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THE SUPREME COURT AND THE FOURTEENTH AMENDMENT*

IT was formerly the wont of legal writers to regard court decisions in much the same way as the mathematician regards the x of an algebraic equation: given the facts of the case and the existing law, the outcome was inevitable. This unhistorical standpoint has now been largely abandoned. Not only is it admitted that judges in finding the law act not as automata, as mere adding machines, but creatively, but also that the considerations which determine their decisions, far from resting exclusively upon a narrowly syllogistic basis, often repose very immediately upon concrete and vital notions of what is desirable and useful. "The very considerations," says HOLMES in his Common Law, "which judges most rarely mention and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less, traceable to views of public policy in the last analysis."

HOLMES has in mind of course the common law, but his argument is equally to the point in the study of our American constitutional law. A great and growing part of this law is, like the common law, judge made. It is true that constitutional limitations are generally referred to some clause or other of the written Constitution. But this after all is a circumstance of which too much may be made very easily. Given a sufficient hardihood of purpose at the rack of exegesis, and any document, no matter what its fortitude, will eventually give forth the meaning required of it. Nor does this necessarily mean that the law is a nose of wax, to be moulded according to the caprice of the hour. What it does mean is that the institutional character of the law rests, partly upon the conception of precedent as binding, but much more largely—and it may be added, much more securely—upon the fact that views of policy themselves tend to become institutional in social and political theories.

* This article is a summary of "Part III" of a volume which the writer has in preparation, to be entitled: *The Growth of Judicial Review*. Naturally the article has all the faults of a summary, and this is to be regretted particularly, since footnotes have had to be sacrificed to make way for the text. For this reason the writer has not the opportunity to justify at length certain statements which may seem to demand qualification.

The police power we may define for our purposes as that power of government under the control of which private rights fall. From the time of the decision in *Barron* v. *Baltimore,* (7 Pet. 243), in which the Supreme Court of the United States, after some vacillation, finally decided that the first eight amendments to the Constitution bind only the Federal Government, down to the adoption of the Fourteenth Amendment in 1867, it was generally admitted that this ample realm of governmental competence belonged to the States, limited only by Congressional regulation of interstate and foreign commerce, and by the necessity of not impairing the obligation of contracts. The Fourteenth Amendment however is directed explicitly to the States. "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." Such is the language of the first section of the Fourteenth Amendment. There can be no kind of doubt that its authors designed that, at the very least, it should make the first eight amendments binding upon the States as well as the Federal Government and that it should be susceptible of enforcement both by the Federal Courts and by Congress. But now to give such scope to the Fourteenth Amendment obviously meant to bid farewell to the old time federal balance which before the war had seemed the very essence of our constitutional system. It meant, in the language of contemporary protest "the institution of a solid sovereignty instead of a government of limited powers," "the transfer of municipal control of the State governments over their internal affairs into the hands of Congress," the subordination of the "State judiciaries to Federal supervision and control," the annihilation of the "independence and sovereignty of the State Courts in the administration of State laws"—in short, "a deep and revolutionary change in the organic law and genesis of the government." But as often happens, the large issue thus raised was obscured by numerous lesser ones. Popular attention was riveted upon the second, third and fourth sections of the Fourteenth Amendment, and thus what was potentially a revolution in our constitutional system was effected entirely incidentally.[1]

Nor did this vast change seem likely to remain long a mere possibility. The Fourteenth Amendment authorizes Congress to enforce its provisions by appropriate legislation. In pursuance of what it deemed to be the authority thus bestowed, Congress in May, 1870,

[1] See Flack: *Adoption of the Fourteenth Amendment,* Chs. II and III.

passed the so-called Enforcement Act, which enacted severe penalties not only against state officers and agents, but also against any *person* within the States who should under the color of any statute, ordinance, regulation, or custom deprive any other person of his civil rights and civil equality. This act was followed a year later by the Ku Klux Act which was of the same general purport but more stringent in its provisions and somewhat wider in its pretensions. Finally in 1875 Congress passed the Civil Rights Act which decreed the "equal enjoyment of the accommodations * * * of inns, public conveyances * * * theatres, and other places of public amusement * * * to citizens of every race and color regardless of any previous condition of servitude," and imposed penalties upon all persons violating these provisions. The theory of these enactments comprises three points: 1. that the rights to which citizens of the United States are entitled by the Fourteenth Amendment comprehend all the rights which the ordinary person enjoys in his community; 2nd, that a denial of the equal protection of the law may be effected as much by acts of omission on the part of a State and its functionaries as by acts of commission; and that therefore, 3rdly, the power of Congress to enforce the provisions of the Fourteenth Amendment extends not merely to remedial measures in rectification or disallowance of adverse State legislation, but also to affirmative legislation, designed to supply the inadequacies of State legislation and directly impinging upon private individuals as well as upon official representatives of the State. It is true that the intention of all this legislation was to secure an equality of black and white races before the law, but it was enacted under color of sanction by the first section of the Fourteenth Amendment, the provisions of which are not specifically limited to such an end. To allow Congress's competence in this one case was, therefore, it could be contended, to allow it in all and to allow it in all was to make actual the revolution which the Fourteenth Amendment had been held to menace.

So far so good, but at this point it became evident that one element of the situation had yet to be dealt with, viz: the power of the Supreme Court of the United States to pass upon the constitutionality of both State enactments and of Congressional enactments, and with the Supreme Court the Federal Theory was still dominant. In the following pages, therefore, I shall show how the Supreme Court, out of devotion to this theory, at first proceeded to eliminate the Fourteenth Amendment from the law of the land. This, however, will comprise but the preliminary part of my task. For the questions raised by the outcome of the war were presently in a manner

disposed of and a new set of problems—those namely arising from the growth of capital and the development of corporate industry,—confronted government and particularly the State legislatures, which are still—thanks to the Supreme Court itself—the repositories of the police power. These now began to exercise this power more aggressively than ever before, with the natural result of arousing that jealousy of governmental control in which our constitutional system was initially conceived and which had, years before the Fourteenth Amendment had been thought of, found enduring expression, not only in our political theory, but also to a great degree in the constitutional jurisprudence of the States themselves, in the days when constitutional limitations fell largely to the device and enforcement of the local judiciaries. To this viewpoint the Supreme Court of the United States was the spiritual heir. Dismissing, therefore, its earlier concern for the federal equilibrium, this tribunal began a reinterpretation of the Fourteenth Amendment in the light of the principles of Lockian individualism and of Spencerian *Laissez Faire,* which traverses the results it had previously reached at every point. To demonstrate this, then, is my task. In its discharge I shall naturally interest myself principally in those cases which have arisen under the Fourteenth Amendment in connection with State legislation affecting property and business.

