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THE DEATH OF E PLURIBUS UNUM

ROBERT EMMETT BURNS*

All trust in Constitutions is grounded on the assurance they may afford, not that the depositories of power will not, but that they cannot misemploy it.

—John Stuart Mill

EVEN YEARS after the passage of the fourteenth amendment, a black citizen brought a civil rights action against the owner of a coffee house for refusing him refreshment, “on grounds he was a man of color.”¹ The owner of the coffee house sought a jury trial. It was 1875. The plaintiff was black. A jury would be white. Defendant’s demand was denied. He was not entitled to a jury trial under applicable state law. Judgment for plaintiff was entered for $1,000 against cafe owner who appealed, insisting that a new due process clause of the new fourteenth amendment gave him a constitutional right to a trial by jury. Chief Justice White, whose opinion was well within the main stream of contemporary constitutional philosophy, wrote: “The states, so far as this amendment is concerned, are left to regulate trials in their own court in their own way.”²

Ninety years later, on May 20, 1968, a 7-2 majority of the Supreme Court, in review under the same due process clause of the fourteenth amendment, this time declared that Louisiana and every

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2. Id. at 92. In Missouri v. Lewis, 101 U.S. 22, 31 (1879), the Supreme Court seemed even more emphatic: “We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so.”
other state in the Union, in all criminal cases in which federal courts would award jury trial, must award jury trials. One hundred eighty-eight years of separate jury trial procedures among the states became unconstitutional in appeal from the same state in construction of the same clause of the same Constitution by dint of review right succinctly stated in the first Louisiana jury case: "Our power over that law is only to determine whether it is in conflict with the supreme law of the land." By what power may the Supreme Court decree uniform trial procedures for every state court in the nation? Why is it that the strictures of a written constitution are subject to such broad interpretation? The answer lies in the phrase "due process of law."


4. Supra note 1, at 93. In Baldwin v. New York, 399 U.S. 66 at 77 (1970), Chief Justice Burger, apparently still unattuned to one-nation due process, writes in dissent: "I find it somewhat disconcerting that with the constant urging to adjust ourselves to being a 'pluralistic society'—and I accept this in its broad sense—we find constant pressure to conform to some uniform pattern on the theory that the Constitution commands it." (Jury required when confinement of 6 months to 1 year possible).

5. The phrase "due process of law" comes from 28 Edw. 3, c. 3 (1354), "... no man of what Estate or Condition he be, shall be put out of Lands or Tenements, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."

This statute in turn is based on famous Chapter 39 of Magna Carta, which the Massachusetts Constitution of 1780 paraphrases thus: "No subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." (per legem terram)

An English Jurist, Sir Edward Coke, in the 17th Century had found a very convenient need and use for this phrase to give substance for resolving a problem in his own days: Was the King a divine right law unto himself or under the law? In one of the struggles for supremacy between King and Parliament (1612), the question arose in Bonham's case whether the King could order the arrest of a free man without assigning a reason for it. It was Coke's contention that law should not be governed by the arbitrary will of the King, but by unwritten precedent and traditions like Magna Carta. Magna Carta required the King to conform according to the law of the land (per legem terram) which, by custom, required notice, a hearing, reasons, or—in short—due process of law. See Lyon & Block, Edward Coke, Oracle of the Law (1929).

Coke held that no man is above the law; the law is reason. Reason is precedent. Precedent is Magna Carta and Magna Carta says NO man could be deprived of liberty except per legem et terram (according to the law of the land), or due process of law. Coke equated the phrase due process of law, which meant fair procedures, to the Magna Carta phrase per legem terram, or law of the land. At the time of Coke's decision, it was not clear whether the King or Parliament (of which the judiciary was to become part) was to be supreme sovereign law-giver. For a last comprehensive post-Civil War review of Lord Coke's phrases and usages before the
The transformation of the due process clause from a recognition of state power over its own procedure, to a grant of legislative power to the supreme judiciary, is the most significant development, for good or ill, in American Constitutional Government. The revolution took ten years.

In their beginnings, anyway, the post-Civil War amendments were enacted to preserve something. The Constitution of 1787 had sought through the Union to avoid two scourges of government by the people: the tyranny probable from one government, the anarchy likely from many.\(^6\)

The great writing had defined not one, but two governments. Indeed, without free states, the Constitution envisioned, this country would have been just another government having three branches and thirteen provinces or departments. Central governments are easy to form. Apportioned sovereignty is more difficult. Though delicate balance was required if dualism was to work at all,\(^7\) powers (stated and reserved), their separation (the real separation was not between Congress, Court and President), twin citizenship, separate courts, dual sovereignty and federalism describe what was, with its additional amendments and guarantees of 1791 (The Bill of Rights), the Constitution, \textit{E Pluribus Unum}.

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\(^6\) The fears of one central government among the Colonies seem difficult to exaggerate: The first ten years' treaty arrangement under the Articles of Confederation provided central government with no executive or judicial branches. Once "more perfect union" was complete in 1787, amendments "to prevent misconstruction or abuse of its powers" (Prologue to Bill of Rights, Line 3) was insisted on by the states in order to limit Federal power and enhance state prerogatives.

\(^7\) Chief Justice Marshall, in \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 429 (1819), saw the principal problem as one of clashing sovereignty or a need to avoid by constitutional construction the tendency of one government to pull down what the other built up, that is, the "incompatibility of rights to destroy where there is a right in another to preserve." Perhaps this accounts for his modest powers approach which today's Supreme Court follows in review of the exercise of congressional power over interstate commerce, \textit{e.g.}, \textit{Katzenbach v. McClung}, 379 U.S. 294 (1964), upholding the Public Accommodations Sections of the 1964 Civil Rights Act over the claim that commerce was but the ostensible purpose to the exercise of the power.
The essence of the Union lie in its perhaps preposterous quest for the squared circle. Government was thought effective because separate: Union would accommodate both nation and state, tribe and country, many and one. The first treaty government under articles of "Confederation" (1781-87) was a failure. The "more perfect" Union, a second time, would be Federalism: a dream, the fulfillment or nightmare of block, alliance, continent and maybe some day, a world community.

There were many problems to the pre-Civil War Union. First among them was the race question. As late as the time of passage into dreadful revolution, men of color were excluded from citizenship in Southern, border, and Confederate states and held not entitled to be federal people by an 1856 decision of the Supreme Court9 declaring void an Act of Congress, in conflict (it was said) with a curious contradictory little British phrase in the fifth amendment, then binding only Congress and its Federal Courts.

Shortly after the Dred Scott Decision,11 or the first time the judicial branch of government declared an act of Congress not to be

8. E.g., pre-W.W.II Balkan Europe; Nigeria; the Middle East; Korea; Ireland; Vietnam; etc.
10. The ambiguity of inference to the term due process arises from its origins in a country which had no constitution.

The United States Constitution had provided in its fifth amendment that NO man was to be deprived of liberty or property except after "due process of law." The issue was, however, what agency or government was to legislate meaning or substance to due process. What is due process is a function of will or law-making. Whether what was done was done according to due process is in case and controversy to the point a judicial question of judge, intention, reason, and dispute resolution. Due process meant that notice, fair procedures or hearings should be provided before taking an individual's life, liberty, or property. The ambiguity to who is it is greater than what is it. In England at the time of Magna Carta, John was probably law-maker, only much later was it Parliament. In our country Congress and the states were to be law-makers. We, however, borrowed a phrase from a non-constitution country that for five hundred years had convulsed with uncertainty whether mad kings, parliaments, dictators or judges were law-givers.

