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Article 1

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Except By Due Process of Law (1)

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By Cap. 44 of the Statutes of Canada, 1960, a Canadian Bill of Rights was enacted by Parliament which in section 1 "recognizes and declares" to "have existed" and to exist certain enumerated "fundamental rights and human freedoms" consisting of the following: (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; (b) the right of the individual to equality before the law and the protection of the law; (c) freedom of religion; (d) freedom of speech; (e) freedom of assembly and association; and (f) freedom of the press. Section 2(1) provides that:

> "Every law of Canada shall, unless it is expressly declared by an act of the Parliament of Canada that it shall operate notwithstanding the 'Canadian Bill of Rights', be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared".

Particular rights and protections in procedure follow this general provision, against "arbitrary detention, imprisonment or exile of any person"; against "cruel and unusual treatment and punishment"; against deprivation of a person arrested of the right "to be informed

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1 For an appreciation of Due Process, I have had the great benefit of writings dealing with the development of that phrase in the United States both before and after the Civil War, by Professor Edward S. Corwin, whose mastery of the subject is indicated by articles in (1908-09), 7 Mich. Law Review 643, and (1910-11), 24 Harv. Law Review 366. For the introduction to many authorities, Professor Walter F. Dodd's *Cases on Constitutional Law*, 5th ed. (1954), has been of the utmost value.

promptly of the reason" for the arrest; of the right to have counsel; of the remedy by way of *habeas corpus;* of the denial of a court or other authority to compel evidence by a person who is "denied counsel, protection against self-crimination or other constitutional safeguards"; of the right to a fair hearing, to the presumption of innocence, to reasonable bail, and to the assistance of an interpreter where a party or witness does not understand or speak the language of the proceedings. These are safeguards recognized and observed presently in the administration of our laws; and the enumeration serves to illustrate the general introductory provision of the section. "Law of Canada" is by section 5(2) declared to include every statute of Parliament enacted as well before as after the coming into force of the Bill of Rights, and every order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of coming into force of the Bill of Rights that is subject to be repealed, abolished or altered by the Parliament of Canada. By section 5(3) the provisions of Part I which declare the freedoms and furnish their protection, shall be construed to extend only to matters coming within the legislative authority of Parliament.

Section 1 exhausts its force in the declaration which it makes; its terms are intended to define the recognized freedoms, not to furnish the means of enforcing them. In isolation the declaration would avail nothing against new legislation; as subsequent in time, conflicting provisions would in fact be in amendment or abrogation of it. Here we meet the difference between a written constitution as a political and legislative foundation agreed upon by the people of a state, and an enactment by the representative legislature of that people; the former is recognized as of a character of enactment capable of imposing restraints on statutory legislation and free from being affected by it. In the case before us, the Bill of Rights is enacted only as a statute and as no parliament can bind its own future legislative action, a declaration of rights with nothing more would be at the mercy of subsequent action by the same legislature.

This difficulty is met by the provision of section 2. There could be no question of ultra vires of parliamentary action in any former or subsequent legislation; the jurisdictional power enacting the Bill of Rights is precisely the same as that of any following enactment; the power is one and entire and its subsequent exercise effecting abrogation or abridgment of freedoms would be unchallengeable. To prevent this, the device provided by section 2 is that of an interpretative direction: all law of Canada is now placed under a condition that it is not to be deemed to violate the freedoms conferred; the condition is in the form of an obligation placed on courts to be observed in their interpretation of the law against the background of the Bill of Rights. They are to construe all such law as not infringing the rights; if the interpretation finds by the language used an infringement in fact then to the extent of that infringement the language or fact of the law must be disregarded as if the offending provision were omitted in the enactment of the law.

If the language of the rule or principle or statment of law is ambiguous, or otherwise capable of it, obviously a non-infringing interpretation will be given; but if the language cannot fairly be so construed, it must, in effect, be treated as meaningless and as if struck out of the law. It might be that the entirety remaining would lead to results not within the contemplation of the statute and in such a case there might be a complete failure of effect. The courts cannot create new provisions which the statement of law is unable to support. But however this may be, the significant circumstance is the adoption of such means of giving force to the liberties proclaimed.

On the freedoms themselves, some observation is called for. The general expression "life, liberty, security of the person and enjoyment of property" is not to be limited to freedoms other than those enumerated in section 1 as paras. (c) to (f); if "liberty", restrained within the limits of due process, is not to be taken to include free speech, religion and assembly, or if due process is not to be extended to qualify them, those specific freedoms stand unconditioned and absolute. Either of these alternatives must then be imposed on the section and the specific freedoms brought within the general restriction. In such an enactment with the expressed purpose in its preamble of "enshrining these principles and the human rights and fundamental freedoms derived from them in a Bill of Rights . . . which shall ensure the protection of these rights and freedoms in Canada", there is every reason that such a construction be given. Obviously the intention is not to set up these freedoms as absolutes even in form; and for passing upon abridgment or infringement, a court should be given the guidance of a standard or rule by which encroachment could be permitted to accommodate necessary social regulation. The inherent assumptions both of the freedoms themselves and of the society in which they are recognized contradict such a character in them. But at what point between the limits of the absolute and the negation is the line of infringing encroachment to be found, the line which marks the practical adjustment between individual claims and community interests? That point is best ascertained by the light of a rational standard.