Two decisions of the Supreme Court are of prime importance as illustrating the point of view from which the Fourteenth Amendment was first interpreted: the decision in the *Slaughter House Cases,* (16 Wall. 36) and the decision in *Munn* v. *Illinois* (94 U. S. 113). In the *Slaughter House Cases,* which were decided in 1873, the issue was the validity under the Fourteenth Amendment of defendant's charter, which, in the supposed interest of the public health, granted defendant a certain degree of control over its competitors in the business of slaughtering cattle, and certain exclusive and, so it was alleged, monopolistic privileges. Complainants in error contended that inasmuch as they were engaged in a lawful pursuit, it was their privilege as citizens of the United States to continue in that pursuit unhampered by the legislation in question. The Court, however, considered the invitation to interfere equivalent to an invitation to set up a new and comprehensive system of national jurisdiction, within which should be brought the sum total of the rights of citizenship and of the powers of government to deal with those rights; and it declined to commit itself to so "revolutionary" a course. A straight line was drawn between citizenship of the United States and the citizenship of a State; and only the rights of

the former, relatively few in number and already secured by the Constitution against adverse State action, even before the adoption of the Fourteenth Amendment, were held to be beneath the protecting ægis of the Court. The opposing view, said Justice MILLER, speaking for the Court, "would constitute this Court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment." And the effect of doing this would be "to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character" and thus to change radically "the whole theory of the relations of the State and Federal Governments." "We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

But the argument was also offered that the legislation under review deprived complainants of their property "without due process of law" and that it denied them the "equal protection of the laws." Significantly enough, these arguments were not much pressed, although the Court thought it necessary to animadvert upon them briefly. The prohibition of a deprivation of property without due process of law, it said, "has been in the Constitution since the adoption of the Fifth Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the Constitutions of nearly all the States, as a restraint upon the power of the States * * * We are not without judicial interpretation therefore both State and National of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of Louisiana be held to be a deprivation of property within the meaning of that provision." The other objection he dismissed even more curtly: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class or on account of their race will ever be held to come within the purview of this provision."

The task of the Court in the *Slaughter House* decision was to draw the line between its own power under the Fourteenth Amendment and the police power of the States. Still more immediately was this its task in *Munn* v. *Illinois,* the most important of the

Granger cases, in which the validity of State enactments designed to establish a uniform rate for the transportation and warehousing of grain and other classified products was challenged on the ground again of their alleged conflict with the Fourteenth Amendment. The opponents of this legislation urged in *Munn* v. *Illinois*, that on two accounts it effected a "deprivation of property without due process of law:" first because it attempted to transfer to the public an interest in a private business, and secondly, because the owner of property is entitled to reasonable compensation for its use and "what is reasonable is a judicial and not a legislative question." The Court, speaking through Chief Justice WAITE, overruled both contentions. Business, it said, is subject to the police power, and a well recognized item of that power is the right to regulate the charges of businesses "affected with a public interest." It is true that the Court does not at first sight seem to accept the enactment under review as evidence conclusive of the public character of complainant's business, but appears to canvass the subject anew on its own initiative. The purport of this inquiry is, however, quite different from what it has often been entirely misconceived to be. A careful examination of the language of the Court will show that this inquiry is entered upon not with the design of insinuating that the Court might, if it chose, overrule the legislative determination as to the public character of a particular pursuit, but in order to ascertain whether the field which the legislature in this instance had assumed to occupy was one which a legislature might ever enter legitimately. There is, the Court finds, a category of businesses "affected with a public interest," and secondly, a line of precedents demonstrating the right of the legislature to regulate the charges of such businesses. "For us," it says, "the question is one of power, not of expediency. If *no* state of circumstances *could* exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. *But if it could, we must presume it did.* Of the propriety of legislative interference within the scope of legislative power the legislature is exclusive judge."

The allocation of the power in question to the police power made easy the answering of a second objection to the enactment under review, viz: that the question of what is a reasonable compensation for the use of property is a judicial and not a legislative one. Said the Court: "The practice has been otherwise. In countries where the Common Law prevails it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or perhaps more properly speak-

ing, to fix a maximum beyond which any charge made would be unreasonable * * * In fact, the Common Law rule which requires the charge to be reasonable is itself a regulation as to price. * * * But mere Common Law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the Common Law. That is only one of the forms of municipal law and is no more sacred than the other. Rights of property which have been created by the Common Law cannot be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will or even at the whim of the legislature, unless prevented by constitutional limitation. Indeed the great office of statutes is to remedy the defects in the Common Law as they are developed, and to adapt it to the changes of time and circumstances. * * * We know that this power (of rate regulation) may be abused, but this is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the Courts."

Both in the decision in *Munn* v. *Illinois* and in the *Slaughter House* decision the Supreme Court is dominated by the view that the States ought to be left to enjoy the same scope of police power which was theirs before the Civil War, unrestricted by the Fourteenth Amendment or the Federal Judiciary in the interpretation of that amendment, except in so far as they might attempt to discriminate against persons on account of race or previous condition of servitude. Let us summarize the leading principles stated in these decisions which plainly flow from this view: 1—The phrase "privileges and immunities of citizens of the United States" comes to signify those privileges and immunities which are secured to citizens of the United States by the United States Constitution independently of this phrase, which therefore becomes entirely gratuitous and unnecessary. 2—The phrase "equal protection of the laws" is construed to prohibit only legislation directed against racial classes: 3—The phrase "due process of law" is scarcely allowed any efficacy at all as a limitation upon legislative power, at the mercy of which the Common Law lies as completely as statute law. These principles receive moreover not merely reiteration but enlargement in adherent decisions, some of which, since we shall have occasion to refer to them later on, we may briefly mention at this point. In the *Bradwell* case (16 Wall. 130) the Court upheld the exclusion of women from practice of the law in the courts of Illinois. In the *Bartemeyer* case (18 Wall. 129) it was similarly held that the right to manufacture and sell intoxicants is not a privilege of United States citi-

zenship. In a number of cases it was held that the legislature cannot divest itself of its power of police, and that all rights, including those of contract, are subject to that power. (E.g. 101 U. S. 814 and 109 U. S. 527.) In *Barbier* v. *Connelly* (113 U. S. 27) the Court upheld a municipal ordinance regulating the hours of labor in a laundry, which, it was charged, was "class legislation." Said Justice FIELD, speaking for the Court,: "Special burdens are often necessary for general benefits;" nor do they "furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions, * * * and it would be a most extraordinary usurpation of the authority of a municipality if a federal tribunal should undertake to supervise such regulations." On the other hand, in *Yick Wo* v. *Hopkins* (118 U. S. 356) the Court reiterated its intention not to allow legislative discriminations on account of race. But the phrase "equal protection of the laws," which is construed in these cases, was apt to be invoked rather less often by those seeking the downfall of State legislation than the phrase "due process of law." Says Justice MILLER in *Davidson* v. *New Orleans* (96 U. S. 97): The phrase "due process of law" remains to this day "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." What is the result? Though as a restraint upon the States the phrase in question has been a part of the Constitution only a few years, yet "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 and property without due process of law." "There is here abundant evidence," he continues, "that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact it would seem * * * that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a State court of the justice of the decision against him and of the merits of the legislation on which such decisions may be founded." In this same case of *Davidson* v. *New Orleans* complainant was urging that in cases of eminent domain "due process of law" meant "just compensation." The Court, however, arguing strictly from the *usus loquendi* of the Fifth Amendment in which "just compensation" and "due process" appear as distinct phrases, overruled the contention. This was in 1877. Somewhat earlier than this in the *United States* v. *Cruik-*

