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Role of Due Process in American Constitutional Law

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THE ROLE OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW†

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The emergence of the Supreme Court of the United States in the role of legislator is one of the most significant changes in the constitutional law of our time. This has come about, in the main, from the attempt to give definite meaning to certain clauses of the Constitution where no standard by which their meaning can be determined is available. The Constitution provides that compensation for the taking of private property must be *just,* that the protection of the laws must be *equal,* that punishments must be neither *cruel* nor *unusual,* that fines must not be *excessive,* that searches and seizures must not be *unreasonable* and that one must not be deprived of life, liberty or property without *due* process of law. The Constitution itself supplies no clue by which it may be determined what is just, equal, cruel, unusual, excessive, unreasonable, or due. Yet the Supreme Court, as the chief interpreter of the Constitution, must necessarily assign some meaning to each of these terms. It is in the exercise of this function that the Supreme Court has become an important creator of fundamental law. This is most evident in the interpretation of the due process clauses. It is the purpose of this paper to study this evolution.

The historical antecedents of the due process clauses are that clause of Magna Carta by which King John promised that "no free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed . . . save by the lawful judgment of his peers or the law of the land" and that clause of the confirmation of Magna Carta by Edward III, by which he ordained that "the Great Charter . . . be kept and maintained . . . and that no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken or imprisoned

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* See Contributors' section, Masthead, p. 689 for biographical data.

nor disinherited, nor put to death, without being brought in Answer by due Process of Law."[1] Their fruit appears in the Fifth Amendment to the Constitution of the United States and in the Constitutions of all the states except five.[2] After the Supreme Court of the United States held in 1833 that the Fifth Amendment was binding only on the federal government,[3] we find "due process" turning up in the Fourteenth Amendment adopted after the Civil War and expressly made applicable to the states by the following words: "Nor shall any *state* deprive any person of life, liberty or property without due process of law."

In attempting to give some meaning to these words, one would naturally seek out the meaning that was given to the same or similar words in Magna Carta and the confirmation of Edward III from which they were derived. However, this search, as we shall see, will not yield much fruit for, in the seven centuries of interpretation, every word of the famous thirty-ninth chapter has been the object of long controversy and modern scholarship has laid bare three centuries of misinterpretation which has been used as the authentic meaning of due process of law.

Across the years there have developed two main currents of opinion in regard to Magna Carta. One, the traditional attitude, looks upon it as a great declaration of human rights and democratic principles, the constituent text for trial by jury and the bulwark of liberties which gave and guaranteed full protection for property and person to every human being who breathes English air. No small part in establishing this opinion must be attributed to Lord Coke. Although Coke's "notions of history were ludicrous"[4] his influence, as the embodiment of the common law, was so strong that it is useless to contend that he "was either misled by his sources or consciously misinterpreted them"[5] for Coke's mistakes, it is said, *are* the common law. Blackstone repeated that Magna Carta protected every individual in the nation in the free enjoyment of his life, liberty and property unless declared forfeited by

[1] 1 Statutes of the Realm 345. Stat. 28 Edw. III cc. 1 and 2 (1335). For two centuries after Magna Carta, successive Kings were in the habit of confirming it. Coke states there were over 30 such confirmations. 2 Co. Litt.* 15.

[2] The five are Indiana, Kansas, New Jersey, Ohio and Oregon. Mott, Due Process of Law § 9 (1926).

[3] Baron v. Baltimore, 7 Pet. 243 (U.S. 1833). The correctness of this decision has been bitterly attacked in a recent work, 2 Crosskey, Politics and the Constitution 1056-1082 (1953). The attack has been repulsed by Fairman, "The Supreme Court and the Constitutional Limitations on State Governmental Authority," 21 U. of Chi. L. Rev. 40, 41-44 (1953).

[4] Radin, "On Legal Scholarship," 46 Yale L. J. 1124, 1129 (1937).

[5] Lyon, "The Lawyer and Magna Carta," 23 Rocky Mt. L. Rev. 416, 431 (1951).

the judgment of his peers or the law of the land.[6] We find uncritical acceptance of these statements today in America in articles, editorials, national holiday orations and in a host of decisions of the Supreme Court of the United States and of the highest courts of the several states.[7] During the Second World War the Great Charter was piously transported for safe keeping to the Library of Congress where more than 14,000,000 people came to view it. Lord Lothian in an address at the Library said, "Every lawyer and every historian will agree that here we have the nucleus of our most cherished liberties, of trial by jury, of habeas corpus, of the principle of no taxation without representation, of the bill of rights and of the entire constitutional structure of our modern democracy."[8] One may regard the culmination of this current of opinion in the work of Stubbs. For him the demands of the barons were no selfish exaction of privileges for themselves.[9] Rather, the whole of the constitutional history of England is little more than a commentary on Magna Carta,[10] and the Great Charter is the act of the united nation, the church, the barons and the commons, for the first time thoroughly at one.[11]

The other current of opinion, the critical and realistic attitude, is represented by a series of modern scholars whose only object is a determined search for truth. One must cite first the studies of Charles Petit-Dutaillis[12] in 1894, and Edward Jenks[13] in 1904. Jenks showed that only a small fraction of Englishmen were its beneficiaries and that it was wrung from an unwilling king by the barons who wished only to safeguard their own narrow interests.

Then came the serious work of McKechnie in 1905. He asserted that the famous thirty-ninth chapter was "reactionary . . . tending to the restoration of feudal privileges and feudal jurisdictions inimical alike to

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6 2 Bl. Comm.* 152.

7 In a widely used American encyclopedia, American Jurisprudence, we find it stated that it is settled beyond question that the principle of due process of law came from England, that it was contained in Magna Carta as a part of the ancient English liberties and these statements are buttressed by many citations from the courts both federal and state. In the American Digest System the key number 251e under Constitutional Law will lead the searcher to hundreds of cases.

8 Meyer, "Magna Carta in America," 26 A.B.A.J. 37 (1940).

9 1 Stubbs, Constitutional History of England 571 (1891).

10 Id. at 572.

11 Id. at 583.

12 Petit-Dutaillis, Etude sur la Vie Le Regne de Louis VIII 57 (1894) quoted by Lyon, supra note 5, at 416, 417.

13 Jenks, "The Myth of Magna Carta," 4 Independent Rev. 260-273 (1904).

the Crown and to the growth of really popular liberties."[14] Pollock and Maitland conclude that upon the whole the Charter is "restorative" and in a few cases there is even "retrogression," that "even in the most famous words of the Charter [the thirty-ninth chapter] we may detect a feudal claim which will only cease to be dangerous when in course of time men have distorted their meaning . . ." but "yet with all its faults this document . . . is the nearest approach to an irrepealable 'fundamental statute' that England has ever had . . . and in brief it means . . . that the King is and shall be below the law"[15] Subsequent serious studies have been made by McIlwain,[16] Sir Paul Vinogradoff, Powicke,[17] Sir William Holdsworth,[18] Max Radin[19] and Bryce D. Lyon.[20]

The late Professor Radin concludes that while Magna Carta is enormously important in property law, its constitutional importance is slight. Professor Lyon concludes that whether we think that the *lex terrae* promised freemen protection from the King's arbitrary will by the rule that execution shall be preceded by a judgment—by a judgment of peers—according to the time honored "tests" of battle, compurgation or ordeal, or that the law of the land included local custom as well, we can be sure that it did not mean due process. *Lex terrae* seems to mean that no matter where or how judgments were made they must precede punitive measures, but such a meaning does not agree with the meaning of due process as understood by our courts.

In any case the traditional view of the equation of the *lex terrae* of Magna Carta with the modern due process of our constitutional law has been completely discredited. Whatever its meaning, it seems certain that we have traveled too far to make a return to ancient meanings possible. We must not be unmindful, as were the traditionalists, that Magna Carta is a document belonging to its own century, and that at-

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14 McKechnie, Magna Carta 449 (1905) quoted by McIlwain, "Due Process of Law in Magna Carta," 14 Col. L. Rev. 27 (1914).

15 1 Pollock and Maitland, History of English Law 172-173 (2d ed. 1911).

16 McIlwain, "Due Process of Law in Magna Carta," 14 Col. L. Rev. 27 (1914), reprinted in 1 Selected Essays on Constitutional Law 174 (1938) with an additional note written in 1938 at 197.