Considering the complementary functions of sections 1 and 2, they must, in more than the usual sense, be read together. Even in several of the illustrations given in section 2 a standard is called for; what is "arbitrary detention or exile"? What is the essence of arbitrary action? How is a court to decide whether there is a sufficient rational basis for the converse of arbitrariness—reasonableness? What is "protection against self-crimination"? Would a court be bound to say that mere exclusion of testimony from subsequent use against the person compelled to give it regardless of the disclosure of facts thereafter readily discoverable and fatal to the witness was "protection" against self-crimination? A "fair hearing" for the determination of rights and obligations, not limited to criminal proceedings, according to "principles of fundamental justice" is declared; by means of what rule or standard would the "fairness" or injustice

be ascertained? These questions arising in adjudication and affecting the means of enforcing the freedoms, in the presence of such fundamental issues, imply, in both sections, the limitations of due process, annexed generally to "liberty", as the determinant in all cases of the scope of permissible infringement.

This conclusion reached, the particular feature to be examined here, then, is the scope and meaning of and the component considerations bound up in the expression "except by due process of law". Appearing for the first time, certainly in relation to liberties and freedoms of individuals in enactments of the Canadian Parliament, it presents a problem of interpretation the difficulty of which will become more apparent as the endeavour to give it meaning and content is pursued. There is no modern legislation in Great Britain or Canada which affords assistance; but it is a phrase which during the past 60 or 70 years has engaged, more than any other, the attention and application of the Supreme Court of the United States as well as many state courts. If from British and Canadian materials specific scope of the expression could be deduced, reference to its treatment in the United States would obviously be extremely limited in pertinency; but the actual circumstances are quite different.

Not in the history of either Great Britain or Canada has there been such a formal and specific recognition, declaration and qualification as appears in this enactment. The phrase is placed for interpretation against the background of specific liberties; the only analogy we have, and it is an exact one, is its appearance in the setting of American constitutionalism, both federal and state. The increasing acquaintance with United States' constitutional interpretation of Canadian lawyers and law schools has undoubtedly made us familiar with its language, if not with its elaboration. But in the total conditions of today in Canada, including that widespread familiarity coupled with what will appear, I think, to be the difficulty, apart from such assistance, of giving content to such unusal language, it is difficult to say that its use by Parliament has been quite unrelated to the prominent role it has played in the judicature of the United States; and although we are not from that fact in any sense to be led to accept the signification it has there acquired, it would be unwise, in the interpretation of the qualification of our own declared rights and freedoms, to ignore the process of reaching a sufficient degree of definiteness if not of precision for use as a standard through which it has passed in that country; and, unless it can be given another and satisfactory, including a more limited, meaning or one of different character, with whatever modification we see fit to make, the ajudicative *modus operandi* which has finally been attributed to it in the United States, is of immediate relevance to the task facing us. It is therefore appropriate to our examination of the legislation to introduce ourselves in some degree to the development of that interpretation, to clarify the factors of legal theory that have played a part in the process, to examine circumstances in which the refractory ques-

tion has been grappled with, and to ascertain the controlling considerations which have finally become operative in its application.

From 1777 to 1789 the thirteen states which had declared their independence were loosely held in a union called Confederation in which the political power conceded to the central government was of meager extent. Its inadequacies were early demonstrated in the confusion and frustration, chiefly in interstate and international matters, which the absence of effective power in the national government made inevitable. This recognization led to the calling of another general convention in Philadelphia, from whose deliberations there issued, in 1787, the constitution which, with amendments made in the intervening years added to it, forms the foundation of the federalism of the United States of this day.

The items of legislative distribution between the national and the state governments of that republic are of slight concern to the question now raised. What is of interest is the limitation of legislative powers in the form of overriding rights and fundamental liberties against legislative, executive and judicial action, subtractive limitations of power by which the individual for the first time in history is furnished a group of allodial freedoms on which, from the language in which they are phrased, not even the sovereignty of the nation or state may intrude.

The original terms of the constitution of 1787 contained a number of legislative restraints: limiting the suspension of *habeas corpus,* forbidding the enactment of any bill of attainder or *ex post facto* law, forbidding the impairment of the obligation of contracts. The constitution came into effect on March 4, 1789; in September of that year amendments were proposed, ten of which passed by the approval of three-quarters of the number of the then existing states. Of these amendments, the first secures the freedoms of religion, speech, press, peacable assembly and the petitioning of the government for redress of grievances. The 5th, perhaps more than any other familiar to Canadians, is in the following terms:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

These amendments up to and including the 8th were interpreted to apply only to the national government.