shank (92 U. S. 542) the Court repelled the argument that the Fourteenth Amendment makes the first eight amendments binding upon the States, and somewhat later in *Hurtado* v. *California* (110 U. S. 516), upon the basis of Webster's definition of "due process of law" in his argument in the *Dartmouth College* case, showed itself indisposed to interfere with the right of a State to elaborate its own judicial processes. Rather broader was the issue raised in *Powell* v. *Pennsylvania* (127 U. S. 678), in which an anti-oleomargarine law was attacked upon the ground that it did not further the public health or public morals and was therefore not within the scope of the police power. The Court refused to make a hypothetical definition of the police power a judicially enforceable limitation upon that power. "Whether" said Justice HARLAN, "the manufacture of oleomargarine * * * involves such danger to the public health as to require * * * the entire suppression of business * * * are questions of fact and public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute or from any facts which the Court may take cognizance of that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering in questions of public policy merely and to sustain or frustrate the legislative will, embodied in statutes, as they happen to approve or disapprove their determination of such questions. The legislature of Pennsylvania, upon the fullest investigation, we must conclusively presume * * * has determined that the prohibition of the sale (of oleomargarine, etc.) * * * will promote the public health and prevent fraud in the sale of such articles."

Thus again and again is the point of view from which the Fourteenth Amendment was at first construed by the Supreme Court brought to light. But we have dwelt too long already upon this phase of the subject. Today, as we know, this point of view has been abandoned. What we have to do now, therefore, is to inquire how this change has come about. The truth is that the Court was committed by the traditions at its back even from the outset to a theory of the relation of government to private rights which was gradually discovered, with the developing self-assertion of State legislatures, to be utterly incompatible with the intention of leaving to those bodies the range of power that had been theirs before the Civil War. Is the legislature or is the United States Supreme Court the final guardian of individual rights?—This was, in all the cases

above reviewed, the ultimate question before the Court. In the decisions rendered in these cases the victory rested with the cause of legislative autocracy, but this victory was not uncontested and much less was it final. With each decision upholding the power of the legislature in the particular case at issue, there usually went forth one or more dissenting opinions, wherein was bespoken for a minority of the Court its allegiance to the idea of judicial supervision. How have these dissents become finally incorporated in the law of the land? This really is the question before us.

To Justice FIELD, vehement and dogmatic exegete, fell the task of developing primarily the canons of an individualistic interpretation of the Fourteenth Amendment. To Justice MILLER's identification, in his *Slaughter House* decision, of "the privileges and immunities of citizens of the United States" with the relatively few and meager rights that arise because of the existence of the United States as a government, FIELD responded by identifying the rights of citizens of the United States with "the natural rights of man." "The question presented," says he, "is * * * nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation." His own answer to this question is as follows: "That amendment was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator, which the law does not confer, but only recognizes." Unless the amendment referred "to the natural and inalienable rights which belong to all citizens," its inhibitions were needless. Though concurring in the *Bartemeyer* decision, Justice FIELD nevertheless found an opportunity to reiterate these views and to elaborate upon them. The Fourteenth Amendment was not, as the majority insisted in the *Slaughter House* case, primarily "intended to confer citizenship upon the negro race. It had a much broader purpose; it was intended to justify legislation, extending the protection of the national government over the common rights of all citizens of the United States. * * * It therefore recognized, if it did not create, a national citizenship and made all persons citizens * * * and declared that their privileges and immunities, which embraced the fundamental rights belonging to the citizens of all free governments, should not be abridged by any State." FIELD refused, however, to admit that this view took from the States their power of police; but it did take from them "the power to parcel out to favorite citizens the ordinary trades * * * of life. * * * It was supposed that there were no privileges or

immunities of citizens more sacred than those which are involved in the right to the pursuit of happiness which is usually classed with life and liberty; and that in the pursuit of happiness, since that amendment became part of the fundamental law, every one was free to follow any lawful employment without other restraints than such as equally affect all other persons."

The view embodied in this final sentence FIELD himself subsequently rejected in *Barbier* v. *Connelly,* in which he upheld the propriety of so-called class legislation. It will be interesting therefore to observe the Court at a still later period blinking the view set forth in this decision, which is precedent, in order to draw for support upon his dicta just quoted, which are not precedents. But this is a later story. Meantime we find FIELD renewing his protest in *Munn* v. *Illinois,* declaring that that decision left "all property and all business * * * at the mercy of the majority of the legislature." It will be remembered that the Court's chief task in *Munn* v. *Illinois* was to ascertain what constituted a deprivation of "life, liberty and property without due process of law." Naturally, therefore, it is to this task that FIELD also addresses himself in his dissenting opinion. Life, he contends, signifies not merely animal existence but "whatever God has given" for its growth and enjoyment; liberty means freedom of pursuit; property connotes the use and income of property as well as its title and possession. These terms, however, have no efficacy independently of the term "due process of law" and this term Justice FIELD defines only by implication. Thus he complains that the police power is too often spoken of as if it were an irresponsible element of government, whereas, he insists, it is limited to the prevention of injury and quotes the maxim of the Common Law; *Sic utere tuo ut alienum non laedas,* as its controlling principle. It assuredly does not comprise the right, he declares, to regulate compensation unless a business is affected with the public interest. But who is to decide these questions—the question of *when* an injury exists and the other question of *when* a business is affected with the public interest? Again Justice FIELD fails of explicitness, but the unavoidable inference from all that he says is that, while primarily these are questions of policy calling for legislative determination, yet ultimately they are questions to be determined by the Court, to whose determination that of the legislature must of course succumb in case of conflict.