If due process meant law of the land, and law of the land was associated with precedent, which was administered by judges, there is visible logic to the conclusion, therefore, that law of the land is due process and due process is whatever a judge holds it to be. The key to the mystery is the phrase according to the law of the land (per legem terram), which refers not to law-making or substance, but to enforcement or procedures of law. The ambiguity remains, however, as to who is to legislate what that law of the land is. In the Constitution, Article I provided Congress with legislative power. In England, Parliament is law-maker.

11. In the infamous 1856 Dred Scott case, supra note 9, Scott, a Missouri slave,
due process, there occurred secession from the Union. As Toomes of Georgia put it in his 1861 farewell speech to his Senate colleagues: "The Supreme Court has decided that, by the Constitution, we have

was taken into free territory where an act of Congress (the Missouri Compromise) had prohibited slavery. Several years after his return to Missouri, Scott sued for freedom which he claimed through his residence in free territory. The Supreme Court ruled against Scott. The Court held slaves were not citizens, for Federal purposes, but "property," and under the fifth amendment, Congress could pass no law depriving citizens of property without due process of law. The Missouri Compromise was not due process of law.

"Rights of Property," Chief Justice Taney wrote, are "united with the rights of persons and placed on the same ground by the Fifth Amendment to the Constitution, which provides that 'no person shall be deprived of life, liberty and property, without due process of law.'" Taney held as "history," that Scott was for federal purposes constitutional "property." An act of Congress legislating to the contrary deprived Scott's owner of property without "due process of law" which, in Taney's opinion, an act of Congress pursuant to power under Article III, § 4 (giving Congress power to dispose of new territory) was so obviously not.

Dissenting Judge Curtis, citing Washington, Jefferson, Madison, Patrick Henry, and the Quakers, wrote differently. Only the Dred Scott decision gave the phrase due process of law any other meaning save an enforcement one.

Taney's view of the phrase "due process of law," personal and subjective (five to three), would first find judicial vindication some fifty years later when the phrase "due process" would become, by fiat, "substantive," meaningfully "liberating" the essence of "liberty" or, in short, almost anything in perpetuity that a majority of five Justices thought it should be.

12. There seems no special reason why both couldn't be due process. Many state constitutions borrowed the phrase "due process" in their documents. In Massachusetts, the phrase used was "according to the law of the land." In those states, judges could set out common judge-made rules of due process in criminal and civil matters, but legislation overriding the judges was also due process and entitled to overriding supremacy. See Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 HARV. L. REV. 366 (1911). "Indeed the great office of statutes is to remedy defects in the Common Law as they are developed, and to adapt it to the changes of time and circumstances." Munn v. Illinois, 94 U.S. 113, 134 (1871). An unambiguous hypothetical dialogue might read something like this:

Law-Maker: Where is your power?
Judge: I have Judicial power; I can require you to act according to the supreme law of the land which is your law and our law.

Law-Maker: But you cannot decide what is the law of the land.
Judge: No, I have the power to require you to conform to the law of the land. My opinion of what should be is not the law of the land. I am a judge. I have no power to decide what is the law of the land. The written Constitution has decided for all of us what is the law of the land.

Law-Maker: Why was I so confused? I thought you could veto everything of mine you didn't like and require things you preferred under the phrase due process, or according to the law of the land.
Judge: Poor boy: A judge can require law-makers to conform to their established procedures. The fourteenth amendment gave me power in case and controversy to compel you to accord to black citizens due process of your (state) law.

13. 3 THE WORLD'S ORATORS 217 (Senators' Edition).
a right to go to the territories and be protected there with our property." The war was about that "property"—one-eighth, in 1861, of the entire population. Lincoln, at his second inaugural address, amid the battles, recalled that some of those who attended his first one in 1860 had sought then without a war to "decide effects by negotiations." He continued:

These slaves constituted a peculiar and powerful interest: All know that this interest was somehow the cause of the war. To strengthen, perpetuate and extend this interest was the object for which the insurgents would rend the Union while the Government claimed no right to do more than restrict the territorial enlargement of it.\(^1\)

The amendments following the battles to rend or save the Union made very definite changes in the 1787, amendable though perpetual, power structures: \textit{Every one of them in color.}

The thirteenth amendment abolished that kind of slavery.\(^1\) The first clause of the fourteenth amendment conferred on blacks federal citizenship (overruling the Dred Scott Decision); the second, state citizenship (overruling the Old South); and the remaining portion of the amendment promised blacks equality in state procedures\(^1\) (due process) and state law (equal protection).\(^1\)

Drafters' intent to the fourteenth amendment is better summarized

14. 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, 276-77 (1907).

15. \textit{Id.} at 276. "... \[B\]oth parties deprecated war, but one would make war rather than let the Nation survive and the other would accept war rather than let it perish, and the war came." Before secession Congress claimed power to restrict importation of slavery in new territories not yet states (Article III); Congress had no power to free slaves from state disabilities before the Civil War, for state citizenship was constitutionally an exclusive state concern. The two-hundred and thirty page \textit{Dred Scott} apologia is misleading. Many Americans seem unaware that blacks were state citizens in most \textit{Northern} states prior to the Civil War.


17. In 1887 Justice Miller, in Davidson v. New Orleans, 96 U.S. 97, 105, wrote in construction of the Due Process Clause of the fourteenth amendment: "[I]t is not possible to hold that a party . . . when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

elsewhere. Suffice it to suggest for now there was very good reason why certain judges would, one-hundred seventy years later, gather a few pebbles of suppositional history from mountains of contrary evidence audaciously to suggest that the post-war amendments intended anything more than guarantees to black Americans, period, with no "ifs," "buts" or "ands" to anyone else.

Before the Civil War, states could, with impunity, deny to blacks equality in rights and procedures. Without a fourteenth amendment neither Congress nor the Supreme Court had the constitutional power to force any states to provide their black residents with the same white state law (equal protection) or procedures (due process). The amendments promised blacks what whites had always had.

After the war, Congress obtained power to enforce the amendments by Express Empowering Clauses. The Court obtained re-


20. Some mountains and pebbles are set out in Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5, at 68-132 (1949), an extraordinary issue (the result of letters, books, documents, and micro study) in response to Justice Black's dissent in Adamson v. California, 332 U.S. 46 (1947), espousing incorporation. Justice Black was appointed in 1937 and has faithfully since attacked with vigor the subjective, personal, arbitrary due process of law of "whatever a majority of the Supreme Court said it was." For his latest thoughts on that subject, see Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969). He was appointed to rectify the disgraceful property due process era (1897-1937). Why he should renovate the fourteenth amendment due process with a Federal Bill of Rights is very understandable. The handful of justices who felt the fourteenth amendment incorporated the Bill of Rights were identified approvingly by Justice Douglas, concurring in Gideon v. Wainwright, 372 U.S. 335 (1963). (Unfortunately it has never commanded a court; yet happily all constitutional questions are always open.)

Even federalists found refuge from the chills of subjective due process in a two-dimension or one-level state bill of rights. In 1943 Mr. Justice Jackson wrote, in Bd. of Educ. v. Barnette, 319 U.S. 624, 639, "The test of legislation which collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the first amendment become its standard." Id. at 639. A little later, in 1950, he had changed his mind: "The history of criminal libel in America convinces me that the 14th Amendment did not incorporate the 1st, that the powers of Congress and of the states over this subject are not of the same dimensions and that because Congress probably could not enact this law, it does not follow that the states may not." Beauharnais v. Illinois, 343 U.S. 250, 288 (1950). See Frankfurter, Memorandum on "Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment," 78 Harv. L. Rev. 746 (1965).
view jurisdiction because there was a Constitution.  

Before the war, the big person-to-person civil rights were the supposed concern of the states. Perhaps the war amendments should have realigned the old federal balance between states and central government.