Following the Civil War further amendments were passed called for generally through the effects of the abolition of slavery and the resulting accession of new citizens for whom, among other objects, corresponding rights and liberties were sought to be secured against legislative action by the states. The provisions of interest here are

contained in the 14th amendment, finally ratified in 1868, the terms of section 1 of which are as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By section 5 of the amendment the Congress is invested with power to enforce, by appropriate legislation, the provisions, among others, of section 1.

It is at once seen that the subjects dealt with in the 1st, 5th and 14th amendments bear on topics which within the last 20 years have become matters of concern to Canada, culminating in the passage of the Bill of Rights. We are approaching the point of constitutional completion by acquiring power of amendment to the British North America Act. With that accomplished we shall be in fact an associate state within the Commonwealth bound to Great Britain by a several allegiance to a common sovereign. In that ultimate status we are probably bound sooner or later to face evolving demands for specific constitutional limitation on legislative action expressed in terms similar to those of the Bill of Rights and the United States constitution. In this we have the advantage of being able to view and benefit from the history of the travail through which the United States has passed in its struggle towards the reconciliation of such rights with local or national administration and regulation; and notwithstanding any tendency to be critical of some of the social manifestations which have accompanied that struggle to reach "a government of laws and not of men", to avail ourselves of whatever benefit that experience may be able to afford us. For the aim of the administration of government including justice in that land, made clearer by its powerful judicial organs, has been and is now nothing short of establishing throughout the entire body of law and executive action the requirement of a standard of reasonableness expressed as due process, the limit to which the free scope of action vital to the fullest realization of individual gifts, talents and genius will be abridged to accommodate social ends. This necessitates the use in regulation of appropriate, direct and effective means to desired and justifiable ends, the minimum encroachment on individual independence, and the sensitive balancing of the considerations supporting both interests. The ultimate determination of this balance and the reconciliation of those interests is the function primarily of the Supreme Court and the federal courts generally, instances of adjudication by which will evidence as unique and as complex a judicial accomplishment as the history of judicature can show.

In the examination of the clause against depriving any person of life, liberty or property "except by due process of law" the differences of existing constitutional form and provisions in the two countries must be kept in mind; and although the course before use in Canada

will undoubtedly lead ultimately to an expansion of the ideas and concepts in this field of adjudication, even only a problematical increasing resemblance to the mode of adjustment reached in the United States will justify a closer acquaintance with what has been achieved there.

The expression "due process of law" in English legislation appears first in 28 Ed. III Cap. 3 which declares that:

> "no man of whatever estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited nor put to death, without being brought in answer by due process of law".

The next occasion of historic use is that by Coke (2 Inst. 50) in his examination of No. 39 of the provisions of Magna Carta, *"Nisi per legem terrae,* but by the law of the land". He refers us "for the true sense and expression of these words" to 37 Ed. III Cap. 8, where the words "by the law of the land" are rendered "without due proces of law", "for there it is said, though it be contained in the great charter, that no man be taken, imprisoned or put out of his freehold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law". And referring also to 28 Ed. III Cap. 3 and 42 Ed. III Cap. 3, he adds "No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land" . . . "Wherein it is to be observed, that this chapter is but declaratory of the old law of England".

The phrase "by the law of the land" is itself indefinite when used in a modern context; even in the 14th century it does not seem to have meant law from time to time as it may be; it was the common law viewed as rooted in permanence. In 1215 there was no parliament to consent to and authorize legislation; and what was being extracted from King John by the barons was the surrender of arbitrary power and the submission to procedures then established for different classes of subjects enjoying, according to their status, courts with customary modes of determining controversies. It was against violation of the customary by the arbitrary that they rebelled. The 17th century gloss of "the law of the land", used in the charter, expressed as "due process of law", made to serve the purpose of a commanding legal figure, was conceived to inhere as reason in the human establishment of England, as fixed precepts and principles of law by which the Sovereign himself was bound; natural law written in the constitution of man as part of nature, and expressing itself in the unwritten law, which not even the statutes of parliament could abridge, abrogate or supersede without due process, statutes which the courts of common law could pronounce null and void: *Bonham's Case,* 8 Coke 114a, 118a. His pronouncement in that case not even his authority associated with Magna Carta could sustain; but it is an historic assertion that even in the 19th century exercised a remarkable influence in the exegesis of the United States constitution; "due process" as a symbol

assumed the form of a cloudy eminence bearing within itself vague intimations of ancient, inviolable and everlasting principles. With such indefiniteness it remained until given substance and significance by the courts of the United States commencing in the last decade of the 19th century.

Previously and throughout that century judicial interpretation in that country had fluctuated between exaggeration of rights, privileges, immunities and liberties of individuals on the one hand and social or state interests on the other. Reflected in this tortuous course was the basic conflict between the conception of a national dominance through the enforced provisions of the federal constitution and that of state primacy through the residual powers of sovereignty in local administration. In this welter the impact on the many forms of individual security led to a multiplicity of legal theories, the clash of which in judicial opinion revealed the dimensions of the task imposed upon the federal courts and the demands on judicial statesmanship which its accomplishment necessitated.