17 Essays by Sir Paul Vinogradoff on Clause 39 and by Professor F. M. Powicke on "Per Judicium Parium Vel per Legem Terrae" appear in the Magna Carta Commemoration Essays (Malden ed. 1917).

18 2 Holdsworth, History of English Law 211 (3d ed. 1922). "It does not legislate for Englishmen generally."

19 Radin, Handbook of Anglo-American Legal History c. 13 (1927) and "The Myth of Magna Carta," 60 Harv. L. Rev. 1060 (1947).

20 Lyon, supra note 5. See also Gardner, "The Great Charter and the Case of Angilly v. United States," 67 Harv. L. Rev. 1 (1953).

tempts to characterize it in modern terms leads to distortion. The document must be located in the "pigeon-holes of medieval and not of modern rubrication."[21] The thread of history has been broken and our courts have turned to other sources of meaning. For every statement making the historical connection between Magna Carta and due process there are a hundred which, unconscious of its existence, seek some other or fancied significance in the words themselves. In addition the wooden application of ancient meanings would deprive the Constitution of capacity for growth.

It is therefore wise to take a fresh start and inquire what has been the course of meaning attributed to the due process clauses in modern times.

What then is the modern meaning of due process? In 1954 we ought to know. Probably more cases, more articles and more books have been written concerning due process than any other single statutory phrase in American Law. There are about 2000 cases in this century,[22] and over 2000 articles and case notes since 1926.[23] There are four substantial treatises confined to the narrow title "due process"[24] and many more of lesser importance,[25] while general treatises on Constitutional Law in which the subject is studied and discussed are as numberless as the sands of the sea.

One would expect that after so much litigation and discussion for 50 years the meaning of due process would be crystal clear. Unfortunately that is not true.

The Constitution of the United States as signed in 1787 did not contain a Bill of Rights. The constitutive assembly at Philadelphia dis-

21 These words of Sir Paul Vinogradoff are quoted at 2 Holdsworth, History of English Law 210.

22 A rough estimate of the number of cases appearing in the American Digest from 1897 to 1952. An average of about 93 cases a year occurred from 1936 to 1946. The present rate is closer to 20 per year. Willis estimates that the due process clauses have been involved in more litigated cases than have all the other clauses of the United States Constitution combined. Willis, Constitutional Law 642 (1936).

23 The estimate was made of citations to articles, comments and case notes in the Index of Legal Periodicals from 1926 to 1952. A spot check indicates an average of 30 per page. This totals 2220.

24 McGehee, Due Process of Law under the Federal Constitution (1906); Taylor, Due Process of Law and the Equal Protection of the Laws (1917); Mott, Due Process of Law (1926); Wood, Due Process of Law 1932-1949 (1951).

25 The Columbia Law Library card catalogue lists 10 books in English and 3 in other languages. Vose, Due Process in Wisconsin (1952) (on microfilm in the Columbia Law Library) lists 28 books.

cussed the question whether such a Bill should be included but the idea prevailed that it was unnecessary because the Constitution contained no grant of power to Congress to legislate on any of the subjects which a Bill of Rights would comprise and it was consequently unnecessary to declare that things should not be done which there was no power to do.[26] This decision proved to be unwise. The gap was soon noticed when the Constitution came up for ratification in the conventions in several states and at least six of them ratified only on the assumption of a tacit agreement that amendments supplying a Bill of Rights would be proposed by the First Congress.[27] The First Congress proposed amendments as expected and what are now the first ten amendments became part of the Constitution on December 15, 1791. In the fifth we find the famous line of interest to us here: "No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

For 64 years these words remained without interpretation by the Supreme Court of the United States. The first official statement came in *Den v. The Hoboken Land and Improvement Company* in 1855:

> The words "due process of law" were undoubtedly intended to convey the same meaning as the words, "by the law of the land" in Magna Carta. Lord Coke in his commentary on these words says they mean due process of law. The constitutions which had been adopted by the several states before the federal constitution, following the languages of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land."[28]

Today there remains extant no discussion of the meaning of due process of law contemporaneous with the adoption of the fifth amendment. But we do find a statement of the meaning of the "law of the land." Alexander Hamilton in discussing the meaning of the thirteenth article of the New York Constitution, "that no member of the state shall be disfranchised or defrauded of any of the rights or privileges sacred to the subjects of this state by the Constitution, unless by the law of the land or the judgment of his peers," states that the best commentators tell us that law of the land means "due process of law; that is by indictment or presentment of good and lawful men and trial and conviction in consequence."[29] Whether these words of Hamilton were known to the court is uncertain, but the court refuses to equate due process with the law of the land. The reason given is that the Consti-

[26] Warren, The Making of the Constitution 509 (1929).

[27] Id. at 768-769, Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49, 55 (1923).

[28] Justice Curtis speaking for the court. 18 How. 272, 276 (U.S. 1855).

[29] Alexander Hamilton, Works 231-232 (Constitutional ed. Henry Cabot Lodge 1886).

tution already contained certain provisions regarding jury trial[30] and therefore for the Constitution to have declared in the words of Magna Carta that no person should be deprived of his life, liberty or property but by the judgment of his peers or the law of the land would have been in part superfluous and inappropriate. The court then seeks a meaning elsewhere and in answer to the question, what is due process, says:

> The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it is due process. . . . To what principles then are we to resort to ascertain whether this process, enacted by congress, is due process? To this the answer must be twofold. We must examine the constitution itself . . . (and) we must look to those settled usages and modes of proceeding existing in the statute law of England, before the emigration of our ancestors which are shown not to have been unsuited to their civil and political condition. . . .[31]

From this early decision we should note three points: (1) The court assumes that due process concerns only procedure, (2) the court already perceives that due process is an uncharted sea where there is no "description of those processes which it was intended to allow or forbid" and no "declaration of principles to be applied" and (3) the court, in default of a test of due process laid down in the Constitution, invents its own test, (a habit which has become a part of our accepted constitutional technique).

Soon came the war betwen the states. The forces that liberated the slave wished to protect him. The fourteenth amendment was the instrument for the purpose.[32] As we have seen, it made the prohibition against depriving a person of life, liberty or property without due process of law expressly applicable to the states.

It was at first narrowly interpreted. In the famous *Slaughter House Cases*[33] the court adopted the view that the amendment was adopted primarily for the protection of the negro and Justice Field said that he doubted that any action of a state not directed by way of discrimination against the negroes as a class would ever be held to come within its purview.[34]

The "negro-race" theory of the amendment was short lived. In 1886 the court extended the meaning of the word "person" to include even

30 The provisions referred to are in Article III, § 2, ¶ 3 and in the sixth and seventh amendments.

31 Atkins v. The Disintegrating Company, 18 Wall. 272, 276-277 (U.S. 1873).

32 See Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5 (1949).

33 16 Wall. 36 (U.S. 1872).

34 Ibid.

corporations.[35] The older theory that the due process of the fifth amendment concerned only procedure was overturned in 1890 in a decision holding that the due process of the fourteenth amendment included substantive rights as well as procedural rights.[36] With the "negro race" and the "procedure" straight jackets removed the way was cleared for the modern development of due process.

The interpretation of due process is very different from the interpretation of other expressions in the law and has presented a problem of unusual difficulty. What has been the cause of the difficulty?

On the part of many it is a failure to analyze the nature of the problem. The chief cause of difficulty is that we have in the word "due" an expression which in its natural meaning refers to something else and there is nothing in the Constitution to which it can refer. In the language of the semanticists the word "due" in the Constitution is a sign without a referent.[37]

All this becomes apparent upon a moment's reflection. The only dictionary equivalents for "due" here are "appropriate" and "proper." Life, liberty or property may not be taken without due process of law, that is, without some appropriate or proper process. The question immediately arises, what is the standard which makes a given process appropriate or proper? One would expect a statement of the standard to be applied to be set out in the Constitution itself. But it is not. The constitutional fathers did not always possess lingual sophistication, that basic quality of a good lawyer which makes him immune to being fooled by words and accepting verbal solutions which merely conceal the problem.[38] Of course it is true in daily life that symbols requiring

[35] Santa Clara County v. Southern Pacific R.R., 118 U.S. 394 (1886). This development came through the efforts of Roscoe Conkling, one of the draftsmen of the fourteenth amendment, who was counsel in the Santa Clara case. See Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938).