It would have been quite possible for the Federal Government to impose a single will upon the various states, destroying them as separate entities and guaranteeing racial equality by this route. The thirteenth, fourteenth or fifteenth amendments could have provided in terms a Constitutional Bill of Rights (under Supreme Court stewardship) as everyone's new privilege and immunity. But this would have mocked the theories of dual citizenship, two constitutions, federal-state power apportionment, reserved rights, stated powers or, in short, would have altered in material, non-racial ways the Union, which the war was fought to preserve.

Instead, the victorious states were left to their way under their union. The South remained policed with federal occupation troops until "reconstructed" (1865-1877) into republican "forms" of government required by Article IV, for admission, or, in their case, "re-entry" to the E Pluribus Unum of 1787.

21. It is not nowadays, in Bill of Rights areas anyway, necessary to separate the function of the Supreme Court sitting qua federal judge (supervisor of federal courts) from our constitutional judge sitting as interpreter of the Constitution.

It is interesting to contrast, however, the constitutional common law of due process with the pre-Erie v. Tompkins federal brooding common law developed by federal judges sitting with diversity jurisdiction by authority of the Judiciary Act of 1789. Mr. Justice Holmes referred to that process as "'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.'" Erie v. Tompkins, 304 U.S. 64, 79 (1938). Perhaps there will be more to "qua" in review of the Crime Control Act of 1968 overruling in federal courts the deliberately decided, constitutional Miranda decision.

22. "The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated." Marshall, J., in Barron v. Baltimore, 32 U.S. (7 Pet.) 242, 246-47 (1833).

It is interesting to note that the Barron decision, the first post-Civil War incorporation decision, Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897), and the incorporating process rationale (Davidson v. New Orleans, supra note 17) all were review cases involving that particular clause requiring just compensation for the public taking of private property. (U.S. Const. amends. V & XIV).

23. The guarantee to every state of a republican form of government has always
The leading post-war case construing meaning to the war amendments, and the first attempt to argue that they meant more than black is white occurred in the *Slaughter House* cases of 1873. It was there urged that the words “privileges” and “immunities” in the fourteenth amendment provided something for everyone, consisting, in the main, of new federal privileges and immunities from state law and government. The eminently citable Justice Miller wrote the majority decision. His opinion (love it, leave it, but read it) saw just what else in addition to petitioners’ supposed federal privilege to continue his slaughter house business would occur to the supreme judiciary if the new state amendments were construed to permit either law maker, Congress or the Court “to incorporate things” into them for all of us (so to speak) for that . . . 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 it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people . . . .

been considered a “political question” resting with Congress to decide which state governments are established as republican. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Baker v. Carr, 369 U.S. 186 (1962).


25. Justice Miller wrote the Davidson v. New Orleans, *supra* note 17 opinion where “inclusion and exclusion” language is standard form, boiler plate due process “authority.” Davidson v. New Orleans, *supra* note 17, at 101 was his inclusion reference to a limited set of procedures which only the Supreme Court could define or to all of the many variations states could contrive. Safe experiment was federalism.


27. *Supra* note 24, at 78. It is the popular thing to denounce the Supreme Courts of 1875 and 1883 which declared unconstitutional under the fourteenth amendment Section 5 of the Civil Rights Act of Congress which was not sought to be upheld by reference to interstate commerce power but instead though applicable to individual discrimination and conspiracies (the Civil Rights cases, 109 U.S. 3 (1883)) by resort to implementing power pursuant to an amendment applicable only to states or state action.

Today’s Court familiars seem unable to come to terms with basics. In United States v. Cruickshank, 92 U.S. 542 (1875), petitioners, of color, failed in their charge of a conspiracy to deny first amendment rights to allege anything done by State Government. The Supreme Court saw the problem in dimension of the Union which survived the Civil War: “The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there.” *Id.* at 555. It could have been different, but: “Why may not Congress with equal show of authority enact
The *Slaughter House* decision left the privileges and immunities clause with a settled intent and purpose. The amendment clause forbidding states from depriving any person of life, liberty or property without due process of law, was, at first, ignored as providing restraining rights over state government, for all it was thought to do was provide that blacks receive equal notice, hearing, and state procedures.

Not every interest was satisfied with mere race amendments. An age of combine, trust, merger and moguls needed, it was felt, judicial protection from the many options for creative police power regulation undoubtedly left states by the Union of 1787. Interstate incorporators were determined to use the amendments for their own purposes. Apropos of the times from Hayes (1877-1881) to Cleveland (1885-1889) was the famous quip, "What's the Constitution among friends." Though it was established that judicial review of state legislation was limited to express provisions of the Constitution

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28. As late as 1877 Justice Miller, in Davidson v. New Orleans, *supra* note 17, wrote in construction of the Due Process Clause of the fourteenth amendment: "[I]t is not possible to hold that a party . . . when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." Davidson v. New Orleans, *supra* note 17, at 105.


31. Marshall had written of the specific prohibitions addressed to states: "In these alone were the whole people concerned. The question of their application to states is not left to construction. It is averred in positive words." Barron v. Baltimore, *supra* note 22, at 249.
(mostly the No-Impairment-to-Contract Clause), business interests would not be deferred. Pandora's box lay secreted somewhere.

In the *Slaughter House* cases, defeated counsel John Campbell, a former Supreme Court Justice who had sided with the majority in the *Dred Scott* decision, had argued that national citizenship and state citizenship had, by force of the amendments, become the same. Was this the liberalism of betrayal?

Had he deliberately portrayed the fulsome potentialities of the Fourteenth Amendment in protecting rights of Negroes in order to evoke a decision curtailing those potentialities...

Blacks would not get the benefits they were promised in 1868. The court would be too busy.

In 1877, in *Munn v. Illinois*, the Supreme Court reviewed the right of Illinois to fix maximum state charges for the storage of grain. This legislation restricted the freedom of the Chicago grain monopoly to storage facilities. The regulation was attacked as a violation of due process of law.

*Munn* upheld the state. From ancient times, property affected with a public interest (*De Portibus Maris*) could be subjected to law maker's regulation. Settled canons of constitutional construction left the Supreme Court no Constitutional occasion to question the reason or the ill wisdom in the exercise of constitutionally allocated power:

> We know that this [rate of charge of service for use of public property] is a power which may be abused; but there is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts... For us the question is one of power not of expediency.

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33. Hamilton, *Path of Due Process Ethics*, 48 INT'L L.J. ETHICS 269 (1938), wrote: "The old South had lost in war and at the polls. But someone within its defeated rank had the vague idea that an appeal to the courts might yet save the situation. Whose it was is lost to history. But an adage was current. 'Leave it to God and Mr. Campbell'—and presently Hon. John Archibald Campbell was putting his ex-judicial mind to a difficult problem."


37. When in 1934 a new New Deal court decided to adapt new presumptions of constitutionality to state and Federal measures regulating property, *Nebbia v. New York*, 291 U. S. 502 (1934) thoughtfully cited *Munn, supra* note 12, and Lord Hale, *supra* note 36. Of course, by *this time* (1934) all legislation was required by due process to be non-capricious, non-arbitrary, and reasonable. Allocating "burdens" is an implicit prerogative of power, not expediency.

Munn v. Illinois was in the great tradition of Chief Justice Marshall, who had written, in Brown v. Maryland: "Questions of power do not depend upon the degree in which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."40

A very different opinion was stated by Justice Field in a dissenting opinion to Munn v. Illinois:

If this be the sound law, if there be no protection either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature.41

Justice Field, a former railroad attorney, had dissented in the Slaughter House cases. Field's objective was to procure for the judiciary the power to review state legislative enactments affecting private property interests on broad sweeping bases of judicial reason.