To most of the issues evoked it is impossible to give even a reference but the problems they presented can be indicated. The Congress is to make no law abridging the freedom of speech: what is the background of assumptions in relation to which that prohibition is prescribed? As early as 1798 drastic sedition laws were passed by Congress and during the past 20 years we have seen the enactment of laws for the protection of the public against speech aimed at bringing about a revolutionary change in the form of government. Free speech is seen not to be unlimited and its boundaries become the matter of judicial determination. What type of utterance is intended to be embraced within "free" speech? Can a distinction be made between expressions of opinion and those that may be called verbal acts? Is a false cry of "fire" in a theatre "speech" within the scope of the expression? Is such a cry the type of utterance present to the minds of those who provided or are concerned with the language? By recalling the arrogant restrictions and limitations in the legal and political history of England which had given rise to the hatred of shackling human speech or writing, the expression of an essential faculty of complete man, we may obtain a clearer notion of what was intended. That appears to have been the utterance of ideas, opinions and propositions on a universal field of speculation in all its aspects, the communication of those speculations to others as a natural and almost necessary propensity. Language as an immediate incitement to action may be denounced as a crime because of its relation to the act which follows upon it; is this such speech as is intended to be within the scope of the clause of freedom? When utterance as such is declared to be a crime, the determination must be made whether the freedom has been violated, but on what considerations? The word "liberty" likewise calls for definition. Mere locomotion or freedom from restraint is obviously too narrow; what is contemplated must be the widest range of action of otherwise unforbidden character. This distributes the field of economic as well as other human activity, and

its limits are the boundary of valid regulation. The injury by language of reputation, giving rise to civil rights in other individuals, marks likewise another boundary. In this we catch a glimpse of the working of a categorical imperative as a principle in the reconciliation of conflicting interests.

These boundaries are the line at which equilibrium of social and individual values is reached; neither to man as an individual nor to the community can be attributed absolute paramountcy; and the necessity of reconciliation is doubly justified by the fact that these constitutional prescriptions do not arise from assumptions postulating any such scope. The examples of that adjustment now to be mentioned cannot fail to enlarge and deepen appreciation of the basic and operative ideas reached to that degree to which in the United States it has been found judicially persuasive for the courts to go.

The word "due" in the phrase means appropriate or apt, and the word "process" has its almost evident application to procedure. Can we confine the language of the phrase to that restricted signification of existant law, that is, actual procedure as from time to time provided by law? The words import a limitation upon law encroaching upon the liberties named and made the subject of security, and the essence of this security would be defeated by confining their effect to actual procedural apparatus. That apparatus could not by the language used, be restricted to the procedure of a particular time, and much less to that from time to time by which the intended protection would disappear. Procedure, obviously, may be of high importance; the progress of centuries has to some degree crystallized essential features of modes of ascertaining issues or of the processes of adjudication; and complaints are not against those modes primarily but their abuse in administration. Obviously those vital interests in procedure, due process must be taken to protect. But to confine its application to them would be to reduce radically the scope envisaged by the language used. What the prohibition against abridgment of freedom of speech certainly appears to be directed against, preserving the most meticulous procedure, is substantive law encroaching upon it; otherwise substantive encroachment could destroy that liberty. To be given any effect whatever interpretation is essential even in procedure, to be worked out by means of principle or standard of balance or reconciliation. That this is so can be seen from the specific matters of section 2 which prescribe and limit procedure. In fact, withdrawing these matters from the general head of due process in section 1 leaves a minimal residue of procedure to which it could apply. That process stands as the limiting factor to social regulation; and the following selected cases from United States courts are illustrative of the development and transformation of its interpreted content.

One of the earliest was *Murray's Lessee et al v. Hoboken Land Company*.[2] The question was the validity of a distress warrant directed by an officer of the Treasury against a revenue collector based upon the balance shown in the public accounts to be owing the United States, a distress expressly authorized by statute. It was urged that the effect of the proceeding was to deprive the defendant of his liberty and property without due process. In the course of the judgment the following language was used:

> "The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. 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 two-fold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and the statute law of England before the immigration of our ancestors and which are shown not to have been unsuited to their civil and political condition of having been acted on by them after the settlement of the country".

In the following year, *Wynehamer v. the People*[3] questioned the validity of a statute which, upon coming into force, prohibited all sale of and other dealings with intoxicating liquor and made its possession thereafter unlawful; affecting, thus, existing stocks. The Court of Appeals, New York, held this constituted a taking of property without due process, in violation of the 14th amendment, illustrating the individualistic trend then dominant in the jurisprudence of many of the states. In the course of the reasons of Comstock J. a quotation from the language of Chase J. in *Calder and Wife v. Bull*[4] carried the reasoning into the realm of natural law:

> "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be restrained by the constitution or fundamental law of the state. The nature and end of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor refrain from acts which the laws permit . . . A law that punishes a citizen for an innocent action, or in other words for an act which when done was in violation of no existing law — a law which destroys or impairs the lawful private contracts of citizens — a law that makes a man a judge in his own case — a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers and therefore it cannot be presumed that they have done it".

