained in that statute is well established in Supreme Court jurisprudence.[49] The Supreme Court introduced this principle in *Reetz v. Michigan*[50] when it held that a statute fixing the time and place of meetings of a medical licensing board provided applicants with sufficient notice of the procedure for obtaining a hearing regarding their applications.[51] The Court emphasized that no special notice of the time and location of the meeting was necessary because the statute itself was sufficient notice.[52]

This principle of statutory notice became firmly established in *North Laramie Land Co. v. Hoffman*,[53] where the Court held that all persons are presumptively charged with knowledge of the provisions of statutes, and must take note of the procedures adopted by them.[54] The Supreme Court further developed the general rule of statutory notice in *Texaco, Inc. v. Short*,[55] in which it stated that a person is charged with knowledge of the statutory

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[46] *Id.* § 1536.

[47] *Id.* § 1540.

[48] *See* City of West Covina v. Perkins, 119 S. Ct. 678, 681 (1999).

[49] *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516, 533 (1982); North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925); Reetz v. Michigan, 188 U.S. 505, 509 (1903).

[50] 188 U.S. 505 (1903).

[51] *Id.* at 509.

[52] *Id.*

[53] 268 U.S. 276 (1925).

[54] *Id.* at 283.

[55] 454 U.S. 516 (1982).

provisions that affect his substantive rights.[56] In *Texaco*, a state statute provided that an interest in minerals that is separate from the ownership of the surface property automatically reverts to the surface owner if the interest is not exploited by the mineral owner for 20 years and the mineral owner fails to file a statement of claim in the local county recorder's office.[57] The statute did not require notice prior to the lapse, but it contained a provision stating that the surface owner who succeeded to the ownership *may* give notice that the mineral interest had lapsed.[58] The mineral owners, who had failed to utilize the claim procedure and lost their rights to the minerals, claimed that the statute violated their due process rights because the state failed to notify them of the legal requirements of the new statute.[59] The Supreme Court rejected their argument, and held that it is well established that persons owning property within a state are charged with knowledge of the relevant statutory provisions affecting the control or disposition of such property.[60]

In *Atkins v. Parker*,[61] the Court once again focused on individuals' responsibility to educate themselves about the law.[62] The majority in *Atkins* held that a notice describing the effect of a change in the Food Stamp Act in general terms, without specific indications of the impact of the change on the individual recipients, was sufficient under the Due Process Clause.[63] The Court, restating the principle that all citizens are presumptively charged with knowledge of the law, noted that the recipients had adequate opportunity following the statutory amendment to become familiar with their obligations under it.[64]

III. FACTS AND PROCEDURAL HISTORY

The respondents Lawrence and Clara Perkins rented a room in their home in West Covina, California to Marcus

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[56] *Id.* at 532.
[57] *Id.* at 529.
[58] *Id* at 533-34.
[59] *Id* at 531.
[60] *Id.* at 533.
[61] 472 U.S. 115 (1985).
[62] *Id.* at 130-31.
[63] *Id.* at 131.
[64] *Id.* at 130.

Marsh.[65] Marsh became a suspect in a murder investigation after moving out of the Perkins' home.[66] However, the Perkins home was Marsh's last known address, and it thus became the subject of a police search.[67] The West Covina police obtained a search warrant for the respondents' home on May 20, 1993, and performed the search the next day while the respondents were away.[68] The warrant authorized a search of "all rooms, attics, basements, garages, and other parts therein."[69] Since the officers did not know which room had belonged to Marsh, they searched the entire house.[70] The officers seized photos of Marsh, paperwork belonging to Marsh, an address book belonging to Lawrence Perkins, a shotgun registered to Lawrence Perkins, a starter pistol, and $2,469 in cash.[71]

After completing the search, the officers left a form at the respondents' home entitled "Search Warrant: Notice of Service."[72] The notice informed the respondents that their home had been searched, identified the searching agency (West Covina Police), and provided the name of the court and judge that issued the warrant, the date of the search, a phone number to contact the searching officers, and a list of the property seized.[73]

On the day of the search, Perkins contacted one of the detectives who had taken part in the search, and he informed Per-

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[65] Respondent's Brief at 2, City of West Covina v. Perkins, 119 S. Ct. 678 (1999) (No. 97-1230).

[66] *Id.* at 2.

[67] *Id.*

[68] *Id.*

[69] Perkins v. City of West Covina, 113 F.3d 1004, 1006 (9th Cir. 1997).

[70] *Id.*

[71] Respondent's Brief at 2-3, *Perkins* (No. 97-1230).

[72] Petitioner's Brief at 7-8, *Perkins* (No. 97-1230).

[73] *Id* at 8. The notice of service did not provide the search warrant number because the warrant was under seal due to its connection to an ongoing murder investigation. *Id.* at 7-8. Detectives Melnyk, Ferrari, and Nalian, and Lieutenant Shimanski conducted the search. *Perkins*, 113 F.3d at 1006. Judge Oki issued the search warrant. *Id.* at 1007. The inventory of the property seized was left pursuant to Section 1535 of the California Penal Code which provides:

> When an officer takes property under a warrant, he must give a receipt for the property taken (specifying it in detail) to the person from whom it was taken by him, or in whose possession it was found; or in the absence of any person, he must leave it in the place where he found the property.

CAL. PENAL CODE § 1535 (West 1999).

kins that he would need to obtain a court order for the release of his property.[74] One month after the search, Perkins attempted to obtain a court order by contacting Judge Oki, but he was informed that Judge Oki was on vacation.[75] Perkins was unable to get another judge to release his property by providing his name because the property was filed under Marsh's name.[76] Court house personnel informed Perkins that he needed the search warrant number, the case number, or other identifying information to get a judicial hearing.[77] The search warrant number had not been provided to Perkins because the warrant had been sealed, and there was no case number because no case had been filed.[78]

Unable to obtain the relevant information, and unaware that search warrants were listed in the court clerk's documents by the address of the searched residence in addition to the search warrant number, Perkins abandoned his attempt to obtain a court order releasing his property.[79] Even after Perkins retained counsel, neither he nor his attorney made any further attempts to obtain a court order for the release of the seized property.[80] On November 19, 1993, Perkins filed suit in the United States District Court for the Central District of California against the City of West Covina ("the City") and the searching officers.[81]

The Perkins' complaint alleged that the officers violated their Fourth Amendment[82] rights by searching their home without probable cause and exceeding the scope of the warrant.[83] The Perkins' further alleged that the City had a policy of permitting unlawful searches.[84] Both sides filed motions for sum-

[74] Petitioner's Brief at 8, *Perkins* (No. 97-1230).