Evidencing the same attitude, Mr. C. Marshall (no relation to J. Marshall) wrote an article in the American Law Review calling for a constitutional amendment to overrule the Munn case so "contrary to the spirit of our age and the character of our institutions."44 Though conceding the accuracy of Munn's legal tradition, Marshall, speaking of Field, and what in several years would be a majority of the Court, wrote:

Is there an institutional spirit, existing as a part of our law, but unexpressed in constitution or in statute, which a state or federal judge can claim as controlling authority and which he may invoke against the legislative power?45

Marshall was candid enough to seek a constitutional amendment. In a last line, quoting Henry Sumner Maine, he wrote: "When a democracy governs, it is not safe to leave unsettled any important questions concerning the exercise of public powers."46 A constitutional amendment was not to be the case. A turning point in American democracy occurred, for then (1890), Chicago, Milwaukee and

39. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 457 (1827). "But arguments drawn against the existence of a power from its supposed abuse are illogical and generally lead to unsound conclusions. And this is emphatically so when applied to our system of government." See note 7, supra.

40. Id. at 439.

41. Munn v. Illinois, supra note 12, at 140.

42. Supra note 24, at 83.


44. Id. at 913.

45. Id. at 914.

46. Id. at 913.
St. Paul Ry. v. Minnesota\(^47\) was decided by a new majority of railroad lawyers committed to overrule Munn and change the meaning of “due process” from judicial power to determine whether or not there was due process (were someone else’s procedures complied with?) to, what is due process (i.e., of what must state due process consist?):

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.\(^49\)

In one fell swoop, the Court assumed the power to review legislative enactments on the basis of due process. Reason then had become will, a “whether” became an “is.” The Court would determine whether law-makers’ acts violated a new due process which forbade

\(^{47}\) 134 U.S. 418 (1890).

\(^{48}\) Justice Miller, in Davidson v. New Orleans, supra note 17, at 104, observed that due process had rarely been invoked to limit governmental power until the war amendments: “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. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions 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 a decision may be founded.”

Justice Miller declined to give a “perspicuous, comprehensive and satisfactory” definition but instead, as per other constitutional provisions, left meaning to the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. (Emphasis author’s) Davidson v. New Orleans, supra note 17, at 104 (what was that reasoning?). In Kennard v. Louisiana ex rel Morgan, 92 U.S. 480, 481 (1875), the court in a post-Civil War due process state case wrote: “Our authority does not extend beyond an examination of the power of the courts to proceed at all.” Justice Miller found in Davidson that there was due process “whenever by the laws of the state” (authorizing a public taking) there was notice and trial; accord, Pennoyer v. Neff, 95 U.S. 714 (1877) and Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). The difference in approach to due process before and after 1890 is dramatized by Davidson, supra note 17, where public takings “cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objection.” Ten years later precisely those doings (taking property for state public uses) became the first right incorporated into a new due process of law; of neither “state” nor of settled meaning, became rather both in meaning and body, the phrase Supreme Court. In England, due process was the subject of wise, ancient precedent (when administered by judges); later it became dynamic Parliament. A dynamic, inclusive due process through judicial definition is peculiar to the American courts’ unique experience administering the phrase.

\(^{49}\) Supra note 47, at 458.
arbitrary, capricious, oppressive, or unfair legislation.

Justice Bradley's dissenting opinion announced the consequence of the majority view:

They say in effect . . . that the final tribunal or arbitrament is the judiciary . . . .

There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature . . . .

By 1897, when the case of Chicago, B. & Q. R.R. v. Chicago was decided, the same Court which discovered that corporations were due process persons, doomed the federal income tax and decided Plessy v. Ferguson had become itself due process of law over states as only once before the war it had been over Congress.

The prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State "violates the constitutional inhibition . . . ."

How did the phrase "due process," which referred to a requirement of notice or procedures to law enforcement, become a constitutional mandate for life appointees to review in cases whether acts of law-makers (first state, later federal) violate an orbital due process of substance, forbidding arbitrary laws? The founding fathers had rejected a supreme council of revision to improve or veto law-makers.

There are three theories:

50. Supra note 47, at 465.
52. Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886).
54. 163 U.S. 537 (1896).
55. Once the Supreme Court's obligation to enforce equal state due process became unhinged from state to court, transformation in character, effect and meaning would also take place in the brother clause—"equal protection of the laws." This provision, would then endure a latency period forbidding "purely arbitrary classifications" (1890-1937) and later an active period (1940-present) forbidding "invidious" discriminations. The reader is cautioned to note that "new" or so called 1890 "old" varieties of non-racial equal protection have no tap roots to original equal protection designed for blacks only to guarantee them equal state law. See infra, note 78, unequally applied because of racial discrimination.
56. Supra note 9.
58. Madison, in the Federalist Papers, takes great pains to point out that in England (and certain colonies) judges were part of the legislative Parliament
Charles Beard, eminent historian, believed a plot or conspiracy had occurred. In 1914 and later in 1927 he wrote that two railroad congressmen, Roscoe Conklin and John Bingham, had deliberately inserted a phrase "due process" into the new state amendment so that courts would not be limited merely to protecting the colored race, but would also be able to protect non-racial property or *laissez-faire* capitalism from state regulation under hitherto conceded reserved powers. In Volume II of his great work on American civilization, Beard wrote:

By a few words skillfully chosen *every act of every state and local government which* touched adversely the rights of persons and property was made subject to review and liable to amendment by the Supreme Court at Washington, appointed by the President and Senate for life and far removed from local dealings and prejudices . . . . Thus, the triumphant Republican minority, in possession of the federal government, and the military power, under the sanction of constitutional forms, subdued the states for all time to the unlimited jurisdiction of the federal Supreme Court . . . .

The late Professor Louis B. Boudin, author of the two volume *Government by Judiciary*, rejected Beard's "cabal version" of the due process grab. In an article for the *New York University Law Review* in 1936, entitled "Truth and Fiction About the Fourteenth Amendment," Boudin attributes the revolution to both Democratic judges and Republican appointees, each anxious to protect, by judicial action, invested capital; the united Republicans in the new reconstructed South; the Democrats; and the national economy elsewhere.

Having failed in the *Slaughter House* cases, Justice Field, who dissented in *Munn v. Illinois*, turned to due process, which Boudin writes "had hitherto gone practically unnoticed and was therefore *tabula rasa*, or the empty tablet, *into which the Supreme Court could write* (House of Lords). The Constitution's separation of powers schema was completely different: "The reasons on which Montesquieu grounds his maxim, are a further demonstration of his meaning. 'When the legislative and executive powers are united, in the same person or body,' . . . 'there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.' Again, 'were the power of judging joined with the legislative, the life, and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.'" HAMILTON, MADISON, & JAY, *The Federalist* 247 (Beloff ed. 1948). Only separation of "review" kept these powers apart.

60. 1d. at 114 (emphasis author's).
anything it pleased.” Boudin continues:

He, therefore, dissented from the decision of the majority in the Munn Case and in his dissenting opinion sought to give the “due process” clause a revolutionary meaning, by making that clause perform the service which the majority of the Supreme Court had said could not be performed by the “privileges and immunities” clause.

His first attempt, like the attempt in the Slaughter House, was a failure. But in the course of the next twenty years, with the passage of time and change of personnel of the Supreme Court, he succeeded in carrying this revolution to a successful conclusion with the result that the Supreme Court now is the arbiter of “the whole range of our national economy.”

Boudin’s version is not gainsaid by the judicial vita of the 1890 Court, which discovered that only they (not Congress and the states) were due process of law:

Justice Field
(1863-1897) A Nominee of the owner of the Central Pacific Railroad.