Chief Justice Marshall in *Fletcher v. Peck*[5] was quoted to the following effect:

> "It may be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?"

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2 18 Howard 272 (1855).
3 13 N.Y. 378 (1856).
4 3 Dallas 386.
5 6 Cranch 135.

Munn v. Illinois[6] presented the issue of whether the state of Illinois could fix by law the maximum of charges for the bulk storage of grain in warehouses at places in the state having not less than 100,000 inhabitants, in which the grain of different owners was mixed together or stored so that no identity of lots could be preserved, an issue depending upon the same amendment. The legislation was upheld by the Supreme Court on the ground that the elevators were affected with a public interest in being devoted to a public use. Mr. Justice Field, dissenting, stressed the protection under due process against the deprivation of liberty and of property of a United States citizen. In the *Slaughter House* appeal[7] in which a statute of Louisiana had given an exclusive right for 25 years of maintaining places within certain parishes for slaughtering animals, Mr. Justice Field had rested his dissent on the provision of the 14th amendment securing against abridgment the "privileges and immunities" of such a citizen. The majority judgment held that those rights did not extend to what was claimed to be abridged by the state's action; that, subject to specific rights and immunities attached by the federal constitution to United States citizenship, the privileges and immunities attaching to state citizenship lay exclusively within state power. That constitution secures to the citizens of each state all the privileges and immunities of citizens of the several states, which means that a citizen of state A when in state B is entitled to all such rights of the citizens of state B; but that produces no effect between a state and its own citizens. In *Munn,* Mr. Justice Field switched his emphasis from the immunities and privileges to the due process clause.

In *Davidson v. New Orleans,*[8] Miller J. speaking for the court observed:

> "It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law', remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several states and of the United States . . .
>
> It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in the minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law', can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation . . . . It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been

[6] 94 U.S. 113 (1877).
[7] 16 Wall. 36 (1873).
[8] 96 U.S. 97 (1878).

> watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law . . . . If, therefore, it were possible to define what it is for a state to deprive a person of life, liberty, or property without due process of law, in terms which could cover every exercise of power thus forbidden to the state, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law".

In *Powell v. Penn*,[9] Mr. Justice Harlan, giving the court's opinion said:

> "The main proposition advanced by the defendant is that his enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the 14th amendment. The court assents to this general proposition as embodying a sound principle of constitutional law".

In *Chicago, M. & St. P. Railway v. Minnesota*,[10] the Supreme Court referred to the judgment below as follows:

> "It is held that as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges, final and conclusive. . . . In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission if it chooses to establish rates that are unequal and unreasonable.
>
> This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its rights to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages. By the investigation judicially of the truth of a matter in controversy and substance therefore, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the said court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice".

Here we have probably the first clear extension of due process to a matter of substantive law as a limitation.

In *Allgeyer v. Louisiana*[11] again the validity was called in question of a state statute imposing a penalty on any person doing any act in the state to effect for himself or for another, insurance on property in the state in any Marine Insurance Company which had not complied with the laws of the state. Mr. Justice Peckham's statement sums up the issue:

> "The Supreme Court of Louisiana says that the act of writing within that state the letter of notification was an act therein done to effect an

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[9] 127 U.S. 678 (1888).
[10] 134 U.S. 418 (1890).
[11] 165 U.S. 578 (1897).

> insurance on property then in the state, in a marine insurance company which had not complied with its laws, and such act was therefore prohibited by the statute. As so construed, we think the statute is a violation of the fourteenth amendment of the federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out of a successful conclusion the purposes above mentioned".

Story expresses a similar view:

> "The terms 'life', 'liberty', and 'property', are representative terms, and intended to cover every right, to which a member of the body politic is entitled under the law. These terms include the right of self-defence, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right freely to buy and sell as others may. Indeed, they may embrace all our liberties, personal, civil, and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. None of these liberties and rights can be taken away, except by due process of law".

One of the striking modern decisions of the Supreme Court, rendered in 1905, was *Lochner v. New York*.[12] The New York statute forbade any employee in a bakery or confectionery establishment to be permitted to work over 60 hours in any one week, or an average of over 10 hours a day for the number of days they should work. The Act was challenged as an infringement of the amendment.

Delivering the opinion of the court, Mr. Justice Peckham expressed the conclusion reached in these words:

> "We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual sui juris, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the federal Constitution, there would seem to be no length to which legislation of this nature might not go".

Mr. Justice Holmes dissented and in the course of his opinion used well-known language:

> "The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics . . . . But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States".

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[12] 198 U.S. 45.

The majority view taken in this case and in *Allgeyer (supra)* has been rejected in subsequent cases, e.g., *Nebbia, West Coast Hotel, Olsen* and *Phelps Dodge Corporation.*

The reference in the case to "police power" indicates simply that exercise of legislative sovereignty which, primarily, in regulation, affects individual liberties and property.[13] It may possibly in some situations reach regulation beyond those subjects but they constitute the great bulk of its subject matter. We have in the case a clear application of the due process restriction to substantive legislation; it constitutes a degree of censorship in the court on the reasonableness, in total circumstances, of local enactment and an indication of the type of considerations determinative of that standard.