[36] Chicago, M. & St. P. R.R. v. Minnesota, 134 U.S. 418 (1890). This is the leading case to which the extension of due process to include substantive as well as procedural rights is usually traced. However, the due process clause of the New York State Constitution had been, much earlier, extended to substantive rights in Wynehamer v. New York, 13 N.Y. 378 (1856). Professor Corwin says this extension was plainly due to "a feeling on the part of judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow." Corwin, "Due Process of Law before the Civil War," 24 Harv. L. Rev. 366, 460 (1911).

[37] This is one of many causes of ambiguity brought out in such books as Black, Critical Thinking, an Introduction to Logic and Scientific Method 171 (1952).

[38] Leach, "Property Law Taught in Two Packages," 1 Jour. Leg. Educ. 28 (1948).

a referent are in constant use where the referent is not spelled out. A mother says to her child "now Johnny I want you to be good." The referent, the measuring rod, for what is "good" is supplied by the conduct which, from past experience, Johnny knows his mother considers "good." But if we were to take one of these symbols out of context and try to discover a meaning we would feel as helpless as the layman who visited the army mess hall at Truax Field in Wisconsin and saw upon the wall a notice reading: "Anyone smoking in this mess hall will be dealt with accordingly."[39]

The difference between symbols with referents and symbols without referents can be illustrated in other fields of law. The Uniform Negotiable Instruments Law uses the word "due" as a symbol when it enacts that a holder in due course holds the instrument free from any defect of title of prior parties, and free from defences available to prior parties among themselves.[40] But the exact meaning of this expression is made clear in another section of the same law which defines a holder in due course as one who takes in good faith and for value an instrument that is complete and regular on its face and not overdue.[41]

Again, Dicey in discussing contracts in the field of Conflict of Laws says that the essential validity of a contract should be governed by the "proper" law of the contract.[42] Were this his only statement it would have been considered utterly useless, because it would simply pose a new problem as difficult as the first, viz., what *is* the "proper" law of the contract. But Dicey, before using the symbol, gave the reader his referent: "the proper law is the law or laws to which the parties intended . . . to submit themselves" and accompanied it with comment and illustrations.[43] The symbol "proper" in itself would be meaningless, but when explained no one can misunderstand.

Books on quasi-contracts, restitution and constructive trusts usually contain statements that recovery is allowed to prevent "unjust" enrichment.[44] The statement in itself and unexplained in no way advances

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[39] 23 Word Study 8 (1947) (a publication of G. and C. Merriam Company, Springfield, Massachusetts).

[40] Uniform Negotiable Instruments Law § 57.

[41] Id. § 52.

[42] Dicey, Conflict of Laws Rule 160, p. 647 (5th ed. Keitb, 1932).

[43] Id. Rule 155 b, p. 628.

[44] Keener, Quasi-Contracts 19 (1893). Woodward, Quasi-Contracts § 8 (1913). This author avoids the expression for the most part. 3 Scott on Trusts § 462.2 (1939). In reviewing Keener's book in 10 Harv. L. Rev. 209 at 224 Abbot says: "This proposition is not a reason at all. This is the very vice of the *petitio principii* which, more or less plausibly, purports to give a reason but fails."

our knowledge of when recovery will be allowed for it merely poses the equally difficult problem under what circumstance is enrichment unjust. If the symbol "unjust" is later defined in the same work, in other words if the symbol is followed by a referent, all is well and the reader then begins for the first time to be really informed as to the cases where recovery will be allowed.

The problem of symbols devoid of referents in the field of Constitutional law has long been noticed. Unfortunately due process is not the only undefined symbol of the Constitution, but the problem is essentially the same in regard to all of them. The following excerpts show how the problem has been expressed by notable commentators:

> In consequence of the modern doctrine of due process as "reasonable law" judicial review ceases to have definite statable limits, and while the extent to which the court will recanvass the factual justification of a statute under the due process clauses . . . often varies considerably between cases, yet this is a matter which in the last analysis depends upon the court's own discretion and on nothing else.[45]
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> The only general principle of interpreting the "due process of law" clause would appear to be this: legislation which appears to the majority of the Supreme Court of the United States as shockingly unfair to the . . . individual affected is unconstitutional.[46]
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> If we are not to stray outside the body of the constitution to establish the meaning of its provisions, there is no way to determine the present meaning of "due process" for without the foundation of its significance as it existed at the time of its inclusion in the fifth amendment the phrase would be stripped of all its vitality.[47]
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> The Supreme Court is a constitutional convention always in session.[48]
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> Legal critics have been distressed to find that through their selective application of the due process concept, judges have moulded the law to coincide with their prejudices.[49]
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> An informed study of the work of the Supreme Court of the United States will probably lead to the conclusion that no nine men are wise enough and good enough to be entrusted with the power which the un-

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[45] Corwin, The Constitution and What it Means Today 193 (1947 ed.).

[46] William Draper Lewis, 243 Annals of American Academy Political and Social Science 63, (Jan. 1946).

[47] Note, 36 Geo. L. J. 398, 409 (1948).

[48] Quotation from Hugh Willis by Hanna, "Equal Footing in the Admission of States," 3 Baylor L. Rev. 519 at 524 (1950). See also Patterson, "The Supreme Court as a Constitutional Convention," 23 Tulane L. Rev. 431 (1949). Beck, The Constitution of the United States 221 (1928) stated:

> The Supreme Court is not only a court of justice but in a qualified sense a continuous constitutional convention. It continues the work of the Convention of 1787 by adapting through interpretation the great charter of government, and thus its duties become political in the highest sense of the word, as well as judicial.

[49] Vose, Due Process of Law in Wisconsin c. V (on micro-film in the Columbia Law Library).

> limited provisions of the due process clauses confer. We have had fifty years experiment with the Fourteenth Amendment, and the centralizing authority lodged with the Supreme Court over the domestic affairs of forty-eight widely different states is an authority which it simply cannot discharge with safety either to itself or to the states.[50]

The judges themselves have perceived the contours of the problem here discussed and have not been averse to expressing their opinion. The venerable Holmes in 1929 said:

> I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the states. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of the court as for any reason undesirable. . . .[51]

In 1952 Judge Learned Hand wrote:

> "What is freedom of speech and of the press"; what is the "establishment of religion and the free exercise thereof"; what are "unreasonable searches," "due process of law," and "equal protection of the law"; all these are left wholly undefined and cannot be effectively determined without some acquaintance with what men in the past have thought and felt to be their most precious interest. Indeed these fundamental canons are not jural concepts at all, in the ordinary sense; and in application they turn out to be no more than admonitions of moderation, as appears from the varying and contradictory interpretations that the judges themselves find it necessary to put upon them. . . .[52]

In 1954, Justice Clark, in a case concerning an unusual violation of the privacy of a home, said:

> . . . a case by case approach to due process . . . makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution . . . The practical result . . . is simply that when five Justices are sufficiently revolted by local police action a conviction is overturned. . . .[53]

These excerpts show that both learned authors and judges admit that the court is necessarily engaged in legislating, if not constitution making, when it has the task of interpreting one of these constitutional symbols that has no constitutional definition. It is a rather significant fact that this has been perceived by the draftsmen of the constitutions of other democratic countries and for that reason the due process clause

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[50] Frankfurter, Law and Politics 16 (1939).

[51] Baldwin v. Missouri, 281 U.S. 586, 595 (1929).

[52] Hand, "Freedom and the Humanities," 38 Bull. of the Amer. Ass'n of University Professors 521 (1952).