[75] *Id.*

[76] *Id.*

[77] Respondent's Brief at 5, *Perkins* (No. 97-1230).

[78] *Id.* at 6.

[79] Petitioner's Brief at 8-9, *Perkins* (No. 97-1230).

[80] *Id.* at 9.

[81] *See* Perkins v. City of West Covina, 113 F.3d 1004, 1007 (9th Cir. 1997).

[82] The Fourth Amendment provides: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

[83] Petitioner's Brief at 3, *Perkins* (No. 97-1230).

[84] *Id.*

mary judgment, and the district court invited the parties to file supplemental briefs regarding whether the state-law remedies for the return of seized property sufficiently satisfied due process.[85] The district court granted summary judgment for all defendants without ruling on whether the remedies for the recovery of seized property violated due process.[86]

The respondents appealed their Fourth Amendment claims to the United States Court of Appeals for the Ninth Circuit, but the Ninth Circuit remanded the case to the district court to clarify and resolve the due process issue.[87] On remand, the district court granted summary judgment for the City, holding that the respondents waived any claim concerning the adequacy of the post deprivation remedies provided by the California Penal Code because they made no good faith attempt to invoke the appropriate remedy.[88] California law allows property owners to retrieve their seized property by filing a motion under either Section 1536 or Section 1540 of the California Penal Code.[89] The court further held that the respondents received adequate "notice" of the remedy:

> [Perkins] was told that he had to [obtain an] order to get his property back, he was told what court and what judge to go to, and he was given the date of the warrant and of the search. [Therefore,] the City's failure to give Perkins formal notice of the procedure did not render that procedure "inadequate to the point that it [wa]s meaningless or nonexistent."[90]

On appeal, the Ninth Circuit, in a 2-1 decision, reversed the decision of the district court, directing it to enter summary judgment in favor of the respondents.[91] The court of appeals

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[85] *Id.* at 4.

[86] *Id.*

[87] *See id.*

[88] *See id.* at 4-5. The district court reasoned that the waiver rule applied because:

> The evidence shows at most that the plaintiff [Lawrence Perkins] made one trip to the Municipal Court, was advised that there was no file in his name and thereafter ceased any efforts to obtain an order returning his property. He filed nothing, he made no inquiry about the procedures....

Id. at 5.

[89] *See supra* notes 46-47 and accompanying text. Section 1536 is the appropriate remedy for this case. *See* Petitioner's Brief at 4-5, *Perkins* (No. 97-1230).

[90] *See* Petitioner's Brief at 5, *Perkins* (No. 97-1230).

[91] Perkins v. City of West Covina, 113 F.3d 1004, 1014 (9th Cir. 1997).

determined that under well established legal precedent, there was no requirement of a prior hearing before the seizure of possessions under a search warrant.[92] The court of appeals also found that the California Penal Code provides adequate post-deprivation remedies, thus satisfying the requirements of due process.[93] However, the court of appeals relied on the Supreme Court's decision in *Memphis Light*[94] to arrive at its conclusion that the City must provide property owners with detailed notice of the post-deprivation remedies for the return of seized property, as well as the necessary information to invoke those procedures.[95] The Ninth Circuit stated that the notice provided to Perkins was insufficient because it did not include: information on the procedure for contesting seizure or retention of the property taken, information for initiating the procedure in the appropriate court, a means of identifying the court file, and an explanation of the need for a written motion to the court stating why the property should be returned.[96]

The Supreme Court granted certiorari[97] on May 4, 1998 to decide whether the Due Process Clause of the Fourteenth Amendment requires a State or its local authorities to give detailed and specific instructions or advice to property owners who seek return of property lawfully seized but no longer needed for police investigation or criminal prosecution.[98]

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[92] *Id.* at 1010-11 (citing Parratt v. Taylor, 451 U.S. 527, 539 (1981) and Fuentes v. Shevin, 407 U.S. 67, 93-94 n.30 (1972)).

[93] *Id.* at 1011. In situations involving property seizure that require prompt action by the State, such as seizures for criminal investigations, "the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process." *Id.* (quoting Parratt v. Taylor, 451 U.S. 527, 539 (1981)).

[94] 436 U.S. 1 (1978).

[95] *Perkins*, 113 F.3d at 1012.

[96] *Id.* at 1013. The "notice of service" under California Law includes information pertaining to the performance of the search, the search date, the searching agency, the date of the warrant, the issuing judge, the court in which he or she serves, and the persons to be contacted for further information. *Id.* at 1013.

[97] City of West Covina v. Perkins, 118 S. Ct. 1690 (1998).

[98] City of West Covina v. Perkins, 119 S. Ct. 678, 679 (1999).

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,[99] Justice Kennedy reversed the Ninth Circuit Court of Appeal's decision and held that the Due Process Clause of the Fourteenth Amendment does not require police officers to provide property owners with notice of state law remedies for the return of lawfully seized property.[100] The Court also rejected the respondents' alternative argument that the notice of service provided to the respondents was inadequate because it did not contain a search warrant number.[101]

The Court began by observing that the purpose of the notice requirement under the Due Process Clause is to ensure that property owners have a meaningful opportunity to be heard.[102] To satisfy due process, the Court found that officers who seize property pursuant to a search warrant must provide notice that the property has been seized in order to allow the owner to pursue the available remedies.[103] According to the Court, however, this notice requirement does not include notifying property owners of the available state law remedies.[104]

In rejecting the respondents' claim, the Court first reasoned that the Due Process Clause does not require notification of state post-deprivation remedies when those remedies are well-established by publicly available state statutes and case law.[105] The Court found that after the initial notification of the seizure, the property owner is responsible for utilizing public sources to

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[99] Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer joined in the opinion. Justices Thomas and Scalia concurred in the judgment in a separate concurring opinion written by Justice Thomas.