In *Whitney v. California,*[14] Mr. Justice Brandeis remarked:

> "Despite arguments to the contrary, which had seemed to me persuasive, it is settled that the due process clause of the 14th amendment applies to matters of substantive law as well as to matters of procedure".

On the other hand, in *Nebbia v. New York*[15] an order of a Milk Control Board fixing the selling price of milk was upheld. *West Coast Hotel Company v. Parrish*[16] pronounced valid a minimum wage law of the state of Washington; in the language of Chief Justice Hughes,

> "It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process".

In *Olsen v. State of Nebraska,*[17] the court reversed a judgment of the Supreme Court of Nebraska that a statute fixing the maximum compensation which a private employment agency might collect from an applicant for employment, was unconstitutional under the due process clause. In the course of his reasons Mr. Justice Douglas reviewed the general question of price fixing legislation as related to emergency or business alleged to be affected with public interest. In the latter case it was "said to be so affected if it had been 'devoted to the public use' and if 'an interest in effect' had been granted 'to the public in that use' ". He proceeds:

> "that test, labelled by Mr. Justice Holmes in his dissent in the *Tyson case,*[18] as 'little more than a fiction', was discarded in *Nebbia.* It was there stated that such criteria are not susceptible of definition and

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[13] Professor Paul E. Freund, one of the leading commentators on the United States constitution, has defined Police Power as "the power of promoting the public welfare by restraining and regulating the use of liberty and property", cited in Professor Dodd's Casebook (*supra,* footnote 1), page 969.

[14] 274 U.S. 357 (1927).

[15] 291 U.S. 502 (1934).

[16] 300 U.S. 379 (1937).

[17] 313 U.S. 236 (1941).

[18] 273 U.S. 446.

> form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices and that the phrase 'affected with a public interest' can mean 'no more than that an industry, for adequate reason, is subject to control for the public good' ".

Phelps Dodge Corporation v. National Labour Relations Board,[19] raised the issue of whether an employer subject to the National Labour Relations Act might refuse to hire persons solely because of their affiliations with a labour union. The court, through Mr. Justice Frankfurter, reversing the Circuit Court of Appeals, held that such a refusal, within the meaning of the statute, constituted an unfair labor practice for which the company was liable in damages to the extent of the wages lost to the proposed employees from the time of that refusal, subject to a deduction of any earnings made by them and losses wilfully incurred.

In a decision in 1935, *Louisville, Joint Land Bank v. Radford,*[20] a statute of Congress enabling a mortgagor to repurchase land mortgaged at an appraised value thereby depriving the mortgagee of the security of the land, was found invalid as a deprivation of property without due process.

The exercise of the power of eminent domain raises the relation of due process to adequate compensation. The court in *Chicago, B. & O. R. Co. v. Chicago,*[21] where the action taken was the opening of a street over a railway right-of-way, holding the due process clause to apply, was unable to pronounce the verdict of $1.00 as unreasonably low.

It may here be remarked to be somewhat significant that in the *Expropriation Act* (Dominion) there is no express declaration of a right to compensation for land taken. The word compensation appears but the right to it is assumed or implied. Is compensation then for compulsory taking one of those fundamental ideas which we treat as underlying legislation affecting individual rights? Its inclusion within due process is enlightening of the ideas bound up within that phrase. It may be recalled that in *Montreal Railway v. Harbour Commissioners of Montreal,*[22] the question of taking provincial government property for dominion purposes was in issue. Viscount Haldane at page 312 said:

> "The dominion statute of 1873, while it was effective to extend the harbour as a harbour and to invest in the Dominion Parliament and in the Harbour Commissioners the right to make due provision for the control of shipping in the harbour as extended, did not enlarge the property rights of the Dominion or enable the Dominion Parliament to take land for harbour purposes without compensation".

In *Nashville C. & St. L. Railway v. Walters,*[23] the Supreme Court held that due process forbade the imposition upon a railroad of one-half the cost of grade separation where the railroad received no bene-

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[19] 313 U.S. 177 (1941).
[20] 295 U.S. 555.
[21] 166 U.S. 226 (1897).
[22] [1926] A.C. 299.
[23] 294 U.S. 405 (1935).

fit therefrom; and a similar holding was made in respect of the imposition upon a pipe line company of the cost of changes in the location of the pipe line upon its right-of-way involved in the re-location of highways: *Panhandle Eastern Pipe Line Company v. State Highway Commission.*[24] In the states of Kansas, New Hampshire and North Carolina, the constitutions of which do not expressly call for compensation for the taking of private property for public purposes, the courts have reached the same result by holding compensation in such cases to be required by due process. These particular issues are of direct relevance to the powers of Parliament in relation to interprovincial and other dominion works, and in particular to the provisions of the *Railway Act.*

In *Truax v. Raich,*[25] the Supreme Court held against a state's attempt to forbid the employment of aliens resident within the state. The express statutory requirement was that not less than 80 per cent of employees engaged by any employer of more than 5 workers at any one time should be qualified electors or native born citizens of the United States. Its express purpose was "to protect the citizens of the United States in their employment against non-citizens of the United States in Arizona". The invalidity of the Act was founded upon the 14th Amendment which in the due process clause applies to "any person".