[53] Irvine v. California, 347 U.S. 128 at 138 (1954).

has not been copied. For example, when Mr. Astor proposed to amend the Irish Home Rule Bill by incorporating the due process clause, his motion was lost on such arguments as the following:

> Mr. John Ward: What the right honorable gentlemen are suggesting is that we should have . . . a sort of general provision so as to enable the courts of the country to question and decide whether any law passed by the Parliament of Ireland . . . may be taken from the floor of the house . . . and be decided by pundits on the benches of the country. I venture to say no more dangerous proposition has ever been suggested in this House . . . . The operation of this clause of the American Constitution is best typified by the terrible story of the industrial conditions in regard to women and children . . . . These things are not allowed to be decided . . . in accordance with the overwhelming majority of the people but . . . on some wretched legal formula settled in courts where popular opinion has not the slightest influence and the demand for justice for the poor is very rarely heard.[54]
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> Mr. Asquith: Without concerning myself for a moment with the actual language of the amendment, its object is to assert in terms that the Irish Parliament shall not pass legislation which no civilized legislature ought to pass or could pass . . . . The language here used . . . is full of ambiguity, abounding in pitfalls and certainly provocative of every kind of frivolous litigation . . . . In every case you have adjectives . . . and they are really all matters of opinion bias or inclination and judgment which cannot be acted upon under anything like settled rules of law . . . . I cannot imagine any subject . . . in regard to which the decisions of the tribunals would be received with less general respect . . . . If you introduce into your bill a limitation of this kind of the powers of the legislature you are . . . really enthroning the judiciary as the ultimate tribunal of appeal.[55]

The words of Mr. Asquith may have crossed the ocean for in 1918 we find the late Professor Albert M. Kales saying:

> In addressing the court in due process cases one should not commence with the usual salutation "May it please the Court." Instead one should say "My Lords." Backed by and charged with the enforcement of the due process clauses of the fifth and fourteenth amendments, the Supreme Court of the United States is the American substitute for the British House of Lords. It constitutes the real and only second chamber of the federal government. It is a second conservative chamber for each of the state governments.[56]

At times when the court's discharge of this legislative responsibility became distasteful, proposals to modify it were made. In 1924 Senator Robert LaFollette, candidate for the Presidency on the Progressive ticket, proposed a constitutional amendment empowering Congress by a two-thirds vote to override any Supreme Court decisions holding a

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[54] 42 H.C. Deb. 2218-2220 (5th series 1912).

[55] Id. at 2229-2231.

[56] Kales, "New Methods in Due Process Cases," 12 Amer. Pol. Sci. Rev. 241 (1918), reprinted in 1 Selected Essays on Constitutional Law 488 (1938).

statute unconstitutional, and in 1937 Senator Borah proposed a constitutional amendment to divest the court of power to deal with substantive due process.[57]

Do judges make law or only discover the law?[58] The realists today unhesitatingly answer "they make law" for is not the whole mass of the common law a monument to the work of the judges? Ordinarily the direct intention is never to make law. Law is rather but a by-product that accretes at glacier speed. However, in the due process cases the accretion is rapid and immediate and the intention to make law is often direct. In any case it is inevitable. We may say then that the court, in deciding whether a given statute violates the due process of law clauses, is engaged directly in legislating.

It is important to note at this point how this species of judicial legislation differs from ordinary legislation, that is, from legislation coming from the legislative assemblies.

First, it depends for its promulgation on the existence of a case. No court has power *per se* to review and annul any statute on the ground of unconstitutionality. That question may be considered only when a justiciable issue must be decided in litigation. Then the power exercised is that of deciding the case before the court. It amounts to little more than the negative power to disregard what is thought to be an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.[59] The result is that law may rest upon the statute books for years and the judges may privately be of the opinion that it is unconstitutional, but until someone brings a case, the court is without power to act. In the meantime the statute may be respected by the public and enforced by the executive. Even when held unconstitutional, the statute may still produce certain collateral effects, and to the extent abrogated may be reinstated by a new case, while a repealed statute must be re-enacted by a later session of the legislature. Nor can the court make rules in anticipation of future cases except by way of dicta. In short, legislative enactments destroy and reform at the will of the legislature while judicial legislation destroys and

[57] See 123 Literary Digest 8 for March 6, 1937 and 38 Col. L. Rev. 569 (1938).

[58] See Chaffee, "Do Judges Make or Discover Law?" 91 Proc. Am. Phil. Soc. 405-412, 419-420 reprinted in Fryer and Benson, Legal Method and System 124 (1934), and Cohen, Law and the Social Order 112 (1933) (chapter entitled the Process of Judicial Legislation).

[59] This is substantially the statement of Justice Sutherland in Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

reforms only when a litigant brings an appropriate case before the court.

Secondly, there exists a surprisingly large field of judicially unenforceable provisions in the Constitution, and as to these the courts have no power to legislate under the due process clauses or otherwise.[60] The Constitution itself may provide that a given question must be settled by a department of government other than the judiciary. For example, each house of the legislature is the judge of its own elections,[61] and the executive authority shall issue writs of election to fill vacancies.[62]

Thirdly, the Supreme Court of the United States has declared that it has no jurisdiction to decide "political questions." The exact limits of this expression are perhaps impossible to determine but a few examples will illustrate its purpose. The court will not decide questions regarding the relation of the United States to other nations. The Congress is given power to declare war,[63] and the President and the Senate the power to conclude treaties.[64] "The United States shall guarantee to every state a republican form of government,"[65] but what is a republican form of government has always been considered a political question.[66] A state has no standing to invalidate a congressional grant of funds subject to conditions it does not approve.[67] The suggestion has been made that the court should have regarded as "political" questions involving social and industrial legislation that have been the object of important constitutional cases in recent years because in such cases the measure of due process approaches the measure of political wisdom and the function of determining political policy is with the legislature and not the courts.[68] The advantageous division of labor between legislature and judiciary is thus upset. The legislature is composed of members representing all shades of opinion and may freely call to its hearings not

[60] This is especially true in the field of state constitutional law. See Dodd, "Judicially Nonenforceable Provisions of Constitutions," 80 U. of Pa. L. Rev. 54 (1931), reprinted, in 1 Selected Essays on Constitutional Law 355 (1938).

[61] U.S. Const. Art. I, § 5.

[62] Id. Art. I, § 2, ¶ 4.

[63] Id. Art. I, § 8, ¶ 11. Prize Cases, 2 Black 635 (U.S. 1862).

[64] Id. Art. II, § 2, ¶ 2. Terlinden v. Ames, 184 U.S. 270 (1901).

[65] Id. Art. IV, § 4.

[66] Pac. State Tel. and Tel. Co. v. Oregon, 223 U.S. 118 (1912); Luther v. Borden, 7 How. 1 (U.S. 1849).

[67] Massachusetts v. Mellon, 262 U.S. 477 (1922).

[68] The suggestion is by Finkelstein, in "Judicial Self-Limitation," 37 Harv. L. Rev. 338 (1923). It gave rise to a small pamphlet war. See Weston, "Political Questions," 38 Harv. L. Rev. 296 (1925) and Finkelstein, "Further Notes on Judicial Self-Limitation," 39 Harv. L. Rev. 221 (1925).

only interested witnesses from both sides but also totally disinterested witnesses. On the other hand the court must depend for its information on witnesses called by the parties who represent the selfish interests of their masters. Despite all this the court has not hesitated to take jurisdiction in due process cases involving questions of far reaching political policy and thus has continued to legislate.

We have said that the "due" of due process is a symbol without a referent, that lacking a definition there is nothing to which it can refer and therefore the meaning is abortive. But may it not be said that this word, like many others used in law at this period, makes implicit reference to natural law, those revealed rules of conduct binding on all men and sanctioned by the dictates of right reason?

The theory of natural law, having roots as far back as Plato and Aristotle, was given added weight by the prestige of Grotius and Newton in the seventeenth and eighteenth centuries and by the publication of John Locke's Second Treatise on Civil Government in 1690. Add to these the influence of Rousseau's theory of the social contract, which was certainly fresh in the minds of the constitutional fathers, and it must be admitted that the framers of the fifth amendment did make implicit reference to natural law. What is more, the influence of such theories has had an enormous influence in its interpretation for over a century.[69]

But all this scarcely advances the argument that the expression, due process of law, has any readily ascertainable precision of meaning. The reference to natural law only shifts the argument from one symbol "due" to other symbols that are equally incapable of precision. The one perfect law, that is the best of all possible rules to govern the relations of man to man, is to be discovered by a process of revelation or reason. As to the revelation, it happens that some ninety million Americans belong to about 250 religious bodies and that about seventy million other Americans belong to none.[70] The chaos resulting from this babel of voices is well illustrated by the diversity and conflicting tangle in the American law of marriage and divorce, a subject long thought to

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[69] See Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149, 365 (1929), reprinted in 1 Selected Essays on Constitutional Law 1 (1938); Manion, "The Founding Fathers and the Natural Law," 35 A.B.A.J. 461 (1949); Haines, The Revival of Natural Law Concepts (1930); Grant, The Natural Law Background of the Fourteenth Amendment, 31 Col. L. Rev. 56 (1931).