Justice Fuller

Justice Brewer
(1889-1910) Nephew of Justice Field. As a judge he refused to be bound by Munn v. Illinois. He held forty-one percent of the police power laws reviewed as Supreme Court Judge unconstitutional.

Justice Brown
(1890-1906) Railroad Attorney

Justice Shiras
(1892-1903) Attorney for the B. & O. R.R.

Howell Jackson
(1893-1895) Railroad Attorney

Rufus William Packham

The prestigious Dean Edwin S. Corwin, not content with arguable muckracking, attributed America’s “law of the land” revolution to a

63. Boudin, supra note 19, at 77.

64. A perspicacious remark of Justice Miller, author of the Slaughter House (supra note 24) and the Davidson decisions (supra note 17), is quoted in Bates, THE STORY OF THE SUPREME COURT 120 ( ): “It is vain to contend the Judges who have been, at the bar, the advocates of railroad companies and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest all their training, all their feelings are from the start, in favor of those who need no such influence.”
new play of Lord Coke's great Seventeenth Century struggle to harness the King to law.\textsuperscript{65} Recalling in nineteen hundred and nine Lord Coke's way of "borrowing phrases" for sixteen hundred and eight, Corwin warned:

The truth is that the moment the court in its interpretation of the 14th 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.\textsuperscript{66}

Oh, but it is worse! For Lord Coke, Seventeenth Century due process of law consisted of judicial restraint, static precedent, or the respect for binding tradition. Due process in America became instead an escape from a written constitution, a mandate for change.

Coke used "law of the land" to harness the King. The Supreme Court used the concept to become one.

It was once settled doctrine that the Supreme Court in reviewing the constitutionality of state legislation in reserved or police matters, such as health, safety, or crime could ask only if the questioned act bore a relationship to power.\textsuperscript{67} The Court would rule only if the state had the power and not whether its exercise there was wise, fool-

\textsuperscript{65} Corwin, supra note 12.

\textsuperscript{66} Corwin, The Supreme Court and the Fourteenth Amendment, 7 Mich. L. Rev. 643, 670 (1909): "By 'law of the land' Coke and his associates means apparently merely such way of proceeding on the part of the monarch, when moving against individuals, as the law, whether ancient custom, the common law, or statute, ordained and established. But now the source of the guaranty that the monarch should thus proceed was Magna Carta. It, therefore, behooved the parliamentarians to exalt Magna Carta as much as possible, or, to quote Sir Benjamin Rudyard, to make 'that good old decrpt Law of Magna Carta, which hath been so long kept in and bedridden, as it were . . . walk abroad again.'" Corwin, supra note 12, at 369. See Lyon and Block, supra note 5; on the relationship between due process and the per legem terram, see Edward Jenks, The Myth of Magna Carta, INDEPENDENT REV. (1904); 447-2 Kent. Comm. 2d 13; Story Comm. 4 Ed. § 1789; Cooly Const. Lin. 2d Ed. § 351.

\textsuperscript{67} Marshall's predecessor as court chief, Justice Iredell, had also claimed constitutional court power to void acts of legislatures, though he added in Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798): "I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."
ish or arbitrary. After new due process, the question became the rate one. Is the questioned act rational, capricious, arbitrary, invidious, or offensive to various natural justice formulae nowhere to be found in the document? After 1890, case controversy and constitutional dispute would become "but a pretext," (to quote a phrase) from among their honors' lavish calendar of hundreds, later thousands, of discretion options. As one of the dissenting

Even Marshall's successor, Justice Taney (author of the Dred Scott decision, supra note 9), seemed clear enough about state power prerogatives. "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions . . . . And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.

Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power. License Cases, 46 U.S. (5 How.) 504, 583 (1847).

68. "The ideas of natural justice are regulated by no fixed standard. The ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." Justice Iredell, concurring in Calder v. Bull, supra note 67, at 396.

69. "[T]here was at one time a line of cases holding 'reasonableness' as the court saw it to be the test of a due process violation . . . The Ferguson case [Ferguson v. Skrupa, 72 U.S. 726 (1963)] totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they 'shock the conscience' or that they are 'unreasonable,' 'arbitrary,' 'irrational,' 'contrary to fundamental' or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like." Black, J. dissenting in Tinker v. Des Moines School District, supra note 20, at 519, holding unconstitutional an Iowa School District regulation banning the wearing of armbands. The date: 1969.

70. Chief Justice Marshall in McCulloch v. Maryland, supra note 7, spoke of the "painful duty" of the court to declare that a legislative act was not the law of the land where Congress under "the pretext" of executing its powers passed laws for the accomplishment of objects not entrusted to government. The modern trend is to relax the court's own jurisdictional requirement that they decide any genuine cases of parties having proper standing. Flast v. Cohen, 392 U.S. 831 (1968), provides an interesting contrast in pretexts. For the art of pretexting by "finding" good constitutional cases see Voses, Litigation as a Form of Pressure Group Activity, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 314 (1958).

71. Supra note 47.

72. See The Business of the Supreme Court, 51-81 HARV. L. REV. (1937-1968). This analysis of Supreme Court statistics published in the HARVARD LAW REVIEW provides interesting data. Since 1937, the Supreme Court's discretionary jurisdiction
judges had put it in the *Dred Scott* decision, or the time the Federal court became due process over Congress: "Why confine our view to colored slavery?"\(^{23}\)

In the first thirty years, between 1888 and 1918, approximately seven hundred twenty-five cases were decided under the fourteenth amendment Due Process Clause.\(^{24}\) That amendment, and primarily that clause, was the reason to declare two hundred thirty-two state police power statutes unconstitutional between 1879 and 1938.\(^{25}\)

Charles Evans Hughes, later Chief Justice, could say by 1907, "[W]e are under a Constitution but the Constitution is what the judges say it is."\(^{76}\)

It is to be noted that once due process became severed from "state laws," then it and its brother, "equal protection of the laws," could\(^{77}\) and would be defined without reference to race at all, a disquieting analysis which, in color cases anyway, explains why the nineteen forties' discovery that the Constitution forbade states from racial discrimination seems but a poke\(^{78}\) in between an "old" 1895 equal

had remained a constant 50 percent. Petition figures went from 873 (1937) to 2,323 (1967); cert. granted averaged an eighteen percent basis (1927-1967): In 1937, 1,004 cases were disposed of by denial of cert.: order memorandum decision or opinion. In 1967 the figure was 2,946; from 1957 to 1967, representing a ten year average the court disposed in written opinion an average of from one ninety to one hundred five cases. Whole number due process statistics would be misleading in so far as much of due process, *i.e.* the Bill of Rights in state courts, is not classed due process there.

73. *Supra* note 9, at 538.

74. *Bates, supra* note 64, at 205.

75. State cases are collected in *Corwin, The Constitution of the United States, Analysis & Interpretations* (1964).


78. As the high court put it in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1968): "Likewise the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory we have never been confined to historic notions of equality any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights."

protection, forbidding Plessy v. Ferguson's "non-rational" discrimination, and a latter day saint's "new" equal protection forbidding invidious ones, including, by this time, some state action race bias.

79. Supra note 54. Justice Harlan, dissenting in Plessy, wrote: "In my opinion the judgment rendered this day will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case." Plessy v. Ferguson, supra note 54, at 559.

Indeed, the majority opinion was a Dred Scott due process inquiry; not whether separate was equal (true fourteenth) but whether separate but equal was reasonable (due process).

The majority opinion read: "So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the Legislature." Plessy v. Ferguson, supra note 54, at 550.

This is not the inquiry intended by the fourteenth amendment promise of equal state substantive law, but is instead a version of due process of law.