In *Chas. Wolff Packing Co. v. Industrial Court,*[26] the court held that a state could not provide for compulsory arbitration of labour disputes in businesses affected with a public interest; and in *Pierce v. Society of Sisters,*[27] the closing of all private schools was held likewise to be a violation of the clause. *Gitlow v. State of New York,*[28] raised the issue whether the state of New York could create the crime of Criminal Anarchy, defined as "the doctrine that organized government should be overthrown by force or violence or by the assassination of the executive head or of any of the executive officers of government, or by any unlawful means . . . ."; the statute provided that any person who "by word of mouth or writing advocates, advises or teaches the duty, necessity, or propriety of criminal anarchy or who prints, publishes, edits, issues or circulates any written or printed matter in any form, containing or advocating, advising or teaching the doctrine shall be guilty of a felony". The court upheld the conviction but the interest in the case lies in the dissents of Mr. Justice Holmes and Mr. Justice Brandeis. In the course of his reasons the former used the following language:

> "Mr. Justice Brandeis and I are of opinion that this judgment should be reversed. The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpreta-

[24] 294 U.S. 613 (1935).
[25] 239 U.S. 33 (1915).
[26] 262 U.S. 522 (1923).
[27] 268 U.S. 510 (1925).
[28] 268 U.S. 652 (1925).

> tion than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States. If I am right then I think that the criterion sanctioned by the full court in *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 249 (63 L. Ed. 470), applies: 'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent'.
>
> If what I think the correct test is applied it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way. If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more".

"Due process" is thus seen to be interpreted as a limitation on law which to a degree of unreasonableness affects personal liberties or property. Confining that limitation to the broadest sense of procedure is incompatible with the provisions of the Bill of Rights. Section 2 deals with specific matters of that nature in such detail as virtually to exhaust the items of importance. If the inclusion were intended to imply that Parliament can, without repudiating the declarations of section 1, make any utterance a crime, that substantive law is not within the scope of due process, that the latter is restricted to whatever adjectival rules or jural constructs may lie beyond the enumeration of section 2 which, to adapt the language of Macbeth would "keep the word of promise to the eyes and break it to the mind", then it could only be said that the declarations are of no significant value, wordy symbols signifying little.

What, on its face, is indicated by the Act is the setting up for all law infringing rights, privileges and liberties, a standard of rational acceptability in the regulation of human conduct and relations. Pertinent to that would be these considerations: the existence of an evil to be curbed or a benefit to be provided, in the public interest; the appropriateness of what is proposed as regulation to the end sought; the extent to which individual privileges and liberties are encroached upon; and the relation between the degree of imposition and the good achieved. That seems to be the natural view of what such law should be generally and it supports the inclination to hold that the theory of the social contract necessarily places limits to the exercise of power entrusted to government. The compact can be viewed as a complete

surrender of human liberties to a supreme power, receiving in exchange rights and immunities; but that conception of absolutism is in conflict with the basic assumptions of democratic, politically-minded men. Without difficulty they can accept a theory of surrender to government; but the withholding of power to enact measures that shock deep instincts can in theory be as appropriately assumed as that the generality of regulation can be conferred.

The contrast to the reasonable emerges in the arbitrary, the judgment of the unenlightened or the tyrannists. What character of law is envisaged by section 2 when it provides for legislation preceded by a declaration that it shall operate in effect to violate the prohibitions previously declared? It would obviously be extreme and extraordinary; the significance is that it is contemplated. Contemplated also is the period of normal workings in which not parliament but the courts will judge of the excesses of legislation. With the evident difficulties of application of the standard, it may be asked whether we are prepared to venture upon the task of establishing under judicial censorship, a body of law in which the individual has preserved to him against government, the widest practicable measure of free activity, and the community, that regulation which, through advancing intelligence, enables its life to deepen and expand in reasonable security, health, strength and the enjoyment of civilization's values? For the realization of these ends should we remain dependent on the temper and judgment of parliament or accept the arbitrament of the courts? Through the vast increase of administrative regulations, the extension of which is inevitable, dangers multiply of abuse through the effect on men discharging such functions of exposure to the clamour of many interests and influences; even in England such dangers have been shown to be real and grave. On the highest level decisions have been made which have shocked Parliament, to say nothing of the public. Power of that sort grows by what it feeds on and arrogance tends to become its accompaniment. A more remote, disinterested and disciplined judgment is likely to be able to see in broader perspective what closer relations to the rough and tumble does not. With the benefit derived from that objectivity, and as our constitutional position now stands, parliamentary action might profit from judicial review. Although popular representatives in their political education become realistic in certain aspects, it is a mistake to assume either that limited realism is always a sound basis for legislative action or that an imaginative sense of realities is denied those who sit in courts of justice.