[100] *Perkins*, 119 S. Ct. at 681. The respondents did not appeal the Ninth Circuit's conclusion that California law provides adequate remedies for the return of seized property, and therefore the Court did not address this issue. *See id.*

[101] *Id.* at 683. The Court relied on the district court's finding that the respondents could not establish the need for the search warrant number to file a motion for the return of their property. *Id.*

[102] *Id.* at 681 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[103] *Id.*

[104] *Id.*

[105] *Id.* at 681-82.

discover the procedures for retrieving his property.[106] To justify its position on statutory notice, the majority cited the Court's earlier decision in *Reetz v. Michigan,*[107] which stated that a statute specifying the time and place of medical licensing board meetings provided license applicants with sufficient notice of the procedures for obtaining a hearing.[108] The Court emphasized that the statute itself is sufficient notice, and thus no special notice to the particular individual is required.[109]

To further support the position that statutory notice of the available state law remedies is sufficient, the majority referred to *Atkins v. Parker.*[110] In *Atkins,* the Court held that a notice describing the effect of a change in the Food Stamp Act in general terms, without specific indications of the impact of the change on the individual recipients, was sufficient under the Due Process Clause.[111] The majority highlighted the principle stated in *Atkins* that "[t]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."[112]

Next, the Court reviewed prior Supreme Court cases in which state post-deprivation remedies were deemed sufficient to satisfy the requirements of due process.[113] Justice Kennedy noted that in cases where the laws establishing the remedies were public and available, the Court has not required states to provide property owners with information about the procedures to retrieve their property.[114]

Justice Kennedy rejected the Ninth Circuit's interpretation of *Memphis Light*[115] as requiring officers to give the respondents

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[106] *Id.* ("Once the property owner is informed that his property has been seized, he can turn to these public sources to learn about the remedial procedures available to him. The City need not take other steps to inform him of his options.") .

[107] 188 U.S. 505 (1903). *See supra* notes 49-52 and accompanying text (discussing *Reetz*).

[108] *Perkins,* 119 S. Ct. at 682.

[109] *Id.* (quoting *Reetz,* 188 U.S. at 509).

[110] 472 U.S. 115 (1985).

[111] *Id.* at 131.

[112] *Perkins,* 119 S. Ct. at 682 (quoting *Atkins,* 472 U.S. at 131).

[113] *Id.*

[114] *Id.* (citing Hudson v. Palmer, 486 U.S. 517 (1984)). *See also supra* notes 36-39 and accompanying text.

[115] 436 U.S. 1 (1978).

notice of California's post-deprivation procedures.[116] In *Memphis Light*, the Court held that due process required a public utility to inform its customers of the procedures for resolving accounting disputes.[117] Justice Kennedy distinguished the holding in *Memphis Light* on the ground that the procedures required to be disclosed in that case were arcane because they were not described in any publicly available document and depended largely on word of mouth referral.[118] On the other hand, the state law remedies applicable in *Perkins* were available to the public.[119] After refusing to apply the holding in *Memphis Light* to cases involving published and well-established state law remedies, the majority reiterated its position that there is no general rule that due process requires notice of post-deprivation remedies and procedures.[120]

Finally, the Court reasoned that requiring notification of remedies would conflict with long existing and well-established Federal and State criminal law procedures,[121] and would render the notice required by these statutes inadequate under the Constitution.[122] Justice Kennedy discussed Rule 41(d) of the Federal Rules of Criminal Procedure which requires federal agents seizing property under a warrant to give the property owners a copy of the warrant and a receipt for the property taken.[123] Justice Kennedy noted that neither the federal nor state rules require that notice of post-deprivation procedures be provided to property owners.[124]

B. JUSTICE THOMAS' CONCURRENCE

Justice Thomas agreed with the majority that the Due Process Clause does not require the City to provide the respondents with notice of the state-law post-deprivation remedies.[125] How-

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[116] *Perkins*, 119 S. Ct. at 682.

[117] *Id.* (citing *Memphis Light*, 436 U.S. at 13-15).

[118] *Id.* at 682.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 683 (citing federal and state laws governing execution of search warrants and procedures for return of seized property).

[122] *Id.* at 682.

[123] FED. R. CRIM. P. 41(d). This rule has an analogous counterpart in state statutes. *See Perkins*, 119 S. Ct. at 683.

[124] *Perkins*, 119 S. Ct. at 682.

[125] *Id.* at 684 (Thomas, J., concurring).

ever, Justice Thomas wrote a separate concurring opinion[126] to argue that the requirement for police officers to leave a Notice of Seizure[127] may be more properly governed by the Fourth Amendment's prohibition of "unreasonable searches and seizures" rather than the Due Process Clause of the Fourteenth Amendment.[128] Justice Thomas argued that the majority's conclusion that due process governs the search and seizure notice requirement[129] is "an unwarranted extension of procedural due process principles developed in civil cases into an area of law that has heretofore been governed exclusively by the Fourth Amendment."[130]

In support of this view, Justice Thomas cited *Gerstein v. Pugh*[131] for the proposition that the Fourth Amendment is specifically tailored for the criminal justice system, and its balance between individual and public interests determines "due process" for seizures in criminal cases.[132] Justice Thomas also discussed historical evidence which suggests that the common-law procedure for executing a search warrant—the model for a "reasonable" search under the Fourth Amendment—required officers to provide an inventory of the property seized.[133] Justice Thomas concluded that the majority improperly relied on the Fourteenth Amendment as the basis for the notice of seizure requirement in criminal cases, and suggested that the Fourth Amendment is better suited to govern this notice requirement.[134]

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[126] Justice Scalia joined Justice Thomas in his concurring opinion.

[127] This Notice informs the property owners of the property that was seized. FED. R. CRIM. P. 41(d).

[128] *Perkins*, 119 S. Ct. at 684 (Thomas, J., concurring).

[129] The majority stated in dicta, "when law enforcement agents seize property pursuant to warrant, due process requires them to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return." *Id.* at 681.

[130] *Id.* at 684 (Thomas, J., concurring).

[131] 420 U.S. 103 (1975).

[132] *Perkins*, 119 S. Ct. at 684 (Thomas, J., concurring) (quoting *Gerstein*, 420 U.S. at 125, n.27).

[133] *Id.* (Thomas, J., concurring) (citing *Gerstein*, 420 U.S. at 116, n.17; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 82 (1969)).

[134] *Id.* at 685 (Thomas, J., concurring).

V. ANALYSIS

This Note argues that the Court properly rejected the expansive notice requirement imposed by the Ninth Circuit because it was unwarranted and completely unsupported by precedent. The Court correctly concluded that law enforcement officers have no obligation under the Due Process Clause to notify property owners of the procedures for seeking the return of their seized property. This Note also argues that the Court's decision will not have a detrimental impact on future judicial decisions regarding deprivation of property.