[70] World Almanac 705 (1954).

be peculiarly within the jurisdiction of revealed truth.[71] To make any claim that a reference to natural law is to give precision of meaning to due process on the basis of revealed truth is to jump from the frying pan into the fire.

Nor do we find firmer ground with reason. The question becomes whose reason? That of Karl Marx or of Adam Smith, that of the revolutionists or the evolutionists, that of the historical jurists, the transcendentalists, or the pragmatists, that of the sociologists or the realists? The list could easily be extended.

The contention of every litigant makes its appeal to reason in all the great problems that have harassed the Supreme Court in the due process cases. And so we go up one blind alley and down another. In the end the reference to natural law solves nothing. It only diverts the problem, gives us something else to talk about, but finally we are in the same position as we were before.[72]

To gain a clearer picture of our position let us summarize:

1. Although the historical roots of due process of law go back to the Great Charter and its subsequent confirmation by Edward III these sources can have no significance in the interpretation of due process today. Magna Carta is a medieval document belonging to its own century.

2. The earliest case to interpret "due process of law" in the fifth amendment considered it a procedural measure only and one in which there was no description of the processes that it was intended to allow or forbid; and the earliest case to interpret the same expression in the fourteenth amendment regarded it only as a measure for the protection of the negro race. Soon however, both the procedural and the negro race limitations were removed.

3. The fundamental difficulty of interpretation is the lack of any

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[71] A report from the Commission on Human Rights of the United Nations states that "the long debate on this controversial subject demonstrated the great difficulty in writing a satisfactory text on marriage and the family . . . that would be consistent with the various profoundly different religious faiths, cultures and legal systems." Dep't State Bull. 218 (Aug. 17, 1953).

[72] See Beutel, "Relationship of Natural Law to Experimental Jurisprudence," 13 Ohio State L.J. 167 (1952). The court in Fisch v. General Motors Corporation, 169 F.2d 266 at 270 (6th Cir. 1948) refused to take cognizance of a reference to natural law in these words:

> . . . a court cannot declare a statute unconstitutional . . . because it is supposed to violate some natural . . . rights of a citizen unless it can be shown that . . . such rights are protected by the Constitution.

standard by which due-ness can be determined, for it is an undefined symbol which has no meaning in itself. This difficulty has been noticed by commentators, judges and draftsmen of foreign constitutions.

4. The court in attempting to give a meaning is engaged directly in legislating. But judicial legislation, unlike legislative legislation, must await a case, cannot make rules for the future and is subject to other limitations.

5. The reference to natural law as a standard of due-ness, while a historical fact, is useless as an interpretative solvent today, for it poses more questions than it answers.

All this looks like a stalemate. And stalemate it is if we wish to find any inherent meaning in due process. Theoretically a constitutional amendment might give a definition, but politically it is not possible when most people, even many lawyers, do not perceive the nature of the difficulty. Our constitutional sense has atrophied. We once put our constitution on paper and told the judges, willy nilly, to make the most of it. Under these circumstances it remains only to examine the cases to discover in what fields the Court itself has felt the stalemate and in what fields it has given the country an acceptable body of judicial legislation.

Unfortunately there are over 2,000 cases and to trace, even in barest outline, the multiple trends of interpretation through this mass of litigation is beyond the scope of this paper. Rather, it is proposed to take as examples a few of the outstanding problems and indicate the turning points in interpretation in order to discover some of the characteristic ways in which the court has discharged its responsibility. We may begin with the cases on the regulation of business.

The nineteenth century attitude of the Court permitted legislatures considerable freedom. If a business was "affected with a public interest" a state might establish maximum rates for its services.[73] A city might regulate the hours of operation of laundries[74] and the state could forbid the sale of oleomargarine.[75] But soon laissez-faire economics and the concept of liberty of contract found their way into the Constitution and the Court denied the right of a state to limit work in bakeries to 60 hours a week,[76] fix prices or establish a licensing system for busi-

[73] Munn v. Illinois, 94 U.S. 113 (1876).

[74] Barbier v. Connolly, 113 U.S. 27 (1885).

[75] Powell v. Pennsylvania, 127 U.S. 678 (1888).

[76] Lochner v. New York, 198 U.S. 45 (1905).

nesses not affected with a public interest.[77] So sacred did the liberty to contract become that the Court forbade both the federal[78] and the state[79] legislatures to prevent discrimination against employees on the basis of labor union membership and forbade the Congress to establish minimum wages for women in the District of Columbia.[80] But a change was in the offing. An old saying has it that "the Court follows the election returns," and perhaps we should add "at some distance."

When a large majority of the voters carried Franklin D. Roosevelt into the Presidency, he characterized these fields in which neither national nor state legislatures could pass social legislation as the "No Man's Land" of the Supreme Court. The phrase had telling effect only second to his "court packing" plan which quickly followed suit. The change came in 1934 when the Court decided that New York could set minimum resale prices for milk.[81] No longer need a business be "affected with a public interest"; but it is sufficient if it can be shown that control is for the public good. Soon the Court did an about-face on minimum wages for women[82] and later allowed a state to fix rates for the services of an employment agency.[83] A litigant was able to show some reason why funeral directors should not be at the same time insurance agents and a statute prohibiting the dual employment was upheld.[84] House to house canvassing in the absence of an invitation from the householders could be forbidden by a state statute.[85] State public utility commissions have come to have virtually a free hand in rate making, Justice Frankfurter saying that "it is not for the federal courts to supplant the Commission's judgment even in the face of convincing proof that a different result would have been better."[86]

Finally we come to the California Compulsory Assigned Risk Law which compelled each insuring unit to take the equitable proportion of risks classified as "poor" which the California Insurance Department assigned to it. Justice Douglas said the consequent diminution in value of the plaintiff's business did not rise "to the dignity of a taking in the

77 Williams v. Standard Oil Co., 278 U.S. 235 (1929).

78 Adair v. United States, 208 U.S. 161 (1908).

79 Coppage v. Kansas, 236 U.S. 1 (1915).

80 Adkins v. Children's Hospital, 261 U.S. 525 (1923).

81 Nebbia v. New York, 291 U.S. 502 (1934).

82 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

83 Olsen v. Nebraska, 313 U.S. 236 (1941).

84 Daniel v. Family Security Life Insurance Co., 336 U.S. 220 (1949).

85 Beard v. Alexandria, 341 U.S. 622 (1951).

86 Railroad Commission v. Rowan and Nichols Oil Co., 310 U.S. 573, 584 (1940). See also, Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944).

constitutional sense" and Justice Black was in favor of dismissing the appeal on the ground that the constitutional questions were *frivolous*.[87]

When we reach the position that the raising of the argument of violation of due process is considered frivolous by the Supreme Court we can say with Harris that "the due process clause no longer is merely in eclipse—it has fallen into the sea."[88] We may conclude that in the field of the regulation of business the court is conscious of the stalemate and seems to have closed up its constitutional shop so far as invalidating statutes on the ground of violation of due process is concerned. Of course, there is no assurance that the Supreme Court will continue of the same mind, but for the present one would be safe in saying that it would require an unusually arbitrary or discriminatory statute to reopen the door.

When we turn from business regulation to protection of persons accused of crime we find not a stalemated court, but a court with a mission, determined to eradicate from America the asperities of criminal procedure.

In a case attracting nation wide attention the Court declared that to deny a poor underprivileged defendant the right to counsel in his defense was to violate due process.[89] Since then the court has pretty consistently held the right to counsel a fundamental ingredient of due process, at least in cases of importance where the defendant is unable to defend himself.[90] But this does not mean that each state must set up a public defender system for the rule is not absolute and each case will be judged on its own merits.[91]

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87 California State Automobile Ass'n Inter-Insurance Bureau v. Maloney, 341 U.S. 105, 111 (1951). See on the whole subject of regulation of business, Harris, "Freedom and the Business Man," 37 Iowa L. Rev. 196 (1951); Divine, "Constitutionality of Economic Regulations," 2 J. of Pub. Law 98 (1953).