The authorities cited sufficiently indicate for the purpose in hand the variations in theoretical conceptions embodied in or appropriate to the interpretation of due process and in the emphasis in application which have characterized the course of adjudication in the United States; they have sought to elaborate corollaries of the institutions which the provisions of the Constitution were designed to set up and secure. Those ideas grew out of the historical circumstances of the time: the arbitrary and arrogant subjection of colonial inter-

ests to those of a government in which there was no voice to represent them; the speculation on political theories of democratic society particularly in England and France, then rife; the emergence of assertions of individual immunities and liberties beyond the reaches of law; a spirit of aggressive independence growing out of the self-reliance generated in the isolation and conquest of a new world in which talents, energies and courage were challenged by a boundless endowment of natural wealth; all this accompanied by inevitable suspicion and distrust of government. That these conditions should lead to an exaggeration of private liberties and their domination in judicial administration is not surprising. While the vast, pristine resources remained open to exploitation the function of juristic reason remained largely that of justifying the dialectic of a detached logic developed for the protection of those liberties and the limitation of social regulation. There was conceived such a generalized self-regulating principle involved in the elaboration of those liberties as would bring about the nearest approach to utopia to which human beings might aspire. But like all exaggerations, this, in the course of time, began to exhibit inherent incompatibilities with social justice.

Left out of account was the evolving nature of social institutions and relations, nor was there sufficiently appreciated the degree to which man is the product of his society; that the rights and liberties demanded are to be exercised and enjoyed in that context: and to organic incorporation they must be reconciled. Within the past one hundred years western society has been in a state of unprecedented dynamic change, evolving innumerable new mechanisms of action which have revolutionized consequential conditions; the multiplication of forms of property; the institution of the corporation, with its limitless ramifications, creating a means for the concentration of economic power undreamt of by preceding ages; contemporary and parallel organizations of groups, economic, social, political, all similarly proliferating interests, influences, compulsions, and powers within the welter of which the isolated individual is tossed about like a cork on the ocean's breast. It is the function of redressing distortions produced by the operations of these forces and tendencies that is performed by due process. Supplementing them have come immeasurable control over the powers of nature, the preservation of human life and the menace of population, the limitations of habitable areas, the necessities of food production, and the ambivalence for good or evil of every new power brought within control. One needs only to contrast the present scene with that in the Western world of 1774 to place the more or less detached questions then dominant in their proper relation to the problems of today.

In such a view of things the changing trend in the treatment of constitutional guarantees in the United States shown during the past twenty years can be assessed as a truer and more penetrating perception of the totality of what was forged in 1787 than any consistent adherence to static ideas could possibly be. It recognizes the

flux of the human situation and gives organic viability to the great ideas there enshrined.

Though that course of adjudication has lessened the emphasis of the early stages in response to the new conditions, the essence of its purpose, adumbrated in 1890, has been the restraint of legislative processes only in that degree in which they are unnecessary and surplus for protection against imbalances so generated. What are to be struck down are the gross excrescences which are foreign to age-old traditions of the reasonable, measures which within a substantial span of time prove their acceptability.

Why not, then, leave the question of what is fair and acceptable to the determination of legislatures? Whatever the answer to this, the legislature, by its own declaration, has placed the duty on the courts which they must accept; and by doing so, it has recognized that on occasion legislation does not always restrain its action within the limits of due process. It has accepted the view that under the conditions in which laws are enacted in our parliamentary system there may be lapses from those appreciations of inarticulate interests with which the function of courts is specifically and uniquely charged; that a detached and objective examination in an atmosphere from which certainly a wider range of irrelevance is excluded than in a legislature will probably be able to pronounce a sounder judgment than that of public debate. Parliament in fact has expressed its opinion to that effect in conditioning legislation by due process; and it has presented to judicial tribunals for the first time an opportunity to elaborate a Canadian jurisprudence within the perspective of the national ethos of a modern western state.

Undoubtedly the expression is one of difficulty in precise definition; but it constitutes a standard and all standards assessing human conduct are imprecise in both conception and application: the "reasonable man" is the creation and instrument of the courts, a sufficiently difficult example. At certain dimensions we can without doubt pronounce legislation outside of the bounds of traditional process, as where the issue of river-pilot licenses is limited to persons of blood relation to presently licensed pilots[29]; or legislation that eliminates most women as barmaids[30]; or legislation that would take property for an exclusively private purpose, or for a public purpose without compensation. With such departures from the norm of living tradition we have no difficulty and they give a clue to the character of action which due process condemns. But similar distortions and their consequences more subtle are scarcely avoidable and it is in that general control, however they may arise and in whatever context, that due process finds its full function.

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[29] *Kotch v. Board of River Pilots*, 330 U.S. 522 (1947).
[30] *Goesart v. Cleary*, 335 U.S. 464 (1948).