Justice FIELD then is the pioneer and prophet of our modern constitutional law, but this is so not because his natural law creed was his own peculiar possession, but on the contrary because, though

none of them was so ready to proclaim the faith that was in him both in season and out, it was shared none the less by almost all of his associates on the Supreme Bench. Thus in the *Slaughter House* case Justice FIELD spoke not only for himself but also for at least two other associates, and in *Munn* v. *Illinois* for one other associate. Then, in the *Bartemeyer* case the tone of the decision itself which the Court was glad to make turn upon a technical point, was strongly indicative of the conflict going on in *gremio judicis* between the Court's sense of duty to private rights and the allegiance it had pledged to the menaced dignity of the States. But the most impressive example of the strength of theoretic individualism upon the Supreme Bench at this time is furnished by the decision in the *Loan Association* v. *Topeka* (20 Wall. 655), in which an all but unanimous Court, speaking moreover through the author of the *Slaughter House* decision, adopted the notion, that a tax must be for a public purpose, as a limitation upon the State's power of taxation. It is not the outcome of the Court's reasoning, however, to which I desire to call particular attention—for the principle above stated is simply one of several dubious restrictions upon legislative authority that the courts have from time to time created out of hand; it is the reasoning itself that is the important consideration. "It must be conceded," says Justice MILLER, "that there are * * * rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power is after all but a despotism. * * * The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. * * * There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights without which the social compact could not exist." From this view Justice CLIFFORD alone dissented, contending that, "except where the Constitution has imposed limits upon the legislative power the rule of law appears to be that the power of the legislature must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case;" and this "for the reason that the Courts are not the guardians of the rights of the people of the State save where those rights are secured by some constitutional provision which comes within judicial cognizance," otherwise the courts would become "sovereign over both the Constitution and the people and convert the government into a judicial

despotism." Despite the obvious weight of this protest it passed unheeded. The champions of the view that the social compact and natural rights imposed judicially ascertainable and enforceable limitations upon legislative power stood eight strong against Justice CLIFFORD's sole advocacy of legislative independence within the limits set by the written constitution.

But now it may well be asked, why did not the Court, since it was willing to do so at this time, enforce its views of natural rights in the other cases we have reviewed? Two duties, more or less in conflict, confronted the Court, it is true; but if it could be loyal to both, as it was apparently persuaded it could, on the one occasion, why not on the other occasions as well? The answer is to be sought in the question of jurisdiction as it was raised before the Court on these several occasions. The *Loan Association* case was one of those cases that fall within federal jurisdiction not because of the nature of the issue involved but because of the character of the parties to the suit: thus the Court's jurisdiction was unmistakable and could by no means be represented as an act of aggression against the prerogative of the State legislature. The Court accordingly felt perfectly free, as Justice MILLER afterwards explained in *Davidson* v. *New Orleans,* to enforce "general principles of constitutional law" in that case. Quite otherwise was it in the *Slaughter House* cases and the other kindred litigation. If the Court was to assume jurisdiction in those cases—and whether it should or not was the entire issue—it must do so under the Fourteenth Amendment, and under an interpretation of that amendment moreover which would, in Justice MILLER's language, not only constitute the federal judiciary "a perpetual censor upon all legislation of the States" but would also enable Congress "to degrade and fetter" the State governments in the exercise of "their most ordinary powers." It was not unnatural that the Court should be reluctant to take a step the consequences of which might turn out to be so revolutionary.

But again the question that we are discussing obtrudes itself upon our inquiring minds in a new form. We know that eventually the Court's reluctance was overcome: How was this brought about? Three circumstances may be adduced in partial satisfaction of this inquiry:

First. The first circumstance to which I allude is the pressure upon the Court of which Justice MILLER speaks in *Davidson* v. *New Orleans,* to adopt a definition of "due process of law" which would cancel the effect of the narrow construction given to the phrase "privileges and immunities of citizens of the United States."

This pressure was the more formidable in that, notwithstanding Justice MILLER's assertion in the *Slaughter House* decision, the definition that the attorneys were contending for was well warranted by certain results that had been arrived at by the State courts before the Civil War. It must moreover always be borne in mind that, as Judge BALDWIN puts it, it is counsel rather than judges that make the law, the latter interposing only to winnow counsel's results. The insistence of counsel upon a broad view of "due process of law" was bound eventually to bear fruit.

Second. In an earlier paragraph I referred to a series of congressional enactments between the years 1870 and 1875 by which the independence and indeed the continuance of the legislative authority of the States seemed seriously menaced. In 1883, however, the last of these enactments was erased from the statute book, by the concluding one (109 U. S. 3) of a line of decisions by which they were, one after the other, brought under the ban of unconstitutionality. In these decisions the Court held that the Fourteenth Amendment prohibited only discriminatory action on the part of the State itself or its functionaries. From this it followed that Congress's power under the fifth section of the amendment was merely remedial: in other words, was of the same scope essentially as that of the Court itself to set aside discriminatory State legislation. But what was this except to condemn constitutional action by Congress as gratuitous meddling? The Civil Rights Act eliminated and the equality of the two great political parties once more restored in the national government, the Court had little further reason to apprehend the substitution of congressional legislation for State legislation.

Third. Meantime, in 1883, in the *Butchers Union Company* v. *Crescent City Company* (111 U. S. 746), the opportunity was afforded the dissenting minority in the *Slaughter House* cases to appear as a concurring minority and to give their views thereby something of the guise of court doctrine. The question at issue before the Court in this case was the right of the legislature of Louisiana to limit the grant of privileges upheld in the earlier litigation. The majority of the Court again rested its case upon the latitudinarian view of legislative power. The minority, on the other hand, preferred to look upon the legislation under review as vindicating the private rights that were, to their way of thinking, transgressed by the original charter of the Crescent City Company. Again it is Justice FIELD who heads the minority, renewing his allegiance "to those inherent rights which lie at the foundation of all action" and to "that new evangel of liberty to the people," the Declaration of Independence. It is, however, Justice BRADLEY'S

opinion that subsequent use has made most important. Summarizing his views under three captions, he holds, first, "that liberty of pursuit * * * is one of the privileges of a citizen of the United States," and again enters a protest against the *Slaughter House* decision. Still he is willing to abandon this contention; for, secondly, it the law creating the monopoly "does not abridge the privileges and immunities of a citizen of the United States * * * it certainly does deprive him—to a certain extent—of his liberty. * * * And, if a man's right to his calling is property, as many maintain, then those who had already adopted the prohibited pursuits in New Orleans were deprived, by the law in question, of their property, as well as their liberty without due process of law." And thirdly, "Still more apparent in the violation by this monopoly of the last clause of the section, 'no State shall deny to any person equal protection of the laws.'"

As we shall discover presently, one of the central canons of present day interpretation of the Fourteenth Amendment is the concept of "class legislation." When a particular class of the community is selected by the legislature for additional privileges or duties, the Court's approval of the legislation whereby this selection is effected is necessary to meet the requirements of "due process of law" and "equal protection of the laws." In most of the cases which we shall subsequently review, therefore, these phrases attend upon each other in an interesting and significant fashion. But now it is in BRADLEY's opinion as given above that this concomitance is first suggested. Likewise in this same opinion, as well as in FIELD's various opinions recited above, the terms "liberty" and "property" take on the meaning of liberty of pursuit and freedom of contract, which also are today leading ideas with attorneys and with the Court. It is true that BRADLEY's opinion in the *Bartemeyer* case shows that his views in the *Slaughter House* case were determined by the fact that he regarded the *Crescent City Company* as a monopoly; and it is equally evident that this was still his attitude in the *Crescent City* case. Nevertheless, we have in his utterance given above a form of words, so to say, which is capacious of varied use and of which, it is a fact, that the very greatest use has been made in the elaboration of present day constitutional law. These then are the circumstances which made it easy for the Court to assume a supervisory power over State legislation, in the pretended enforcement of the Fourteenth Amendment. In the first place, the pressure upon the Court to do so by adopting a view of due process of law that would settle the question of jurisdiction in its own favor

was constantly increasing. In the second place, after the Civil Rights decision, all danger that Congress would take advantage of a broad construction of the Fourteenth Amendment to assert its own authority aggressively seemed at an end. Finally, the doctrine by which the Court was to assert its jurisdiction was already at hand in a form that bore the guise of an adequate precedent. But even now the Court still held back from occupying at one stroke the whole region of jurisdiction that lay before it. It must proceed step by step. And in this connection the downfall of *Munn* v. *Illinois* is important.[2]