However, this Note contends that the majority was incorrect in its assertion, in dicta, that the Due Process Clause governs the execution of a criminal search warrant, and thus requires officers to give notice that property has been seized. This suggestion by the Court represents an unwarranted and careless expansion of due process principles into an area historically governed by the Fourth Amendment.

A. THE DUE PROCESS CLAUSE DOES NOT REQUIRE LAW ENFORCEMENT OFFICERS TO NOTIFY PROPERTY OWNERS OF POST-DEPRIVATION REMEDIES FOR THE RETURN OF SEIZED PROPERTY.

The majority properly concluded that due process does not require police officers to provide property owners with notice of state law post-deprivation remedies when their property has been seized in a criminal investigation.[135] The strongest arguments in support of this holding are the statutory notice rule and the absence of a remedy notification requirement in Supreme Court cases involving post-deprivation issues.[136]

1. Statutory Notice is Sufficient For Published and Well-Established Statutes

The statutory notice rule established in Supreme Court precedent[137] and relied upon by Justice Kennedy indicates that police officers have no duty to notify property owners of available post-deprivation remedies.[138] According to the rule, all citi-

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[135] *See id.* at 682.

[136] *See id.* at 681-82.

[137] *See, e.g.*, Atkins v. Parker, 472 U.S. 115, 131 (1985); Texaco, Inc. v. Short, 454 U.S. 516, 533 (1982); North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925); Reetz v. Michigan, 188 U.S. 505, 509 (1903).

[138] *See Atkins*, 472 U.S. at 130-31 (stating that all citizens are presumptively charged with knowledge of the law, especially when the law is well-established).

zens are presumed to know the law.[139] Therefore, information that is well established and publicly available, such as the statutory remedies at issue in this case, need not be directly provided to property owners by police officers.[140]

The basic premise underlying this rule, highlighted in *Atkins* and *Texaco* is that individuals are responsible for and capable of educating themselves about the public laws and policies that affect their lives or property.[141] This rationale is especially true when the property owner already has notice that the property has been seized, and can reasonably acquire information regarding the steps necessary to retrieve his property.[142]

Under the statutory notice rule the Perkins family is presumed to know the available state post-deprivation remedies.[143] First, the searching officers left a Notice of Seizure at the Perkins' home which stated that the property had been searched, and provided the name of the issuing judge, the respective court house, the date of the search, the name of the searching agency, a number to contact for further information, and an inventory of the property seized.[144] Second, the post-deprivation remedies were codified in the California Penal Code, which is published and generally available at libraries.[145]

Once the Perkins family learned that its property had been seized, it had a duty to apprise itself of the publicly available remedies for retrieving the seized property.[146] The first step would be to contact one of the searching officers at the number

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[139] *See Texaco*, 454 U.S. at 533. *See also North Laramie*, 268 U.S. at 283.

[140] *See Texaco*, 454 U.S. at 533.

[141] *Atkins*, 472 U.S. at 131 ("[T]he entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny."); *Texaco*, 454 U.S. at 532 ("It is well established that persons owning property within a state are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.").

[142] *Cf. id.* (discussing a notice describing the effect of an amendment to the Food Stamp Act in general terms, and stating "[s]urely Congress can presume that such a notice relative to a matter as important as a change in a household's food stamp allotment would prompt an appropriate inquiry if it is not fully understood").

[143] *See, e.g., Texaco*, 454 U.S. at 533.

[144] *See Perkins*, 119 S. Ct. at 679-80.

[145] The available post-deprivation remedies are stated in CAL. PENAL CODE §§ 1536 and 1540 (West 1999). See *supra* notes 46-47 for the text of the statutory provisions.

[146] *See Atkins*, 472 U.S. at 131.

provided on the notice of seizure.[147] The Perkins family pursued this option, and one of the searching officers informed Mr. Perkins that he would need a court order to retrieve his property.[148] The next logical step would be to go to the courthouse to inquire about obtaining a court order.[149] The statutes governing the available remedies are a matter of public record, and the Perkins could have sought the necessary information from the court clerk or he could have obtained professional legal advice.[150] Mr. Perkins attempted to obtain a court order, but became frustrated and abandoned his attempt when he was unable to locate his file in the court records because he lacked the search warrant number.[151]

Mr. Perkins' actions after the execution of the search shows that he was able to obtain in reasonable time the basic information regarding the retrieval of his property, namely the need for a court order.[152] This procedure is not a secret, but rather a publicly available remedy.[153] Mr. Perkins' impatience with the court system does not justify requiring police officers to give notice of established and publicly available post-deprivation remedies.[154] Any imposition by the appellate court of a duty on the part of police officers to notify property owners of post-deprivation remedies contravenes the statutory notice rule and

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[147] *See* Petitioner's Brief at 8, *Perkins* (No. 97-1230). The notice of seizure left at the Perkins' home stated: "If you wish further information you may contact Det. Ferrari or Det. Melnyk at [telephone number]." *Id.*

[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *See id.* at 8-9. The relevant information was also listed in the court records by the address of the searched home. *Id.* at 8. The Supreme Court adopted the District Court's finding that Perkins failed to establish that he needed the search warrant number to obtain a court order for the return of his property. *See Perkins*, 119 S. Ct. at 683.

[152] *See Perkins*, 119 S. Ct. at 680 ("Not long after the search, Perkins called Ferrari, one of the detectives listed on the Notice, and inquired about return of the seized property. One of the detectives told Perkins he needed to obtain a court order authorizing the property's return.").

[153] The California Penal Code is a public statute. *See* CAL. PENAL CODE § 1536 (West 1999).

[154] *See* Atkins v. Parker, 472 U.S. 115, 131 (emphasizing the importance of one's personal duty to inform himself of policies or laws that affect his life).

is unwarranted by the Due Process Clause.[155] Thus, the Supreme Court properly reversed the Ninth Circuit and held that the Due Process Clause does not require officers to give property owners notice of state law remedies.