88 Harris, supra note 87 at 201.

89 Powell v. Alabama, 287 U.S. 45 (1932).

90 Hawk v. Olson, 326 U.S. 271 (1945); Rice v. Olson, 324 U.S. 786 (1945); Williams v. Kaiser, 323 U.S. 471 (1945); Glasser v. U.S., 315 U.S. 60 (1942); Avery v. Alabama, 308 U.S. 444 (1940).

91 In Betts v. Brady, 316 U.S. 455 at 462 (1942) Justice Roberts said:

> Asserted denial is to be tested by an appraisal of the totality of the facts in a given case. That which may, in one setting constitute a denial of fundamental fairness, may, in other circumstances . . . fall short of such denial.

In Quicksall v. Michigan, 339 U.S. 660 (1950) it was held that the absence of counsel, in a hearing leading to a conviction ten years earlier, in the case of a fairly intelligent defendant with some prior experience in court was insufficient to discharge the prisoner on the ground that due process had been violated.

In the attempted supervision of state criminal procedure through the due process clause the key case is that of *Adamson v. California*.[92] A California statute provided that both court and counsel might comment on the failure of a defendant in a criminal case to take the witness stand and permitted the jury to consider the comment. Upon conviction, the defendant contended before the Supreme Court that this process was less than that due him at the hands of the state, for the simple reason that the Fifth Amendment provision that no person shall be compelled, in any criminal case, to be a witness against himself had become a restriction on the state through the due process clause of the Fourteenth Amendment. Thus was initiated the great debate on whether the provisions of the Bill of Rights, or any of them, were incorporated in the Fourteenth Amendment. As we have seen, the Court held, at an early date, that the Bill of Rights was applicable only to the federal government.[93] Now it was contended that the framers of the Fourteenth Amendment intended the expression "due process" to carry over to the states the privilege against self-incrimination. Five justices rejected the argument chiefly on the basis of a decision of forty years standing.[94] Four justices believed that the Bill of Rights must be applied to the States *in toto* but three of them thought that the Bill of Rights did not express all the protection afforded by that Amendment and that more might be added. Justice Black alone believed that the Bill of Rights constituted both the maximal and minimal limits of the meaning of due process in the Fourteenth Amendment. Thus was precipitated a major controversy on the technique of discovering the scope of due process.

Mr. Justice Black based his argument that the Bill of Rights was included in due process in a study of *les travaux preparatoires* and the dissenting opinions of Mr. Justice Harlan in three historic cases.[95]

What was the original intention? Corwin in 1908 had stated "There can be no kind of doubt that its authors [authors of the Fourteenth Amendment] designed that, at the very least, it should make the first eight amendments binding upon the States as well as the federal government."[96] More recently the historical thesis of Justice Black has

92 332 U.S. 46 (1947).

93 Barron v. Baltimore, 7 Pet. 243 (U.S. 1833).

94 Twining v. New Jersey, 211 U.S. 78 (1908).

95 Twining v. New Jersey, 211 U.S. 78, 114 (1908); Maxwell v. Dow, 176 U.S. 581, 605 (1900); Hurtado v. California, 110 U.S. 516, 518 (1884).

96 Corwin, "The Supreme Court and the Fourteenth Amendment," 7 Mich. L. Rev. 643, 644 (1908).

been examined by Professor Fairman,[97] who concludes that the record of history is overwhelmingly against him. In similar vein Professor Morrison states that Justice Black's historical research "will not stand critical examination."[98]

However important the search for historical truth may be, it is more important for our purpose to discover the technique of interpretation. How does the Court go about the task of assigning content to the due process clause?

As far as Justice Black is concerned, his purpose becomes evident from his opinions in other cases. We have seen that the Court in an early decision determined the content of due process by examining the Constitution itself and looking at "those settled usages and modes of proceeding existing in the state law of England, before the emigration of our ancestors, which are shown not to have been unsuited to their civil and political condition."[99] But with the extension of due process to cover substantive rights came the notion that due process in the procedural field was equivalent to a fair trial,[100] or consistency with the fundamental principles of liberty and justice[101] or what is implicit in the concept of ordered liberty."[102] These additions cannot be traced to any original English meaning but rather have their origin in concepts of natural law. Now it happens that the whole idea of natural law is distasteful to Justice Black. He so expressed himself in the *Adamson* case.[103] So when his colleagues in substantive law cases on the regulation of business based their decision on natural law, Justice Black urged that we should return to the ancient notion that due process was a matter of procedure only.[104] But when we turn to the cases on civil

97 Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stan. L. Rev. 5, 139 (1949).

98 Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation," 2 Stan. L. Rev. 140, 171 (1949).

99 See note 28 supra.

100 This idea was developed in Davidson v. New Orleans, 96 U.S. 97 (1878).

101 Hebert v. Louisiana, 272 U.S. 312 (1926).

102 Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937).

103 He said:

> I think that decision [Twining v. New Jersey] and the "natural law" theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise.

332 U.S. 46, 70 (1947).

104 In United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938) he expressed the opinion that the assurance of a fair trial was the only matter involved, and in Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) he was willing to deny to the Court the right of review of public utility rates.

liberties Justice Black becomes a judge with a mission. For him civil liberties must receive the solicitous protection of the Court. But civil liberties called for not only procedural due process but substantive due process as well. The only position then to fit this congerie of convictions was to contend that the Bill of Rights, which contained all the civil liberty provisions dear to his heart, be applied *in toto* to the states through the Fourteenth Amendment. Since power to regulate business was *not* expressed in the Bill of Rights but civil liberties *were,* this contention fitted his purpose like a glove.

Let us isolate and examine this technique. First, Justice Black relies upon history. To do so is to disregard completely the theory of the Constitution as a vital and growing document. Everyone admits today that it has grown and must grow. So in any case the argument of history is not conclusive. It is, at most, a make-weight which of itself is not very important in the acute problems of today that, in almost every sphere, transcend everything that could have been even imagined by the authors of 1787 or even of 1868.

But if the argument of history is to have decisive effect, it is important that the historical research be complete and accurate. It was not.[105]

Then we see his conclusion, that the Bill of Rights is to be incorporated in the Fourteenth Amendment, flowing from three convictions: (a) That no reference to natural law to clarify the process is proper, (b) that statutes regulating business must be upheld, and (c) that civil liberties must be protected. None of these is expressed as such in the Constitution. None of them flows necessarily from the text of the due process clause. Here then is the essence of the method. Statutes are held to be constitutional or unconstitutional depending on some private convictions of the justices. This is proof, again, if any were needed, that the Justices are legislating.

The opinion of Justice Black is studied here as an attempt to show one way in which a great justice comes to a judicial decision. That particular method probably will not be employed by others for the method grows out of the particular convictions of Justice Black. Other convictions, another background, a different education and another set of motives will command a different result on the part of others. But in the due process cases it is important to notice that it is the total personality of the judge that is speaking when he gives his opinion and it is not and cannot be any inherent meaning in the constitutional words.

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105 This conclusion seems inevitable after the very careful studies of Professors Fairman and Morrison, supra notes 97 and 98.

There is nothing new in the above statement. Justice Stone in 1936 observed, "While constitutional exercise of power by the executive and legislative branches is subject to judicial restraint, the only check on our exercise of power is our own sense of self restraint."[106] Justice Frankfurter, while admitting the necessity of self limitation, nevertheless is of the opinion that some test exists and thinks the court must attempt to apply it. In a recent case he said:

> This Court must give the freest possible scope to states in the choice of their methods of criminal procedure. But those procedures cannot include *methods that may fairly be deemed in conflict with deeply rooted feelings of the community.* . . . Of course this is a most difficult test to apply, but apply it we must, warily and from case to case. . . . Our constitutional system makes it the Court's duty to interpret those feelings of society to which the Due Process clause gives legal protection. Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory but such as they are we must apply them. (Emphasis supplied.)[107]

The inner mind and creed of both Justices Black and Frankfurter have been subjected to a searching study by Professor Braden who says, "They both put into the Fourteenth Amendment what they want to."[108] After examination of their separate attempts at self limitation, he says:

> Each theory collapses, on analysis, into little more than a front for policy making . . . Perhaps Mr. Justice Frankfurter measures his power, finds it precarious and retreats. If so, that is the cause of the retreat, not 'society's opinion.' Perhaps Mr. Justice Black is stymied by an inability to maneuver around "specific" words. If so, it is a lack of ingenuity, a fear of criticism, or a judgment of the reaction to the transparency of his maneuver which stops him, not the "specific" words.[109]

In recent years the Court's work has been channelled in a new direction. Until 1938, the cases coming to the Court under its diversity jurisdiction[110] played an important role in helping to determine state law.[111] But the abandonment of this position in 1938 in *Erie R.R. v.*

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106 United States v. Butler, 297 U.S. 1, 79 (1936).