Interesting enough, it was Chief Justice WAITE himself who laid the axe to the tree. In the *Railroad Commission* cases (116 U. S. 307), in 1886, the Court again declared the right of the legislature to regulate railroad charges, but in the very body of the opinion is to be found this warning of a veering in the judicial mind: "From what has thus been said it is not to be inferred that this form of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. * * * The State cannot * * * do that which in law amounts to a taking of private property for public use without just compensation or without due process of law." The important feature of this utterance is the use of "just compensation" and "due process of law" as equivalent phrases,—a usage involving two assumptions, each of which contradicts flatly the previous pronouncement of the Court. The first of these assumptions is that the power to regulate carrier's charges is an item, not of the State's police power, but of that much more special branch of the State's power, the power of eminent domain. The second assumption is that this power of eminent domain is limited by the Fourteenth Amendment. This assumption is of course to the entire derogation of *Davidson* v. *New Orleans*, as the other is both of historical fact and of *Munn* v. *Illinois*. Nevertheless we find Justice GRAY in *Dow* v. *Beidelman* (125 U. S. 680) ratifying WAITE's dictum in the *Commission* cases as the "general rule of law." GRAY's utterance is also obiter dictum, but it warrants the assertion that the identification of a branch of the police power with the power of eminent domain and the overruling of *Davidson* v. *New Orleans* together comprise the initial step in the overthrow of *Munn* v. *Illinois*.

But only the first step. To his acquiescence in WAITE's dictum Justice GRAY adds: "Without proof of the sum invested (by complainant in error) * * * the Court has no means, *if it would*

[2] In tracing the downfall of Munn *v.* Ill., I have made large use of Smalley's *Railroad Rate Control.*

under any circumstances have the power, of determining that the rate fixed by the legislature is unreasonable." How is the doubt thus expressed to be reconciled with the reiteration of the general rule of law which it follows so immediately? The answer is to be found in the argument for counsel for complainant in error in the *Dow* case. This argument reveals the fact that the railroads were by no means satisfied with the limitation which Chief Justice WAITE had suggested in the *Commission* cases upon the power of rate regulation; for that limitation still left the power of the legislature very ample. The legislature must not impose a confiscatory rate, a rate in other words that might mean positive loss to the carrier; for such loss would amount to a taking of the physical property of the railroad for public use without compensation: this, it seems, is the sum and substance of Chief Justice WAITE's thinking in the *Commission* cases. In the *Chicago & Northwestern Railway* v. *Dey,* moreover, we find Judge BREWER, then of the United States Circuit Court, applying WAITE's principle as follows: "Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say three per cent. Decisions of the Supreme Court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income for their investment. As to the amount of such investment, if some compensation or reward is in fact secured, the legislature is the sole judge." Put more concisely, Judge BREWER's idea seems to be that legislatively imposed rates must not be confiscatory, and to secure that they shall not be, the Courts may interfere, but farther than that they must keep their hands off. But certainly to have secured such an illusory restraint as this upon legislative power was an empty triumph for the railroads, and so they regarded it. Accordingly we find them urging a stricter pinioning of the legislature's hands and devising a new argument, or rather perfecting an old one, upon which to base their contention.

In brief compass this argument is simply that when the reasonableness of legislative rates is questioned, "due process" requires that the Courts shall finally decide the matter; that is, that the question of the reasonableness of legislative rates is a judicial one, under the Fourteenth Amendment's guaranty of "due process of law."

This argument had been met directly and resolutely repulsed by Judge BREWER in the *Chicago & Northwestern* case, which occurred in 1886. Justice GRAY'S dictum in the *Dow* case is perhaps evidence that, three years later, the Supreme Court was also adversely minded, but the year following the Court yielded to the inevitable and adopted the argument of the railroad attorneys, making it the basis of their decision in the decisive case of the *Chicago, St. Paul & Milwaukee Railroad* v. *Minnesota* (134 U. S. 418). Complainant in error asserted its rights under the Fourteenth Amendment to contest the reasonableness of certain rates imposed by the Railroad Commission of defendant State. The law establishing this commission made the rates fixed by it conclusively reasonable. The constitutionality of this law under the Fourteenth Amendment was therefore the question before the Court, and it was held to be unconstitutional. Said Justice BLATCHFORD, delivering the opinion of the Court: "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does *the element of reasonableness both as regards the company and as regards the public,* is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

Thus was the doctrine of judicial review of legislative rates brought forth. Its appearance marks a complete volte-face on the part of the Court that fourteen years before pronounced the decision in *Munn* v. *Illinois*. The completeness of the change of view is well indicated in the dissenting opinion delivered by Justice BRADLEY for himself and Justices GRAY and LAMAR. "It is urged," says BRADLEY, "that what is a reasonable rate is a judicial question. On the contrary, it is preeminently a legislative one, involving considerations of policy as well as of remuneration. The legislature has the right and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. This is just where I differ from the majority of the Court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature * * * unless the legislature * * * has made it judicial. * * * By

the decision now made we declare in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads. * * * It is an assumption of authority on the part of the judiciary which it seems to me, with all due deference to the judgment of my brethren, it has no right to make."

Justice BRADLEY'S protest fell on deaf ears. In *Budd* v. *New York*, Justice BLATCHFORD attempted to reconcile his decision in the *Chicago, Milwaukee & St. Paul* case with *Munn* v. *Illinois* by confining the operation of the former to cases where rates had been fixed by commission and denying its application to rates directly imposed by the legislature. This attempt is important as showing the step that still lay between the *Chicago, Milwaukee & St. Paul* decision when it was first pronounced and the doctrine at which the Court was finally to arrive. Otherwise this distinction has long since dropped out of judicial ken, while the decision it was meant to limit has been progressively expanded. We shall, however, have to be brief with the record. "It has always been recognized," says Justice BREWER in *Regan* v. *The Farmers' Loan & Trust Co.* (154 U. S. 362, 397), "that if a carrier attempted to charge a shipper an unreasonable sum, the Courts had jurisdiction to inquire into that matter and to award the shipper any amount exacted from him in excess of a reasonable rate. * * * The province of the Courts is not changed, nor the limit of judicial inquiry altered because the legislature instead of the carrier prescribes the rates." This language, besides setting forth in a very illuminating manner the theory which the Courts of this country entertain of their position in the State, marks the final definition of "due process of law" in this species of cases, viz.: law which the Court has pronounced reasonable. The same doctrine finds reiteration in *Smyth* v. *Ames* (169 U. S. 466), but at the same time it is assimilated to the doctrine of Chief Justice WAITE'S dictum in the *Commission* cases, with the result that the distinction between confiscatory and unreasonable rates, against which the railroad attorneys had waged war from the outset, disappears. "What the company is entitled to ask," says Justice HARLAN, "is a fair return upon the value of that which it employs for the public convenience." Finally, in the recent *Consolidated Gas Company* case the Court stipulates six per cent as its idea of a "fair return."