2. The Availability of Post-Deprivation Remedies Satisfies Due Process Requirements and Precludes the Need for Further Notice

The justifications for requiring notice in the pre-deprivation context do not apply in the post-deprivation context.[156] In *Parratt v. Taylor,*[157] the Supreme Court created an exception to the pre-deprivation notice and hearing requirement, whereby the availability of post-deprivation remedies satisfies the requirements of procedural due process when quick action by the state is necessary or when providing pre-deprivation process is impractical.[158]

Applying this exception and the underlying rationale to the Perkins' claim warrants the conclusion that due process does not require notice of California's post-deprivation remedies.[159] First, the pending criminal investigation and subsequent search warrant demanded quick action by the state.[160] Furthermore, the circumstances surrounding search warrants in general would render impractical any attempts to comply with the pre-deprivation procedural requirements of notice and hearing.[161] Thus, the availability of state post-deprivation remedies under California law sufficiently satisfies procedural due process requirements.[162]

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[155] *See generally Atkins,* 427 U.S. at 131; Texaco, Inc. v. Short, 454 U.S. 516, 533 (1982); North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283 (1925); Reetz v. Michigan, 188 U.S. 505, 509 (1903).

[156] *See* Hillwig, *supra* note 16, at 704 (citing Parratt v. Taylor, 451 U.S. 527, 539 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986)).

[157] 451 U.S. 527 (1981).

[158] *Id.* at 539. *See also* Hudson v. Palmer, 468 U.S. 517, 532-33 (1984) (applying the *Parratt* rule to hold that due process is satisfied when a meaningful post-deprivation remedy is available).

[159] *See* Hillwig, *supra* note 16, at 736-37 (stating that "Parratt recognizes that under certain circumstances pre-deprivation process is impractical" and that in such circumstances "[a] state can provide due process by affording an adequate post-deprivation remedy for . . . deprivations of property").

[160] *See* Fuentes v. Shevin, 407 U.S. 67, 93-94 n.30 (1972).

[161] *Id.*

[162] *See Hudson,* 468 U.S. at 539. (citing *Parratt,* 451 U.S. at 537-44).

In addition to the existence of the post-deprivation exception, prior Supreme Court cases that have applied the exception do not require police officers to further provide notice to the property owners about the post-deprivation remedies or procedures for invoking them. [163] In these cases, there is absolutely no mention of a requirement to notify property owners of the available remedies.[164]

Furthermore, *Memphis Light,*[165] the case in which the Supreme Court held that a public utility had an obligation under the Due Process Clause to inform a customer whose service was on the verge of termination of the administrative procedures to resolve an accounting dispute, is distinguishable on two grounds.[166] First, the procedures in that case were not publicly available, and thus a person informed of the impending termination of his utility service could not reasonably be expected to know of the procedures available to object to the termination.[167] Second, the issues in *Memphis Light* were in the pre-deprivation context where, according to the *Mullane* framework, sufficient notice must be "reasonably calculated . . . to apprise [the] interested parties of the pendency of the action and afford them an opportunity to present their objections."[168] In that context, knowledge of the remedies is essential to obtaining a meaningful hearing, and thus the notice must provide information pertaining to the remedies.[169]

The facts surrounding *Perkins*[170] are substantially different from those in *Memphis Light* because the remedies in *Perkins* are publicly available and the existence of a search warrant places

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[163] *See, e.g., id.* at 532-35; *Parratt,* 451 U.S. at 538-40.

[164] *Hudson,* 468 U.S. at 532-35; *Parrat,* 451 U.S. at 538-40.

[165] Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1 (1978).

[166] *See generally id.* at 13.

[167] *See id.* at 13-15.

[168] *See* Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 306, 314 (1950).

[169] *See Memphis Light,* 436 U.S. at 14-15. The Court stated:

> Petitioner's notification procedure, while adequate to apprise the [respondents] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. . . . Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.

Id. at 14-15.

[170] City of West Covina v. Perkins, 119 S. Ct. 678, 682 (1999).

the case in the post-deprivation context.[171] Therefore, *Memphis Light* does not apply to the circumstances present in *Perkins*, and consequently Supreme Court precedent does not support a notice requirement for post-deprivation remedies, particularly where the statutes embodying the remedies are publicly available.[172]

The Court did not address any substantive due process issues in *Perkins*.[173] The District Court rejected the Perkins' claim that the City had a policy of permitting unlawful searches, and the family did not raise this issue on appeal.[174] Moreover, cases involving substantive due process claims in the property deprivation context usually target city-wide policies that result in unfair deprivations of property.[175]

The Court's decision in *Perkins* will not have any detrimental effect on due process rights in the post-deprivation context if it is limited to situations in which the available state law remedies are published and generally available.[176] Although the opinion seems to simplify the ease with which people can obtain information regarding the statutory remedies, the due process clause does not guarantee a right to simple procedures.[177]

Furthermore, under the *Matthews* test,[178] requiring law enforcement agents to give detailed notice of post deprivation procedures would be financially and administratively burdensome on law enforcement organizations across the country.[179]

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[171] *See id.*

[172] *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 532-33 (1984); Parratt v. Taylor, 451 U.S. 527, 538-40 (1981). *But cf. Memphis Light*, 436 U.S. at 14.

[173] *See Perkins*, 119 S. Ct. at 679.

[174] *See id.* at 680-81.

[175] *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) (holding that post-deprivation remedies don't satisfy due process where the deprivation is caused by conduct pursuant to established state procedure). *See also* Hillwig, *supra* note 16, at 714.

[176] *Cf. Memphis Light*, 436 U.S. at 13 (providing the controlling law for cases in which the remedies are not publicly available).

[177] Hudson v. Palmer, 468 U.S. 517, 535 (1984) (rejecting the plaintiff's argument that state law remedies should be deemed inadequate because they were far from certain and complete).

[178] *See* Hillwig, *supra* note 16 and accompanying text.

[179] *See* Matthews v. Eldridge, 424 U.S. 319, 335 (stating that one of the factors to be considered in determining entitlement to procedural safeguards is the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"). Detailed notice would require a complete revamp of current procedures for executing search

Chief Judge Posner of the Seventh Circuit described the *Matthews* test as a "cost-benefit approach . . . which asks essentially whether the particular procedural safeguard that the plaintiff is urging would save more in costs of legal error than it would add in administrative or other costs."[180] Under this approach, a detailed notice requirement would add more in administrative costs and burdens than it would save in legal error, and it would also expose the government to tremendous due process liabilities in the event that the notice fails to mention or does not adequately explain one of the available post-deprivation remedies.[181] Additionally, it forces law enforcement and state government personnel to become legal advisors.[182] Since the officers provided the Perkins with sufficient information regarding the details of the search, and California law provides adequate post-deprivation remedies, due process was served.[183]

B. IMPACT ON FUTURE JUDICIAL DECISIONS INVOLVING PROPERTY DEPRIVATION

The holding in *Perkins* that the Due Process Clause does not require officers to notify property owners of available state law remedies to retrieve seized property will not have a detrimental effect on future due process cases involving deprivation of property.[184] Two recent property deprivation cases citing *Perkins*

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warrants and substantial changes to the notice of seizure forms currently in place. *See* FED. R. CRIM. P. 41(d) (requiring only that agents leave at the premises a copy of the search warrant and a list of the property taken). The state laws governing the execution of search warrants are similar to the federal law. *See, e.g., Perkins*, 119 S. Ct. at 683.