107 Haley v. State, 332 U.S. 596, 604 (1948).

108 Braden, "A Search for Objectivity in Constitutional Law," 57 Yale L.J. 571, 591 (1948).

109 Id. at 593-594.

110 They include ". . . Cases . . . between Citizens of different States;—between Citizens of the same state claiming Lands, under Grants of different States . . ." according to U.S. Const. Art. III, § 2.

111 The basic case, followed for nearly a century, is Swift v. Tyson, 16 Pet. 1 (U.S 1842).

Tompkins[112] obliterated the creative role of the federal courts and transformed them into mere automatons that follow the pronouncements of state courts. So we may say that, since 1938 the significance of the Supreme Court as a factor in determining state law has been reduced almost to the vanishing point while its significance as an arbiter of federal questions has been correspondingly increased.

The jurisdiction of the Supreme Court based on the existence of a federal question includes cases involving the Constitution, federal laws and treaties. Cases concerning treaties are few. Those concerning the interpretation of federal laws and problems of federal procedure probably account for the bulk of the work of the Court. Yet there are still a large number of cases decided under and controlled by the Constitution. While these cases may entail the interpretation of any and every clause of that document, concentration is apt to occur on fundamental issues that still remain unsettled. It is not surprising therefore that due process is still a large part of the court's business.[113]

It would be a mistake to conclude from the assertion that the Supreme Court is engaging in legislation that it does so without restraint. It lacks the free hand of the ordinary legislative chamber. When the Court is bent on creating some new law it is hemmed in by a whole series of traditional obstacles. Tradition requires that the Court write an opinion. The task of expressing the collective opinion of the Court is assigned to one Justice, but in recent years there is a tendency of each of the others, even when in agreement, to write a concurring opinion to explain to the bar and to posterity his particular reasons for agreement. Frequently there are also dissenting opinions. Then the doctrine of stare decisis comes into play and this compels the Court either to follow precedent or frankly to overrule and give its reasons. In short the Court keenly feels the obligation to make out of its decisional law a consistent and logical whole. This impulsion of consistency and logic is accompanied by certain fears: the immediate fear of seeming ridiculous in the eyes of fellow judges or the bar, and the ultimate fear of seeming ridiculous in the eyes of history and posterity.

Within the framework of these traditional restraints the Supreme Court has become a symbol. It may be the American version of a throne. As such what has been its effect?

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112 304 U.S. 64 (1938). See Stimson, "Swift v. Tyson—What Remains?," 24 Cornell L.Q. 54 (1938) and Broh-Kahn, "Amendment by Decision—More on the Erie Case," 30 Ky. L.J. 3 (1941).

113 This is the conclusion stated in the Summary of the October 1952 Term in 73 Sup. Ct. 87, 112-114 (1953).

In some areas its effect has been to conserve, maintain the status quo and, in the minds of some, to retard progress. For instance the Congress in 1916 attempted indirectly to abolish child labor by a law prohibiting the transportation in interstate commerce of manufactured goods, the product of factories where children under fourteen years of age were employed. The Court held the law unconstitutional.[114] In 1919 the Congress again attempted a similar oblique control of child labor by imposing a 10 per cent excise tax on the entire net profits of persons knowingly employing children. The attempt met a similar fate.[115] Foiled in these two attempts the Congress proposed the Child Labor Amendment to the States in 1924. But its passage became unnecessary when *Hammer v. Dagenhart* was overruled and the Fair Labor Standards Act of 1938, prohibiting the shipment in interstate commerce of goods produced by child labor, was held constitutional.[116] Thus the early conservative position of the Court in 1918 was reversed by 1941.

The tendency to conserve existing patterns and hold fast to that which is may be illustrated by the recent *Steel Mills Seizure* case[117] in which the Court restrained the executive from seizing and operating steel mills in order to prevent a strike that threatened to stop the continuous flow of steel to the nation's defense plants. This decision on the limits of powers lodged respectively in the executive and the legislative departments of government represents a considered judgment that even a President may not go beyond what a majority of the Court considers his constitutional role. The decision stands as a limitation of executive power in favor of the legislative and may be thought of as a reaffirmation of Montesquieu to the effect that liberty is best preserved and arbitrary authority controlled by a strict separation of the powers of government.

On the other hand the Court, in recent years, has played an important role in curbing particular outbursts of barbaric brutality by state police and in regulating the use of coerced confessions in evidence.[118]

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114 Hammer v. Dagenhart, 247 U.S. 251 (1918).

115 Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

116 United States v. Darby, 312 U.S. 100 (1941).

117 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The decision has been noted in a great many law reviews. One of the best is Bischoff, "Constitutional Law and Civil Rights," 28 N.Y.U.L. Rev. 57 (1953).

118 The story is too long to attempt even a compressed survey here. The evolution may be traced from Brown v. Mississippi, 297 U.S. 278 (1936) to Irvine v. California, 347 U.S. 128 (1954). Hall, "Police and Law in a Democratic Society," 28 Ind. L. Rev. 133 at 154 (1953) says, "It is estimated there were three and one-half million illegal arrests in

The Court's influence is broader than the cases. It is true that, for direct legislation, it must await a case[119] but the effect of the case once decided permeates everywhere. If the court has invalidated state action, that state and all others have learned a lesson and they are not likely to try something which, being within the principle stated, will invite a like invalidity later. The court opinion thus overhangs and conditions the choice among alternative courses of action. This has long been true of the States and the Congress. It is now true of the Executive.[120]

The Court itself has become increasingly conscious of its own power to direct and guide the course of institutions and policies of American life. This appears when one unmasks some of the conventional disguises.

The Court has called attention to the "great gravity and delicacy" of its function in passing upon the validity of an act of Congress and, for all cases within its jurisdiction, has laid down rules of self limitation in an attempt to avoid passing on constitutional questions. Among these is the rule that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."[121] The Court has the habit of refusing to consider a point not presented in the inferior courts[122] and Rule 38 of the Revised Rules of the Supreme Court states: "Only the questions specifically brought forward by the petition for certiorari will be considered."[123] But when the Court feels that injustice has been done, it may take the bit in its teeth, overturn tradition and reverse a state decision on a point which it ferrets out on its own initiative. Its unsolicited opinion may thus stand as a monument to its watchdog function to control state procedure. This happened in *Terminiello v. Chicago*[124] where the Court seized upon a charge to the

United States in 1933. In 1948, 1949 and 1950 there were apparently even more. . . ." See also Allen, "Due Process and State Criminal Procedures: Another Look," 48 Northwestern L. Rev. 16 (1953) and Garfinkel, "The Fourteenth Amendment and State Criminal Proceedings—'Ordered Liberty' or 'Just Deserts'," 41 Calif. L. Rev. 672 (1953). Probably in this field the Court is entering on a period when it will systematize and rationalize its past pronouncements rather than break new ground. This conclusion of Allen, supra, is justified in the Irvine case.

119 See text supra at note 59.

120 See text supra at note 119.

121 Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 U.S. 288 at 346 (1936). See also Note "Avoidance of Constitutional Issues in Civil Rights Cases," 48 Col. L. Rev. 427 (1948).

122 Wilson v. Cook, 327 U.S. 474 (1946); Flournoy v. Wiener, 321 U.S. 253 (1944); First National Bank v. Kentucky, 9 Wall. 353 (U.S. 1869); Otis v. Bacon, 7 Cranch 589 (U.S. 1813).

123 306 U.S. 717 (1938).

124 337 U.S. 1 (1949).

jury which it thought erroneous even though this "ground for reversal was explicitly disclaimed on behalf of Terminiello at the bar of the Court."[125] This action of the Court, however understandable and desirable stands as evidence of what is characteristically the exercise of the legislative function viz., the promulgation of rules to determine future action.[126]

To this extraordinary method by which the Court may influence and correct what it considers amiss in the lower courts must be added its ordinary function of choice among the petitions for certiorari. In 1952, out of 1025 such petitions only 113 (or just over 11 per cent) were granted.[127] Very frequently a petition is granted because of the existence of contrary decisions by the Courts of Appeal in the different circuits. But frequently the reason given is simply "the importance of the question." The Court in deciding which cases to accept and which to reject is consciously giving direction and guidance to the evolution of American law.