At this point we may dismiss the railroad decisions, our concern with which has been simply to trace the development through them of the doctrine of due process of law. With the results obtained in mind we return to the larger subject of the relation of the police

power of the State, as a whole, to the Fourteenth Amendment as interpreted today. The first matter that we have to take note of is this. While the Supreme Court of the United States was engaged in the obliteration of *Munn* v. *Illinois*, the State judiciaries had seized upon Bradley's dissent in the *Crescent City* case and, divesting it of all its original qualifications, had elevated it to the position of an authoritative canon of constitutional law, applying it moreover in a manner against which BRADLEY himself would have been the first to protest. These decisions we have no space within the limits of this article to review. Instead we shall content ourselves with sketching their ratification by the Supreme Court, under the following topics: 1. Due process of law; 2. Class legislation; 3. Liberty and property; 4. Judicial cognizance; 5. Legal presumption.

1. The constitutional requirement of "due process of law" is recognized as a limitation upon legislative power from the outset of our constitutional history, but in a very definite sense: the legislature must provide "due process" for the *enforcement* of the law.[3] But what is due process in the *enforcement* of the law? One indispensable element, it came to be held, was a hearing: wherefore, it followed that a visitation of pains and penalties or other inconveniences upon selected individuals by direct legislative action, as in bills of attainder or in acts of confiscation, is not allowable. This view of the matter finds expression with some enlargements, in Webster's definition of "due process of law" in his argument in the *Dartmouth College* case, which definition is adopted by the Supreme Court in *Hurtado* v. *California*. Nor is it evident that Justice BRADLEY thought that he was going beyond this view of the matter when, in the *Crescent City* case, he protested against the monopoly which, he alleged, had been created by legislative enactment, at the expense of particular persons engaged in a business which the law itself viewed as legitimate. Nevertheless the connection between this view of "due process of law" and the present very sweeping view is palpable enough. Suppose, for example, that the legislature, while providing satisfactory machinery for the *enforcement* of a particular statute should by that same statute impose pains and penalties for the performance of an act generally deemed harmless or even beneficial; in such a case the question of the method by which the act was to be enforced would be a very trivial consideration as compared with the requirements visited by the act upon those to whom it was addressed. It is still,

[3] This is a subject I go into at great length in "Part II" of my study, where I trace the development of "Due Process of Law," principally at the hands of the State Courts, before the civil war.

I believe, a maxim formally recognized by the courts in constitutional cases, that the possibility that power may be abused is no argument against its existence. In point of fact, however, this maxim has been entirely cast aside. In the matter under review, therefore, the courts, moved by some such consideration as finds illustration in the hypothesis just given, have set up, in the first place, certain purposes which it is assumed the police power ought always to subserve and, in the second place, their own opinions as to the reasonableness of legislation viewed from the standpoint of these purposes, as limitations answering to the constitutional requirement of "due process of law" and therefore as judicially enforceable limitations upon legislative power. "Due process of law," therefore, comes to mean reasonable law, in the Court's opinion. This view is first deduced by the State Courts from BRADLEY's dissent in the *Crescent City* case. Meantime, the Supreme Court itself was elaborating a kindred doctrine out of BLATCHFORD's opinion in the *Chicago, Milwaukee & St. Paul* case. It was quite ready, therefore, to appreciate and, when the time came, to ratify the more broadly applicable doctrine of the State courts. This it does for the first time in *Mugler* v. *Kansas* (123 U. S. 623). Later cases will be noted below.

2. But the view that the courts today hold of "due process of law" is intimately involved with their view of what is called "class legislation." Most police legislation, as was insinuated in *Barbier* v. *Connolly,* indicates some class in the community for special privileges or special burdens. Such legislation therefore tends to approximate, if the question of its reasonableness be eliminated from the discussion, to that type of legislation in which the legislature, without the intervention of the courts, designates certain persons for unfavorable treatment and which was brought under judicial condemnation long before the Fourteenth Amendment had been framed. This being the case, it is easy to see that that amendment's requirement of "an equal protection of the laws" for all persons greatly assisted the Court in arriving at its final view of "due process of law." Again, however, there was no sudden evolution by a step by step development. In the *Slaughter House* cases this clause was construed to require merely that there should be no legislative discrimination against the negro, but in *Yick Wo* v. *Hopkins,* the Chinese were also brought within its contemplation. The first great step toward the modern view was taken in the county of *Santa Clara* v. *the Southern Pacific Railroad Company* (118 U. S. 394). In this case the issue raised by defendant was the validity of a law under which certain corporations were subjected

to a special method of assessment for purposes of taxation. The Court refused, much to Justice FIELD's disappointment, to pass upon the constitutional question. At the same time, however, it ruled unanimously, and without listening to argument on the point, that a corporation is a "person" in the sense in which that term is used in the final clause of the First Section of the Fourteenth Amendment. Meantime, in *Munn* v. *Illinois,* an idea had cropped up of which the Court was years later to make the greatest possible use; viz.: the application of the historical test of the Common Law in the partial determination of what are reasonable legislative classifications. Thus in *Holden* v. *Hardy* (169 U. S. 366), where the Court assumes its final position, and in later related cases, it comes out that there is an important difference in the mind of the Court between what it calls persons *sui juris,* meaning adult males, and dependent persons, such as women and children. In some of the State decisions in which this distinction is first utilized, the right of the legislature to go further and distinguish classes of persons *sui juris,* for the purpose of placing special duties upon some or bestowing special privileges upon others, is totally denied. The Supreme Court does not go that far, but contents itself with thrusting upon the State the burden of showing the reasonableness of such legislative classifications.