[180] Tavarez v. O'Malley, 826 F.2d 671, 676 (7th Cir. 1987).

[181] *See* Tony Mauro, *An Unlikely High Court Specialist*, LEGAL TIMES, Nov. 2, 1998, at 8 ("[The] Ninth Circuit ruling, if upheld, could bring due process nightmares to governments in certain kinds of property seizure cases.").

[182] *See id.* ("Governments fear they would virtually have to provide legal advice to citizens on how to recover property if the Ninth Circuit's ruling is not overturned.").

[183] *See generally* Parratt v. Taylor, 451 U.S. 527, 539 (finding that the necessity of quick action by the state coupled with the availability of adequate post-deprivation procedures satisfies procedural due process).

[184] *See, e.g.*, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978) (requiring notice when statutes are arcane or not publicly available); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (supporting the proposition that in the pre-deprivation context, due process requires notice and a meaningful opportunity to be heard *prior* to any deprivation).

for various propositions have limited its scope to due process claims in the post-deprivation context.[185]

In *Gete v. Immigration and Naturalization Services*,[186] the court held on remand from the Ninth Circuit that due process required the Immigration and Naturalization Services ("INS") (1) to provide notice of the factual and legal bases for a forfeiture to car owners upon seizure of vehicles; (2) to permit access to any adverse evidence that it intends to rely on at the personal interview or any subsequent hearing; and (3) to provide written rulings and explanations in those rulings of the evidence it relied on and the factors it considered in reaching its decision.[187] The Ninth Circuit held that the plaintiffs' due process claim was substantial, and that due process requires certain of the procedures requested by them.[188] On remand, the INS asserted that the Ninth Circuit's analysis was not controlling in light of the Supreme Court's intervening opinion in *Perkins*, and that the

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[185] *See* Gete v. Immigration and Naturalization Servs., No. C94-8812, 1999 U.S. Dist. LEXIS 11806 (W.D. Wash. July 21, 1999); McKenzie v. City of Chicago, No. 97C-284, 1999 U.S. Dist. LEXIS 9084 (N.D. Ill. May 28, 1999).

[186] No. C94-8812, 1999 U.S. Dist. LEXIS 11806 (W.D. Wash. July 21, 1999).

[187] *Id.* at *17. The Ninth Circuit remanded the case for a determination of the plaintiffs' motions for class certification and for preliminary injunctive relief. *Id.* at *1. The district court granted both the class certification and a preliminary injunction requiring the INS to provide certain notices in future seizures. *Id.* at *17. The named plaintiffs in the class action were ten persons whose cars were seized by INS after they entered the United States from Canada based on alleged violations of 8 U.S.C. § 1324(a)-(b), which assigns criminal liability for bringing illegal aliens into the United States, and allows border officials to seize vehicles used for such actions. *Id.* This case addressed the due process clause of the Fifth Amendment because the plaintiffs sued an arm of the federal government. *See id.* at *10. The Fifth Amendment provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[188] *Gete*, 1999 U.S. Dist. LEXIS 11806, at *11. The Ninth Circuit further stated:

> [R]equiring the disclosure of the factual bases for seizures would go a long way toward preventing some of the erroneous and fundamentally unfair forfeiture decisions that inevitably flow from so haphazard a process. So, too, would requiring the giving of notice of the specific statutory provision allegedly violated, rather than allowing the mere provision, without explanation, of copies of the entire statute and regulations. Similarly, furnishing owners with copies of evidence to be used against them, such as officers' reports detailing the facts upon which the claim of probable cause is based, would permit them to understand the true nature of the INS' charges and afford them a fair opportunity to prepare a proper defense to the threatened forfeiture.

Id. at *11-*12.

plaintiffs were therefore entitled to no relief on their claim relating to the adequacy of notice.[189]

The district court distinguished *Perkins* on the ground that it dealt with whether officers must provide notice of post-deprivation remedies, rather than with the adequacy of the notice of seizure itself.[190] The court stated:

> *Perkins* is inapplicable because the plaintiffs here challenge the adequacy of the seizure notice as to the bases for the seizure, the lawfulness of the seizure, and the constitutionality of the regulations providing for seizure. The Court in *Perkins* did not address, nor decide, what notice must be given at the point of seizure regarding the bases of the seizure or [the constitutionality of] the remedies provided. . . .[191]

This distinction demonstrates that courts must analyze the adequacy of statutory notice on a case by case basis to determine whether due process has been satisfied:

> [n]otice of the bases for the seizure, or of the reasons for not returning seized property, serves a different purpose than notice of available remedies to return lawfully seized property. Notice in the former instance helps ensure that a meaningful hearing is held on the vital matter of whether the seizure was lawful. The administrative hearings challenged by the plaintiffs are intended to allow the plaintiffs to secure a return of their property if they make a showing of lawfulness. They are not routine hearings like those addressed in Perkins, held simply to force a ministerial act, i.e., a return of lawfully seized property that the state no longer has an interest in retaining.[192]

Thus, *Perkins* has not been interpreted to provide blanket authority for the statutory notice rule in property deprivation cases.[193]

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[189] *Id.* at *13.

[190] *Id.* at *14. In *Perkins*, the Court stated:

> [The plaintiffs] raise no independent challenge to the Court of Appeals' conclusion that California law provides adequate remedies for return of their property . . . . Rather, they contend the City deprived them of due process by failing to provide them notice of their remedies and the factual information necessary to invoke the remedies under California law.

City of West Covina v. Perkins, 119 S. Ct. 678, 681 (1999). The plaintiffs in *Gete* sought notice of the statute under which their cars were seized, not notice of the remedy for retrieving their cars. *Gete*, 1999 U.S. Dist. LEXIS 11806, at *9.

[191] *Gete*, 1999 U.S. Dist. LEXIS 11806, at *14-*15.

[192] *Id.* at *15-*16.

[193] *See id.* at *15.