80. "New" equal protection began its creep in Skinner v. Oklahoma, 316 U.S. 535 (1942), where, on equal protection grounds the court invalidated Oklahoma's law providing for sterilization of multiple offenders but exempting political offenses.

An even broader statute applicable to misfits had been sustained from due process challenge in Buck v. Bell, 274 U.S. 200 (1927), Mr. Justice Holmes dismissing the equal protection contentions there as "the usual last resort of constitutional arguments..." Id. at 208. In Skinner, supra, Justice Douglas warned that legislation involving "basic rights" or "basic liberties" would receive strict scrutiny of any classification which the state makes "lest unwittingly or otherwise invidious discriminations are made against groups of individuals in violation of the constitutional guaranty of just and equal laws" Skinner, supra, at 541 (emphasis author's).

Old equal protection forbade states only from discriminatory legislation without "any reasonable basis or purely arbitrary." One who assailed the classification carried the burden of proof. After Skinner certain "suspect" criteria affecting "fundamental rights" (applicable to the states by the Due Process Clause) would be held to deny equal protection unless the legislation was shown to be justified by a compelling state interest. See Shapiro v. Thompson, 394 U.S. 618 (1969).

In December, 1970 the Supreme Court upheld in United States v. Arizona, the 1970 Voting Rights Act giving 18 year olds the vote in states for national elections (Art. I, sect. 4 and Necessary and Proper); a "floating majority" found no power in Congressional Section 5 to alter state qualification to implement 14th amendment protection. [Even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise, Black, J. 39 U.S.L.W. 4029 (Dec. 22, 1970)]: The dissenters found congressional power to enact in state elections the right to vote by application of a Due Process version of Equal Protection, i.e., did Congress have a rational basis for its finding? Justice Douglas added a scholarly appendix listing cases where state statutes were struck under the Equal Protection Clause on different grounds than race. His headings were: Statutes Which Discriminated Against Certain Businesses; Indigents; Favored Certain Business; Taxing Statutes; Treatment of Convicted Criminals; Legitimacy and Aliens (to which he might have added the controversial political apportionment cases, Baker v. Carr, supra, note 23, and his own opinion in Skinner): See Karat, Invidious Discriminations, Justice Douglas and the Return of the Natural Law Due Process Formula, 16 U.C.L.A. L. Rev. 716 (1969). The opinions of Brennan, White and Marshall, 39 USLW 4067 (Dec. 22, 1970) are clear enough. "Although it once was thought that equal protection required only that a given legislative classification once made, be evenly applied, see Hayes v. Missouri, 120 U.S. 68, 71 (1887), for
Neither the "new" nor the "old" equal protection standard was mentioned or envisioned by the document. Both, in fact, represent a **Haut Pas of substantive due process**, 81 railroad vintage.

In 1970, *per legem terram* is whatever the Supreme Court forbids or compels in substance82 and procedure by *cert.* discretion in case

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81. Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights, 80 HARV. L. REV. 91 (1966)* put it just about right, "Once loosed, the idea of equality is not easily cabined." See *Bolling v. Shapre*, 347 U.S. 497 (1954) where the Due Process Clause of the fifth amendment was used to desegregate by court order Washington, D. C. schools (because D. C. is not a state the equal protection clause was inapplicable). "The concepts of equal protection and due process are not mutually exclusive; the equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law and therefore we do not imply that the two are always interchangeable phrases." *Bolling, supra*, at 499; compare *equal protection (1890-1949)* with *current economic due process (1940-present)* or *economic due process, (1890-1935)* with today's active equal protection banning chilling discrimination unredeemed by a compelling state governmental interest, *e.g.* *Levy v. Louisiana*, 391 U.S. 68 (1968).

Mr. Justice Harlan, a federalist, sees the current trend for what it is. In *Williams v. Illinois*, 399 U.S. 235, 259 (1970), he states in a concurring opinion: "The 'equal protection' analysis of the Court is, I submit, a 'wolf in sheep's clothing,' for that rationale is no more than a masquerade of a supposedly objective standard for subreddit judicial judgment as to what state legislation offends notions of 'fundamental fairness.' Under the rubric of 'equal protection' this Court has in recent times effectively substituted its own 'enlightened' social philosophy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of 'substantive' due process."

82. Due process requires all state and federal legislation to be non-capricious, non-arbitrary, and non-offensive to undefined "liberty" and fundamentals implicit in the phrase; it forbids acts, practices, rules and regulations whose vagueness, overbreadth or tendency to chill the exercise of valued constitutional rights such as pure, mixed and symbolic speech, press, association, privacy, religion, travel, assembly, or silence violate fundamental fairness. See *Civil Disabilities and the First Amendment, 78 YALE L.J. (1968)*. Due process *commands* in state courts the first eight amendments in a watered down, bi-level or same-breadth construction as in federal courts. The late Justice Frankfurter, at a 1958 assembly of British university heads gathered in the courtroom of the Supreme Court put it all together this way: "Nevertheless, the ultimate justification for nullifying or saying that what Congress did, what the President did, what the legislature of Massachusetts or New York or any other state did was beyond its power, is that provision of the Constitution which protects liberty against infringement without due process of law. There
and controversy.\textsuperscript{83} It happened on the day when “due process of law” became instead “due process of courts.”

are times, I can assure you—more times than once or twice—when I sit in this chair and wonder whether that isn’t too great a power to give to any nine men, no matter how wise, how well disciplined, how disinterested. It covers the whole gamut of political, social, and economic activities.” \textsc{Frankfurter, Of Law \& Life \& Other Things That Matter} 129 (1965).

83. Due process describes undefined fifth amendment procedures required in criminal or quasi-criminal proceedings of Congress such as immigration, employment, or civil commitment. Students frequently ask what happened to fourteenth amendment procedural due process in state cases, once that phrase incorporated specific federal procedures like the fourth, fifth, or sixth amendment rights. The answer is: nothing much. Procedural due process requires of states only “fundamentals” from time to time, such as, for example, counsel in capital cases, \textit{e.g.}, \textit{Powell v. Alabama}, 287 U.S. 45 (1932).

Balanced juries, fair line-ups (1969), or forums to litigate constitutional rights, continue irrespective of a specific incorporated Bill of Rights. This procedural due process related to the court majority’s conceptions of fundamental fairness continues (perhaps in camel-nose fashion) to include and exclude \textit{(a la Davidson v. New Orleans, \textsc{supra} note 17)}. For all 50 states uniform court rules and procedures for juveniles \textit{in re Gault}, 387 U.S. 1 (1966), employment, or welfare proceedings, where fact finding ought to be accompanied by a most fundamental requisite of due process, the opportunity to be heard. See \textit{Goldberg v. Kelly}, 397 U.S. 254 (1970) (public assistance revocation hearings). Substance and procedure merge in school cases where a student is expelled for violating unreasonable rules.

\textit{Original} due process was to be dynamic, bold, capable of progress, change and refinement too. But as \textit{Hurtado v. California, \textsc{supra} note 5}, at 534, pointed out, “\textit{Judge Miller in Davidson, says, however, \textquoteleft\textquoteleft It is not possible to hold that a party has, without due process \ldots, been deprived of his property, when, as regards the issues affecting it, he has by the \textit{laws of the State} a fair trial \ldots\textquoteright\textquoteright}” (emphasis author’s) \textit{Accord, Ex Parte Wall}, 107 U.S. 265, 266 (1882). “\textit{But the action of the court in cases within its jurisdiction is due process of law.}” \textit{Id.}, at 288. \textit{Hurtado} continues: “Due process of law in the latter \textit{(Fifth Amendment)} refers to that law of the land which derives its authority from the legislative powers conferred upon congress. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers \textit{of the State}.” (emphasis author’s) “The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities \ldots may exist in two States separated only by an imaginary line. On one side of the line there may be a right to a trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding.” \textit{Missouri v. Lewis, \textsc{supra} note 2}, at 31.