3. The third topic is the phrase "liberty and property" in the constitutional requirement that no State "shall deprive any person of life, liberty or property without due process of law." The evident assumption underlying the attempt in the *Commission* cases to identify "due process of law" with "just compensation" is that property is tangible property, or evidences thereof, and this indeed is the view of the Common Law, where similarly liberty means simply freedom from physical distraint, a violation of which would be remediable by an action in damages for false imprisonment. The whole tendency, however, of the effort succeeding the Civil War to put the negro on a parity with the white race was, in the first place, to enlarge very greatly the significance of both these terms, and, secondly, by investing civil rights with the sanctity of property rights, to merge them and thus to confer upon property something of the broad connotation that it bears in the pages of Locke. Justice FIELD, in his various dissents, accepts these enlarged but decidedly vague notions of liberty and property apparently without qualification. BRADLEY's tone, on the other hand, even in his monumental *Crescent City* opinion, is noticeably diffident and tentative. Naturally the more confident view won its way, first with the State courts,

and then with the Supreme Court. In *Allgeyer* v. *Louisiana* (165 U. S. 578) the Court was confronted with the task of obviating an uncomfortable precedent without incurring the responsibility of overturning it. This it does by adopting Justice FIELD'S definition of liberty and then applying it in a totally illogical fashion to the case under review. In *Holden* v. *Hardy,* Justice BROWN seeks for a definition of "due process of law," and finally fastens upon the definition of liberty given in the *Allgeyer* case.

4. Thus far we have been dealing with phrases. The law, however, is not a mere matter of phrases: it has to be applied by the Court to facts. And what sort of facts? In constitutional cases the answer given to this question will depend upon the theory held of the nature of the power of judicial review. Is it, as is often asserted, a power analogous to that of the courts at the Common Law to pass upon the validity of executive commissions, or is it a broader power and analogous rather to that of equity, to set aside a rule of law which it finds productive of injustice in a particular case? This at bottom is the point in a dispute that arose very early in the judiciary itself. Ostensibly the former of these two views won out, but actually it is the latter that has triumphed, the best proof of which is the doctrine of due process of law which we have been tracing. Accordingly a part of the process by which this doctrine has become established has been a concomitant change of view upon the part of the Court as to the sort of facts of which it could take "judicial cognizance" in deciding constitutional cases. In *Munn* v. *Illinois,* the Court sets about to canvass only facts of law, the only question for determination being the question of legal power. In *Powell* v. *Pennsylvania* the same point of view is adhered to with emphasis. Meantime, however, the State courts, in setting up their views of what is conducive to the public health, etc., as a limitation upon the police power, had adopted a different practice, and in the *Jacobs* case the New York Court of Appeals had taken "judicial cognizance" of the effect of tobacco upon the human system. The ratification of this method by the Supreme Court of the United States takes place in *Mugler* v. *Kansas. Powell* v. *Pennsylvania,* which comes shortly after, is therefore a retreat, but only a temporary one, for the lost ground is recovered and new territory gained in *Holden* v. *Hardy.*

5. The Court, then, in passing upon constitutional cases, judges of both the law and the facts: but even this is not the whole story. For in judging of the law and the facts the Court sets out with certain presumptions in mind whereby it directs its inquiries. No judicial maxim is more venerable than that a legislative enactment

must be *presumed* to be valid until it is shown to be the contrary. The inevitable implication, however, from the distinction drawn by the Court, in cases affecting their liberty or property, between persons *sui juris* and dependent persons, is that legislation touching these matters stands upon a diverse footing; that, in short, the presumption shifts from the side of the State to that of private rights, or vice versa, according as the persons affected by the legislation are adult males or not. In *Holden* v. *Hardy* the burden of proof is still held to rest upon the opponents of the legislation under review, despite the principle just stated. In *Lochner* v. *New York* (198 U. S. 45) the burden of proof is shifted.

All this, however, is a very abstract statement of the development of the law. Let me therefore review a decision that furnishes illustration of the various points made above, and of the present state of the law. In *Lochner* v. *The People of the State of New York* the issue was the validity of a statute limiting employment in bakeries to sixty hours a week and to ten hours a day. Complainants in error contended that this statute comprised an unreasonable and arbitrary regulation of an innocuous trade and was therefore not within the police power; and they propounded the following questions, which, they contended, the State must answer satisfactorily, in order to justify such an enactment as the one in question. "Does a danger exist which the enactment is designed to meet? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the objects sought without impairing essential rights and principles? Does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?" These questions are interesting as showing counsel's estimate of the present state of the law. Judged by the standard set by the court in *Powell* v. *Pennsylvania,* none of them is pertinent. But much water had poured over the judicial mill wheel since that decision. The extremest proposition that the defenders of the statute could adduce with which to ward off this fusilade of questions was the equivocal maxim that "the propriety of the exercise of the police power within constitutional limits is purely a matter of legislative discretion with which the courts cannot interfere," thus leaving it still to be determined, it is obvious, what such constitutional limits are.

Justice PECKHAM, speaking for a bare majority of the Court, pronounced the statute void as in transgression of the right of contract safeguarded by the Fourteenth Amendment. His statement of

the law governing the case is far from clear, and deals very freely in those ambiguous platitudes the constant reiteration of which, without attempt at definition, has from the outset of the development we are tracing, constituted the Court's most formidable weapon in its struggle for jurisdiction. The assertion is ventured that under the Fourteenth Amendment "no State can deprive any person of life, liberty and property without due process of law"; also that the police powers "relate to the safety, health, morals and general welfare of the public"; that "both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the States, in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere"; that "the State therefore has the power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection"; that "if the contract be one which the State, in the legitimate exercise of its police powers, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment." All of which seems fairly indisputable but gets us no further. The next statement is more illuminating: "When the State," it runs, "by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right to contract in regard to their means of livelihood between persons who are *sui juris*—both employer and employee,—it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the State." "It must of course be conceded," the opinion continues, "that there is a limit to the valid exercise of the police power by the State. * * * Otherwise the Fourteenth Amendment would have no efficacy in the legislatures, and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and elusive name for the supreme sovereignty of the State, to be exercised free from constitutional restraint. * * * In every case that comes before this Court, therefore, where legislation of this character is concerned and where the protection of the Federal Court is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the

State, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty?" This does not mean, however, Justice PECKHAM insists, that the Court is substituting its own judgment for that of the legislature. "If," he asserts, "the act be within the power of the State it is valid, although the judgment of the Court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? And that question must be answered by the Court." But certainly this is a rather dark saying, since, taken in its literal and grammatical sense, it means that the question of whether it is within the police power of the States may be raised even of an entirely valid statute. Probably, though, Justice PECKHAM does not mean that, but is contending simply that the validity, which in this connection means reasonableness, of a law is something absolute. But if this be true, why was the statute in this particular litigation overturned by the Supreme Court of the United States by a vote of five to four after having been sustained by the New York Court of Appeals by a vote of four to three?

But to return to the decision itself, we find Justice PECKHAM animadverting upon the statute under review in this fashion: "In looking through statistics regarding all trades and occupations it may be true that the trade of a baker does not appear to be as healthy as some trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recognize the exercise of that or of any other trade as a remedy of ill health. * * * It might be safely affirmed that almost all occupations more or less affect the health. * * * But are all on that account at the mercy of legislative majorities. * * * Not only the hours of employees, but the hours of employers could be regulated, and doctors, lawyers, scientists, or professional men, as well as athletes and artisans, could be forbidden to fatigue their brain and body by prolonged hours of exercise lest the fighting strength of the State be impaired." This method of proceeding by the *reduction ad absurdum* is scarcely convincing, since the whole question at issue is whether the statute under consideration is reasonable or unreasonable; and to the query, whether all trades are to be at the mercy of legislative majorities, inquiry may be returned, whether they are to be at the mercy of judicial majorities.