In *McKenzie v. City of Chicago*,[194] the court denied the plaintiffs' motion for summary judgment on their claim that the City of Chicago's notification process for a demolition program was inadequate because it neither informed them of the City's demolition determination, nor notified them of the procedures available to obtain a pre-deprivation hearing.[195] The notice provided by the City cited a statute containing the information needed to challenge a municipality's deprivation of property.[196] The plaintiffs argued that the notice was inadequate and did not provide a meaningful opportunity to be heard because the statute cited merely stated that "a person 'objecting to the proposed actions of the [City] may file his or her objection in an appropriate form in a court of competent jurisdiction.'"[197] The defendants relied on *Perkins* for the proposition that a notice which cites a statute is per se constitutional.[198] After precluding summary judgment based on the existence of issues of material fact, the court distinguished *Perkins* on the ground that it involved a challenge to post-deprivation remedies for property legally seized pursuant to a search warrant.[199] The court also noted that even though *Perkins* supports the notion of statutory notice, the statute in *McKenzie* may be deemed inadequate for failing to provide a meaningful pre-deprivation hearing.[200]

C. THE FOURTH AMENDMENT GOVERNS NOTICES OF SEIZURE

The majority opinion asserted, in dicta, that the Due Process Clause governs the execution of a criminal search warrant by requiring law enforcement officers to take reasonable steps to give notice that property has been seized.[201] In his concurring opinion, Justice Thomas refused to endorse the majority's assertion based on what he referred to as "an ahistorical reliance on

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[194] No. 97C-284, 1999 U.S. Dist. LEXIS 9084 (N.D. Ill. May 28, 1999).

[195] *Id.* at *7. After stating the requirements for summary judgment under FED. R. CIV. P. 56(c), namely that there must no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the court found that genuine issues of material fact existed as to the adequacy of notice claim. *Id.* at *5-*6.

[196] *Id.* at *7.

[197] *Id.* at *7-*8.

[198] *Id.* at *7.

[199] *Id.* at *8.

[200] *Id.*

[201] City of West Covina v. Perkins, 119 S. Ct. 678, 681 (1999).

procedural due process as the source of the "notice of seizure" requirement.[202]

The majority's suggestion represents an unwarranted and careless expansion of due process principles into an area historically governed by the Fourth Amendment.[203] According to a majority of the Supreme Court in *Gerstein*, the Fourth Amendment is specifically suited to governing the criminal justice system, and implicitly contains a due process requirement, which abrogates the need for reliance on the Due Process Clause of the Fourteenth Amendment in particular criminal cases.[204] The majority in *Gerstein* noted that the Fourth Amendment was tailored explicitly for the criminal justice system, and that the balance it strikes between individual and public interests defines the "process that is due" for seizures of people or property in criminal cases.[205]

Fourth Amendment law has traditionally limited government evidence gathering in order to guard individual privacy.[206] Two eighteenth century cases, *Entick v. Carrington*,[207] and *Wilkes v. Wood*,[208] heavily influenced the development of the Fourth Amendment and its protection against "unreasonable searches."[209]

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[202] *Id.* at 685 (Thomas, J., concurring).

[203] *See* Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975). The Fourth Amendment provides in pertinent part: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[204] *Gerstein*, 420 U.S. at 125, 126 n.27.

[205] *Id.*

[206] William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 395 (1995).

[207] 19 Howell's State Trials 1029 (C.P. 1765).

[208] 98 Eng. Rep. 489 (K.B. 1763).

[209] *See id.* at 396-97. Stuntz noted that these cases share two common themes:

> First and foremost, both decisions emphasize the importance of the privacy interest in homes and papers. This was the main focus of [the] opinion in *Entick*, and though it was less critical to Wilkes's success, the quoted portion of Pratt's jury instruction plainly strikes the privacy chord. This interest was, to be sure, wrapped up with Entick's and Wilkes's property interests—the word "property" appears more often than "privacy" in these cases. . . . Second, both decisions express concern with official discretion, a concern reflected particularly in Pratt's rejection of the general warrant used against Wilkes. The set of cases arising out of *The North Briton No. 45* episode came to stand for the proposition that such warrants are invalid—a proposition later explicitly enshrined in the Fourth Amendment—and that arrests must be grounded in some cause to suspect the arrestee personally of a crime. Together, these concerns seem to capture the essence of the Fourth Amendment, at least from the perspective of the men who wrote and ratified it.

The respective plaintiffs were authors of political pamphlets critical of the King's ministers.[210] Consequently, both suffered the search of their homes and the seizure of all their books and papers, and both sued the officials who carried out the searches and won—collecting substantial damages.[211] The respective courts emphasized the importance of limiting the government's power to search for and seize private papers in private homes.[212] The courts also admonished the officers for not leaving an inventory of the property seized.[213] This admonition suggests that at common law the proper execution of a search warrant required officers to provide the property owners with an inventory of the property seized.[214] The common law concern for instituting procedural constraints against the government is evinced in the Fourth Amendment's requirement that warrants must "particularly [describe] the place to be searched, and the persons or things to be seized."[215]

The Fourth Amendment's requirement that warrants be specific is based on the common law notion that general warrants are unreasonable.[216] The Amendment's prohibition of general warrants was deemed to be part of a larger scheme to categorically extinguish general searches.[217] The notion that general warrants are unreasonable represents the relationship between the concept of unreasonableness in the first clause of the Amendment and the warrant requirements dictated in the

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Id. at 399-400.

[210] *See id.* at 397.

[211] *See id.*

[212] *See id.*

[213] *See* Entick v. Carrington, 19 How. St. Tr. 1029, 1067 (C.P. 1765) ("The same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; . . . would require him to take an exact inventory, and deliver a copy. . . . Want of [these safeguards] is an undeniable argument against the legality of the thing."); Wilkes v. Wood, 98 Eng. Rep. 489, 499 (K.B. 1763) ("As to the proof of what papers were taken away, the plaintiff could have no account of them; and those who were unable to have given an account . . . have produced none.").

[214] *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 82 (1969).

[215] U.S. CONST. amend. IV.

[216] *See* Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1713 (1996). The specific warrant clause "is a direct outgrowth of a multi-staged, centuries-long rebellion against general warrants by British intellectuals that inspired all other facets of the amendment." *Id.* at 1714.