What a world of difference between the dynamics of fifty possibly different state procedures; (federalism was a safe experiment) and one fifty-state constitutional model \textit{which will change only if court personnel are willing to forego \textquoteleft\textquoteleft strict construction.	extquoteright\textquoteright} \textit{Hurtado} said that if a proceeding followed usages of England and this country it was due process: “[\textit{B}ut it by no means follows that nothing else can be due process of law \ldots To hold that such a characteristic is essential to due process of law would be to deny every quality of the law but its age and to render it incapable of improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.” \textit{Supra} note 5, at 528-29. Reasonable men could differ on which characteristic would be most like the law of the
At first per legem terram required states to honor glorious Rosseau bromides about fundamental liberties or the “spirit of a writing.” In a while, states were forbidden to abridge, without court sanction, ‘implicit liberties,’ some specified phrases, from federal amend-

Medes, the due process of fifty state procedures changeable by their law and legislation or a one nation due process, uniform because constitutional, and constitutional because our countrymen preferred in 1787 and in 1968 to put some fundamental things in a writing amendable by the people. Query: Why aren't state laws that provide “inadequate” fact finding procedures in relief cases due process? States have courts and constitutions.

84. Allgeyer v. Louisiana, 165 U.S. 578 (1897), spoke not merely of the physical liberty of the person (corporation), but of liberty to be free in the employment of the his faculties, livelihood, including liberty of contract necessary, proper or essential to his carrying out to a successful conclusion these purposes . . . above mentioned, id. at 589; the 1905 Lochner v. New York decision, 198 U.S. 45 (1905), is the most famous of the liberty of contract cases forbidding wage and hour regulation. By 1937 when the High Court discovered that the Constitution does not speak of liberty of contract (the Court having in the interim voided both state and federal labor statutes with due process), there were other newer liberties, like free speech, press, religion and assembly for the now new due process. The change in the constitutional emphasis through due process justice is best illustrated by comparing two assembly or speech-plus cases. In Truax v. Corrigan, 257 U.S. 312 (1921), Justice Taft wrote that the “fundamental principles of right and justice” or the guarantee that due process in the fourteenth amendment was “intended to preserve,” commanded the issuance of a state injunction sought by a property owner to enjoin peaceful picketing at his place of business. Nineteen years later, in 1940, the same conduct, measured by the same phrase in the same amendment, but at the hands of a different majority, did not command, but for bade constitutional relief or remedy, A.F. of L. v. Swing, 312 U.S. 321. The change is one of value emphasis from personal economy to individual liberty. Due process makes either easy.

85. LOUIS BOUDIN, author of the two-volume GOVERNMENT BY JUDICIARY, wrote bitterly in 1937: “When did this liberty get into the Constitution? . . . [W]e infused into the old words the new spirit of extreme individualism and now we declare legislation unconstitutional on the grounds that it is repugnant to this spirit . . . . The ‘spirit of the Constitution,' the ‘spirit of our institutions' and the ‘principles of our government’ which are now used as criteria of constitutionality are in themselves empty phrases into which not only each generation but each individual puts a different context according to his own philosophical, political and social principles.” See Warren, The New “Liberty” Under the Fourteenth Amendment, 39 HARV. L. REV. 431 (1925).

It is interesting to note that by 1924 both Felix Frankfurter (then a Professor) and Senator LaFollette advocated abolition of the due process clause. See, Shall Due Process of Law be Abolished, 58 AM. L. REV. 290 (1924).

86. The first judicial amendment to the Constitution took place in 1897. In that year the Supreme Court defined a new due process to mean or “incorporate” a fifth amendment phrase: “Nor shall property be taken for a public use without just compensation.” U.S. CONST. amend. V.

The process of reading into one amendment the restrictions of other ones is called “incorporating into due process selected phrases and amendments.” Once any clause becomes incorporated: (1) The Supreme Court obtains new jurisdiction to review all state cases relating to the rights incorporated. (2) All state courts, or
ments, later the whole of the forms87 once enacted to protect states power.

From state cases in construction of the due process clause of the fourteenth amendment came Mutatis Mutandis and a bootstrap "precedent" for the same look at the substance of things in due process review of law-making by Congress.88

It was simple. Two things, we are told, equal to the same thing, are equal to each other. The fifth amendment had, from conception, been applicable to the Federal Government. The fourteenth amendment was about states. Both used the same phrase, due process every town in America, must respect on a uniform basis the Supreme Court's construction from time to time of the content, meaning, emanations and penumbra of the subject area.

87. The incorporation to states' raison d' être did not come until twelve years after the first amendment speech guarantee was casually incorporated as another fundamental liberty of due process in Gitlow v. New York, 268 U.S. 652 (1925). Charles Warren, in that year, predicted that the Bar would eventually include into due process the whole Bill of Rights, adding: "The World Liberty seemed an especially convenient vehicle into which to pack all kinds of rights." WARREN, supra note 85 at 439.

In 1937 Justice Cardozo described this strange pursuit in Palko v. Connecticut, 302 U.S. 319 (1937): "Whatever would be a violation of the original Bill of Rights (amendments I to VIII) if done by the federal government is now unlawful by force of the Fourteenth Amendment if done by a state." Id. at 323.

Cardozo refused to accept total incorporation of the Bill of Rights. His task was to sweeten a track record of 1897 vintage. Only those Bill of Rights provisions "rooted in the tradition and conscience of our people" would be made binding on states. In affirming a state conviction for murder over the claim that by two trials the state of Connecticut had placed the defendant twice in jeopardy for the same offense he asked: "Is that kind of double jeopardy to which the statute has subject him a hardship so acute and shocking that our policy will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" Id. at 328.

Cardozo said of double jeopardy, "NO." That was in 1937. Double jeopardy was incorporated in 1969. Benton v. Maryland, 395 U.S. 784 (1969). One could become distracted in wondrous thought why double jeopardy was not at the base of all our civil and political institutions in 1937 or 1967 but became so in 1969.

88. Osmond K. Fraenkel, a standard-form liberal of the day, wrote in the Nation (July 10, 1939): "The current conception of due process has caused more havoc than has any other constitutional doctrine. It has doomed workmen's compensation, minimum wages, regulation of the hours of labor, regulation of various kinds of businesses, the establishment of railroad pensions, and a great variety of taxes. It is time the original meaning of the phrase, a purely procedural one, be restored."

A leisurely review of the Readers' Guide to Legal Periodicals from 1934 to 1937 contains provocative thoughts by most respectable authorities for more civilized methods to curtail due process review veto by life appointees of term presidents than the English Commons threat in the nineteenth century (packing the House of Lords) or Roosevelt's plans of 1936 to pack the court. See Clark, Some Recent Proposals for Constitutional Amendment, 12 Wis. L. Rev. 313 (1937).
of law, didn't they!  

Contemporaneous with plain due process in state cases came new radical "tradition" to the phrase. The right to "just compensation" for a state's taking private property pursuant to their laws and constitutions (as the Supreme Court would henceforth "review"), was the first clause from the Federal Bill of Rights amendments merged by the 1897 "railroad court" into due process and made applicable to states per order of judges. Later, "due process," not formal amendment to the Constitution would, for all states, describe from time to time a first amendment, a fourth amendment (as a majority would

89. Due process nearly killed the New Deal. Justices McReynolds, Sutherland, Butler, and Van Devanter would see to that. These undistinguished jurists formed the conservative nucleus which, from 1934 to 1936, killed, in the midst of a great depression, the National Recovery Act, Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); the Agricultural Adjustment Act, U.S. v. Butler, 297 U.S. 1 (1935); and the Guffey Coal Bill, Carter v. Carter Coal Co., 298 U.S. 238 (1936). McReynolds was appointed in 1914, Van Devanter in 1910, and the other two in 1922.