Justice PECKHAM's mode of arguing nevertheless has its value; for it brings out the fact that this decisions rests, immediately, upon considerations of policy with regard to which there is ample room for

debate, and, ultimately, upon a highly controversial view of public policy in general. Addressing himself to the former of these topics, Justice HARLAN, speaking in dissent for himself and justices WHITE and DAY, adduces the *Eighteenth Annual Report by the New York Bureau of Statistics of Labor,* a Professor Hirt's treatise on the *Diseases of the Workers,* and "another writer," who testifies to the chronic suffering of bakers from inflamed lungs and bronchial tubes and sore eyes, and to their lack of resisting power to diseases, and short average life. Thus the reasonableness of the enactment under consideration is at any rate open to discussion, and that fact of itself makes it, under *Holden* v. *Hardy* and kindred precedents, within legislative discretion. "Responsibility," HARLAN concludes, "therefore rests upon legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come through our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of a citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution."

Justice HOLMES' dissent is still more trenchant, cutting as it does through the momentary question of policy to the deeper, though inarticulate, major premise underlying all preference for or against the political will when it appears arrayed against private rights. "This case," says HOLMES, "is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this Court that State constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or, if you like, as tyrannical as this and which, equally with this, interfere with the liberty of contract. * * * The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Statics.* * * * A constitution was

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 striking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. * * * I think that the word 'liberty' in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and of our law."

The value of these dissenting opinions is that of most of the other dissenting opinions that we have noted, viz.: that they serve to measure the advance that the law receives in a given direction from the decision dissented from. On the other hand, they are both of them open to criticisms of a rather obvious sort. Thus Justice HARLAN was himself the author of *Mugler* v. *Kansas*, and the line connecting that decision with the one in *Lochner* v. *New York* is both direct and logical. Much the same criticism has to be levelled against Justice HOLMES' dissent also. For it is to be noted that he accepts in toto the present day view of due process of law. Moreover his "rational and fair man" without a social philosophy of some kind and, equally, his constitution devoid of preconceptions are the veriest fictions. And certainly it was ungracious on Justice HOLMES' part to imply a lack of rationality on the part of his majority brethren. The truth is that, the moment the Court, in its interpretation of the Fourteenth Amendment, left behind the definite, historical concept of "due process of law" as having to do with the *enforcement* of law and not its *making*, the moment it abandoned, in its attempt to delimit the police power of the State, its ancient maxim that the possibility that a power may be abused has nothing to do with its existence, that moment it committed itself to a course that was bound to lead, however gradually and easily, beyond the precincts of judicial power, in the sense of the power to ascertain the law, into that of legislative power which determines policies on the basis of facts and desires. Moreover, and this is another point at which Justice HOLMES seems to blink the truth, the feeling instigating the first step was the same as that which prompted the last, viz.: a fear of popular majorities, which fear, however, lies at the very basis of the whole system of judicial review, and indeed of our entire constitutional system.

Thus it comes about that Justice MILLER's apprehension of a perpetual censorship of State legislation by the Supreme Court has been realized, and Chief Justice WAITE's counsel that the remedy for abuses of legislative power is to be sought at the polls and not in the court has been rendered obsolete: and this in brief is the theme I have been pursuing. I desire to add but two remarks. In the first place, this development which we have been tracing is often represented as a centralizing movement in our government, and the cry of "States Rights" has been recently revived in consequence. Is this protest a really relevant one? On the one hand, in support of the view which it represents, the following facts may be adduced: the "Twilight Zone," which also is a creation of the federal judiciary at the expense of State power; the increased use of the injunction by the federal courts in constitutional cases, the enlarged view held by these tribunals today of their power under the Eleventh Amendment (*Ex parte Young,* U. S. Sup. Ct. Reps., 52 L. ed. 714), the recent action of the Supreme Court in sweeping aside the line drawn by the new Virginia constitution between legislative and judicial power in the creation of a Railroad Commission (*Virginia R. R. Commission* cases, 211 U. S. 210). But on the other hand these facts are equally obvious: the general extension of their equity jurisdiction by all American courts today, whether State or federal; the indebtedness of the Supreme Court of the United States to state jurisprudence for its present view of the pregnant phrases of the Fourteenth Amendment; the evident readiness of the Supreme Court to enforce the same ideas against federal legislation under the sanction of the first eight amendments (*Adair* v. *U. S.,* 208 U. S. 161), and indeed the "general principles of constitutional law," where these may be needed to piece out the written Constitution (Dicta in the *Insular* and related cases); and finally the fact that the Supreme Court of the United States has never in the course of its existence bestowed authority upon the political branches of the federal government, though it has often been called upon to ratify an assumption of authority by those branches after the act. The truth of the matter is that the alleged issue between State power and federal power is largely imaginative, and in this connection at least quite pointless. The real issue is far different and traverses both State and federal governments. It is the issue between two theories of government, one of which, centering around the notion of sovereignty, regards government as the agent of society; the other of which, centering around the notion of natural rights, regards government as somewhat extrinsic to society. It is the issue also

between two theories of law, the one of which regards law as an emanation from authority and as vested with a reformative function, the other of which holds that law ought to be conservative and ought to represent no more than a ratification of the custom of the community. The latter is plainly shown, for example, by the language of Justice HOLMES' dissent just quoted to be the theory of our American courts, which indeed seem disposed to reduce legislative power to the function of finding the law rather than of making it. Nor is it impertinent to add in this connection that the maxim *sic utere tuo ut alienum non laedas*, which the courts today make the controlling principle of the police power, is the norm which the Common Law sets to private action.[4]

My second remark I can put more briefly. The Court in its early fear for the federal balance denied the Fourteenth Amendment practically all efficacy as a limitation upon State power, save in the interest of racial equality before the law. Subsequently, however, the Court found reason to abandon its early conservative position and in the interest of private and particularly of property rights to take a greatly enlarged view of its supervisory powers over State legislation. As we have seen, the history of this change is the history particularly of the development of the phrase "due process of law." But now an interesting thing is to be noted. The *Berea College* decision makes it perfectly plain that the enlarged view of "due process of law" is not available against legislative classifications based on racial differences, such classifications being deemed prima facie reasonable. Thus it comes about that property, or, calling to mind the *Santa Clara* case, the corporations succeed to the rights which those who framed the Fourteenth Amendment thought they were bestowing upon the negro. This outcome is not entirely devoid of irony, but neither on the other hand, as I have above emphasized, is it devoid of historical justification, from our constitutional jurisprudence antedating the Fourteenth Amendment.

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PRINCETON, N. J.

[4] The topics referred to in this paragraph, I treat of at length in "Part IV" of my study.