[217] *Id.* at 1724.

second clause.[218] The original meaning of the Fourth Amendment dictates that "specific warrants [are] mandatory and [are] intended to be the conventional method for search and seizure."[219] Specific warrants came into prominence precisely because they protected citizens' rights against unreasonable methods.[220]

In the early twentieth century, the Fourth Amendment seemed to lose its momentum in regulating police power, and due process became the focus of the law of criminal procedure.[221] The rise of police forces in the mid-1900s led courts to focus on police coercion and violence rather than proper seizure procedures:

> Police officers do not just look for evidence; they force people to do things. The force may be gentle or subtle, or it may be harsh, even brutal. By the mid-twentieth century, a growing body of due process case law reflected courts' concern with this danger. Thus, by about 1950, Fourth and Fifth Amendment law was almost an empty shell, while due process cases concerned with regulating police coercion seemed about to take over the law of criminal procedure.[222]

However, this takeover did not occur.[223] The due process cases became less prevalent in the field of criminal procedure, and the Fourth Amendment once again became the chief vehicle for regulating the police:

> The main point of [this body] of law is to regulate the police. This regulation is no small affair; modern Fourth and Fifth Amendment law governs the day-to-day decisions about how police make arrests and gather evidence and question suspects. It has gone from being nearly irrelevant to ordinary criminal investigation to dominating ordinary criminal investigation. . . . In the 1960s, the courts' concern with shielding evidence from the government's prying eyes came to dominate the law of police investigation of crime. . . . The Fourth Amendment and

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[218] *See id.* at 1713. See also *supra* note 82 for the text of the Fourth Amendment.

[219] Cloud, *supra* note 216, at 1713. Although the specific warrant originated in England, its development continued in North America between 1755 and 1789. *Id.* at 1714. During the years after the American Revolution, "general warrants and searches were rejected and specific warrants and searches were adopted in the laws of many of the original states." *Id.*

[220] *Id.* at 1730.

[221] *See* Stuntz, *supra* note 206, at 434.

[222] *Id.*

[223] *See id.*

> Fifth Amendment [are] now the primary bodies of law that regulate day-to-day police work.[224]

Therefore, the Fourth Amendment exclusively governs the execution of search warrants, which includes the notice that property has been seized.[225]

The Ninth Circuit recently emphasized the importance of a warrant's notice function in *United States v. Gantt*.[226] In *Gantt*, the court held that Rule 41(d) of the Federal Rules of Criminal Procedure,[227] absent exigent circumstances, requires service of the warrant at the outset of the search on persons present at the search of their premises.[228] The court pointed out that in addition to its "assurance" function,[229] the particularized warrant requirement is also intended to notify the person subject to the search of the items that the officers are entitled to seize.[230] It also bears mentioning that Rule 41(d) specifically requires officers to provide to the person present or leave behind a list of

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[224] *Id.*

[225] *See, e.g., id.*

[226] 194 F.3d 987 (9th Cir. 1999), *amending and superseding* 179 F.3d 782 (9th Cir. 1999).

[227] Section 41(d) provides in pertinent part:

> the officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken . . .

Fed. R. Crim. P. 41(d).

[228] *Gantt*, 194 F.3d at 990. The court rejected the government's argument that leaving the warrant behind after the search satisfies Rule 41(d) when the person is present at the outset of the search. *Id.* The court further stated, "showing Gantt the face of the warrant without Attachment A certainly did not satisfy Rule 41(d). Without Attachment A, the warrant violated the Fourth Amendment's particularity requirement and for purposes of Rule 41(d) was not a valid warrant. " *Id.* at 990 n.7.

[229] The court cited *United States v. Chadwick*, 433 U.S. 1, 9 (1977), for the proposition that an essential function of the warrant is to "assure[ ] the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Gantt*, 194 F.3d at 990.

[230] *Gantt*, 194 F.3d at 991. The court further stated:

> [i]f a person is present at the search of her premises, agents are faithful to the "assurance" and "notice" functions of the warrant only if they serve the warrant at the outset of the search. A warrant served after the search is completed cannot timely "provide the property owner with sufficient information to reassure him of the entry's legality."

Id. (citing Michigan v. Tyler, 436 U.S. 499, 508 (1978)).

the property taken.[231] Furthermore, the principles set forth in the Fourth Amendment, not the Fourteenth Amendment, govern Rule 41(d) and its analogous state statutes.[232]

Given its history, the requirement of notice of property seizure in criminal investigations is more appropriately based on Fourth Amendment principles, rather than on the principles embodied in the Due Process Clause of the Fourteenth Amendment as the *Perkins* majority suggests.[233] Furthermore, couching the "notice of seizure" requirement in the Fourth Amendment prevents the expansion of procedural due process principles into unwarranted areas, which preserves the integrity of the due process doctrine.[234]

VI. CONCLUSION

The Supreme Court properly concluded that the Due Process Clause does not require law enforcement agents to notify property owners of post-deprivation remedies for the return of property seized pursuant to a search warrant. The Court based its decision on (1) the well-established statutory notice rule; (2) the absence of support in Supreme Court precedent for a remedy notification requirement in the post-deprivation context; and (3) the lack of support for a remedy notification requirement in well-established federal and state rules of criminal procedure.

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[231] *See* FED. R. CRIM. P. 41(d) ("[O]fficer[s] . . . shall [provide] . . . a copy of the warrant *and a receipt of the property taken* . . . .") (emphasis added).

[232] *See generally* Michigan v. Tyler, 436 U.S. 499, 508 (1978) ("[A] major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality."); United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) ("[W]ithout a warrant . . . the occupant has . . . no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization.") (quoting Camara v. Municipal Ct., 387 U.S. 523, 532 (1967)); *Gantt*, 194 F.3d at 990 ("Rule 41(d) must be interpreted in the light of the important policies underlying the [Fourth Amendment's] warrant requirement—to provide the property owner assurance and notice during the search.").

[233] *See* Gerstein v. Pugh, 420 U.S. 103, 125 n.27 ("The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the 'process that is due' for seizures of property in criminal cases."). *See also* Stuntz, *supra* note 206, at 434.

[234] *Cf.* Fallon, *supra* note 8, at 309 ("[T]he Supreme Court's recurrent efforts to shape due process law to promote policy ends have taken a toll on doctrinal integrity.").

Furthermore, the Court's decision will not have an adverse impact on future property deprivation cases if it is properly limited to seizures similar to those in *Perkins*. However, the majority should have based its "notice of seizure" requirement, discussed in dicta, on the principles espoused by the Fourth Amendment's requirement for specific warrants and its guarantee against unreasonable seizures, rather than on the Due Process Clause of the Fourteenth Amendment.

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