In recent years the Court has had before it many cases in which it might have determined that race segregation as practiced in educational institutions, railroads and buses and other public facilities amounted *per se* to a violation of the due process clauses.[128] In one way or another it has succeeded in avoiding the issue. But today it has consolidated for argument and decision five cases where it is probable the issue will be squarely met.[129] It is, of course, impossible to foretell what the de-

[125] Justice Frankfurter, 337 U.S. 1 at 12 (1949). Chief Justice Vinson said:

> The offending sentence [in the charge to the jury] had heretofore gone completely undetected. It apparently was not even noticed, much less excepted to, by the petitioner's counsel at the trial. No objection was made to it in the two Illinois appellate tribunals which reviewed the case. Nor was it mentioned in the petition for certiorari or the briefs in this court.

337 U.S. 1 at 10. See also, "Scope of Supreme Court Review: The Terminiello Case in Focus," 59 Yale L.J. 971 (1950) and "Jurisdiction of the United States Supreme Court to Consider Errors not Raised in State Court," 21 Miss. L.J. 278 (1950).

[126] This is precisely what the French courts are forbidden to do by Article 5 of the Napoleonic Code.

[127] Annual Report of the Director of the Administrative Office of the United States Courts 67-68 (1952).

[128] The cases are conveniently annotated in 94 L.Ed. 1121 (1950). The leading cases on educational institutions are: McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Gaines v. Canada, 305 U.S. 337 (1938). See also, "Grade School Segregation: The Latest Attack on Racial Discrimination," 61 Yale L.J. 730 (1952). The leading cases on railroad and buses are: Morgan v. Virginia, 328 U.S. 373 (1946); Plessy v. Ferguson, 163 U.S. 537 (1896). See also District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953).

[129] Brown v. Board of Education, 98 F. Supp. 797 (D. Kansas 1951), order of reargument, Brown v. Board of Education, 344 U.S. 1 (1952).

cision will be. The case has been argued twice and both bar and press are eagerly awaiting the outcome. Already the Court has given portent, if not of what it will decide, at least of what it wants to consider. After the first argument the Court invited counsel, upon reargument, to discuss a list of issues which shows clearly that the Court is seriously considering the particular kind of decree it can make in order to bring about a gradual and thus more palatable cessation of segregation in this important matter where constitutional questions are inextricably interlaced with an emotionally and highly charged congerie of mores and customs of the people.[130] Doubtless the Court is to be congratulated in undertaking to consider this important question asked by thousands

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[130] The list of issues on which the Court requested discussion [345 U.S. 972 (1953)] is as follows:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?
2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment
   (a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or
   (b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?
3. On the assumption that the answers to questions 2 (a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?
4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment
   (a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or
   (b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?
5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),
   (a) should this Court formulate detailed decrees in these cases;
   (b) if so what specific issues should the decrees reach;
   (c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;
   (d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?

The Attorney General of the United States is invited to take part in the oral argument and to file an additional brief if he so desires.

Attorney General Brownell in a brief filed before the Court on November 27, 1953 stated that the Court had full authority and a duty to outlaw racial segregation in the nation's public schools, that an anti-segregation ruling would require the revision of school laws in at least 17 states and he suggested a one-year transition period with allowance for a further reasonable extension. Associated Press Release, November 28, 1953.

of people, but the answer bids fair to be a determination of broad policy that has all the characteristics of a legislative and few of the characteristics of a judicial decision.[131]

If we admit that the Court is engaging in direct and immediate legislation what may be said for or against it. If the Court is a third house, black robed and *pro haec vice* mistakenly called Justices, we must ask, is its work effective and praiseworthy? It is, after all, of minor importance that the nine men carry a deceptive label. None of the law men is deceived by it and only the naive and uninitiated will object.

Against the exercise of this power one may contend that (a) it is unconstitutional; (b) it is not forthright, it is an upper house masquerading as a court; (c) it is not orderly, it operates by fits and starts depending on the arrival of a case before the court.

To each of these objections it may be answered:

(a) It is as constitutional as the historic and settled doctrine of judicial review itself. This doctrine was settled 150 years ago in *Marbury v. Madison* and, without a constitutional amendment its denial today would be unthinkable. That being so, the right of the Supreme Court to interpret the due process clauses is unquestionably constitutional, and if the judges are to interpret at all they must be free to interpret, each according to his sincere conviction. Thus the series of cases writing Adam Smith economics into the Constitution is as constitutional as the later series holding in effect that the Court will not invalidate, as unconstitutional, statutes regulating the conduct of business. The earlier series flowed from a sincere conviction that due process referred to natural law and that natural law was equivalent to the system of economics then considered normal by a majority of the Court. Now that natural law and Adam Smith economics have less general acceptance and are not convincing to a majority of the Court, it is to be expected that the Court will allow greater legislative control of business. The above observation specifies only one argument that has been effective. Undoubtedly there are a dozen others but whatever the argument, if the majority of the Court is convinced by it, a decision

131 Since the text here was completed the Supreme Court has rendered a decision in this case. According to an Associated Press dispatch of May 17, 1954, the Court said: "Therefore, we hold that the plaintiffs [negro parents] and others similarly situated for whom the action has been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." This disposition makes unnecessary any discussion whether such segregation also violates the due process clause of the Fourteenth Amendment.

in accordance therewith is constitutional and should occasion no surprise.

(b) The objection that this method is not forthright legislating is more serious. The contention is that if we are to have a second upper house with power to veto legislation upon the arrival of a case before the court, such a revolutionary doctrine should come in through the front door of constitutional amendment and not through the back door which, in this instance, is improperly called judicial interpretation. This argument seems theoretically unassailable. Practically there are objections to it. For over a century the American people have been fervently engaged in the worship of the Constitution that in many quarters surpasses, in intensity, the worship of a king. They have amended their constitution 22 times but the Eighteenth Amendment of 1919 (imposing prohibition of intoxicating liquors) had to be repealed in 1933 by the Twenty-first. Since then, Congress is a bit gun shy of amendments, and it mistrusts its own judgment. To suggest that a constitutional amendment providing that the Supreme Court should act as a third legislative chamber to veto legislation whenever a case is properly brought before it would disturb the opinions of so many that it would have no chance of passage. It would, in fact, require a complete overhauling of our scheme of the separation of powers. It matters not that the opinions of the many are erroneously held. It is certain that they are held by persons sufficiently numerous to defeat any amendment proposed. We see then this situation: A great nation whose citizens once discussed, proposed and passed a great Constitution has somehow lost, in the blindness of its worship of that Constitution, confidence in its own ability to discuss, propose and pass an amendment. The people prefer instead to tolerate constitution making that arrives bit by bit under the cloak of judicial interpretation.

(c) The objection that the exercise of the power is not orderly but depends on the arrival of a case is serious enough but not as serious as it sounds. Cases arrive before the Supreme Court not blindly or automatically, but are brought by lawyers who, for the most part, are perfectly aware of the process outlined in this paper. The wise lawyer knows that his chances under the due process clauses depends, not on any intrinsic meaning of those clauses, but precisely upon his ability to persuade a majority of the Supreme Court of the wisdom and reasonableness of his contention. If this in turn depends on the background, the education and the prejudices of the nine justices of the Court, he knows too, that all of these are influenced by the state of opinion among

the American people. And it is this last, in turn, which would determine directly the existence and content of a constitutional amendment. It is probably true that the average American has as much confidence in the wisdom of constitutional amendments which come strained through the three fold process of the decision of the lawyer to bring the case, the careful argument of the case on both sides and the critical appraisal of those arguments by the Supreme Court, as he has in the wisdom of constitutional amendments (one of which, the Eighteenth, went sour on him) which come through the conventional amending process. In any case, before he decides to abandon the one and insist on the other, he must be fully aware of the problem and after debate and full consideration decide what he wants. But today there is no widespread discussion of this problem. Indeed it exists only for the specialist. The people will probably continue to worship the Constitution and fail to grasp or understand this more subtle process of legislating and constitution making.