One commentator wrote recently about that court: "So similar did the court consider these due process clauses, however, that when it came to abandon 'economic due process' it casually overruled a federal case arising under the 14th without any apparent awareness that two separate constitutional clauses were involved."

90. In the case of Chicago, B. & Q. R.R. v. Chicago, supra note 22, the City of Chicago condemned a railroad right-of-way in order to widen a public street. Defendant received old due process notice and opportunity to be heard at the condemnation hearing. The Illinois Constitution required the payment of compensation for the taking of property for public uses. The jury awarded the railroad $1.00. Not satisfied with the award in the state court, the railroad appealed to the United States Supreme Court, and there sought a determination of: "The circumstances under which the final judgment of the highest court of a state in a proceeding instituted to condemn such property for public use may be reviewed by this court." Chicago, B. & Q. R.R. v. Chicago, supra note 22, at 223. And the answer from the high bench: "In determining what is due process of law regard must be had to substance not to form . . . . The requirement that the property shall not be taken for a public use without just compensation is but an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity and is laid down by jurists as a principle of universal law." Chicago, B. & Q. R.R. v. Chicago, supra note 22, at 234.

Only 20 years before, in Davidson v. New Orleans, supra note 17, an orthodox Supreme Court had under old due process written: "It may violate some provisions of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraint on the states in that regard, if private property be taken for public use without just compensation, it must be remembered that when the Fourteenth Amendment was adopted the provision in that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out and this was taken." Davidson v. New Orleans, supra note 17, at 105.

The effrontery of it all. The Davidson decision, overruled by the first Bill of Rights incorporated to states is the authority most often cited to make applicable by "judicial inclusion" the rest of them.


The prestigious Dean Warren in an article entitled The New "Liberty" Under the
The Bill of Rights, restricting only the Federal Government, would become, by due process "case and controversy" selectively adapted, adopted or incorporated to state courts sometimes on a single vote plurality basis, though always including in the delicate mandate of ultimate incorporation inner and outer discretionary review jurisdiction, emanations, penumbra, rules, incidental emanations, or new due

Fourteenth Amendment, supra note 87, pointed out that the right of freedom of speech was a less fundamental part of a person's liberty than many other "rights," such as, religion, bearing arms (the second amendment), or search and seizure. He continued: "This historical fact makes it all the more clear, therefore, that if any right contained in the Bill of Rights is to be regarded as a part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment, on the ground of its being 'fundamental,' then certainly all the rights which were considered by the States prior to 1787 as 'fundamental' must be similarly protected." Warren, supra note 87, at 461. In forty-five years Warren was right sans "more fundamental" right to bear arms.

92. Wolf v. Colorado, 338 U.S. 25 (1949). It is noteworthy to contrast the two great protagonists of whether due process incorporated to states a total gulped version of the fourth amendment or merely a tepid-sipped "adapted" version. Both Black and Frankfurter each opposed the other's position for just the same reason. Black, concurring in Rochin v. California, 342 U.S. 165 (1951), but favoring in state cases a rule of reason, just as in federal cases, complained of the prevailing standard (1949-1961) in state cases: "The majority emphasize that these statements do not refer to their own consciences or to their senses of justice and decency. For we are told that 'we may not draw on our merely personal and private notions ....' If the Due Process Clause does vest this Court with such unlimited power to invalidate law, I am still in doubt as to why we should consider only the notions of English speaking people to determine what are immutable and fundamental principles of justice." Id. at 175-76.

Frankfurter, dissenting in Elkins v. United States, 364 U.S. 206 (1960), but opposed to incorporation, wrote: "The division in this Court over the years regarding what is and what is not to be deemed an unreasonable search within the meaning of the Fourth Amendment and the shifting views of members of the Court in this regard, prove that in evolving the meaning of the Fourth Amendment the decisions of this Court have frequently turned on dialectical niceties and have not reflected those fundamental considerations of civilized conduct on which applications of the Due Process Clause turn.

What the Court now decides is that these variegated judgments, these fluctuating and uncertain views of what constitutes an 'unreasonable search' under the Fourth Amendment in conduct by federal officials, are to determine whether what is done by state police, wholly beyond federal supervision, violates the Due Process clause." Id. at 239. Were they both right?

process umbrellas. The fifth amendment privileges against self-incrimination for example, was applicable to the Federal Government and in Federal courts only by the Constitution of 1787.

After the passage of the fourteenth amendment, it was in company with the other Bill of Rights, held repeatedly not required or applicable in state courts. After the grab the privilege was held by the


Every violation of a Constitutional decision is deemed grounds for reversal unless the state proposes it to have been harmless beyond a reasonable doubt, etc. From the Code of Constitutional Procedures, enacted for State Courts by the United States Supreme Court in construction of due process of law.

95. "... [N]or shall any person be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

96. Of the four states (New Jersey, New York, Georgia, and South Carolina) that did not preface their constitutions with a separate bill of rights, none secured the right against self-incrimination. See Levy, Origins of the Fifth Amendment 405-522 (1968). Barron v. Baltimore, supra note 22; 8 Wigmore on Evidence 2250 (1940). The Ordinance for the government of the Northwest Territory did not include the privilege. An Act to provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 stat. 50-53.

97. "[The] first ten articles of Amendment were not intended to limit the powers of state government ..." Spies v. Illinois, 123 U.S. 13, 166 (1887).

"[T]he first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the States ..." Eilenbacker v. Plymouth County, 134 U.S. 31, 34 (1890).

"The first Ten Amendments . . . contain no restrictions on the powers of the
Supreme Court not applicable to states because not "rooted or fundamental." That was 1908. Thirty years later a court of Holmes, Brandeis and Cardozo wrote that self-incrimination was "not fundamental" under "settled" constitutional law. Ten years later, Frankfurter would write, this time in a 5-4 decision, that the matter under the due process clause was "closed," and then in 1964, whoops, by one single vote, "fundamental," binding in all respects on all courts, thereafter, as any five should view, i.e., Miranda et seq.


"This court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal Courts . . . ." Bolin v. Nebraska, 176 U.S. 83, 88 (1900).

"It is well established that the first eight articles of the amendments . . . have reference to powers exercised by the government of the United States, and not to those of the States." Lloyd v. Dollison, 194 U.S. 445, 447 (1904).

"After exhaustive consideration of the subject, this Court has decided that the Fourteenth . . . does not, through its due process clause or otherwise, have the effect of requiring the several states to conform . . . to the precise procedure of the federal courts . . . or Bill of Rights." Bute v. Illinois, 333 U.S. 640, 656 (1948).

"We have held from the beginning and uniformly that the Due Process Clause of the Fourteenth Amendment does not apply to the states any of the provisions of the first Eight Amendments as such."

"The relevant historical materials have been canvassed by this Court and by legal scholars. These materials demonstrate conclusively that Congress and the members of the legislatures of the ratifying States did not contemplate that the Fourteenth Amendment was a short-hand incorporation of the first eight amendments making them applicable as explicit restrictions upon the States." Bartkus v. Illinois, 359 U.S. 121, 124 (1958).

98. Twining v. New Jersey, 211 U.S. 81 (1908). "If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands." Id. at 114.

99. "What is true of jury trials and indictments is true also, as the cases show, of the immunity from compulsory self-incrimination." Twining v. New Jersey, supra note 98. "This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether." Palko v. Connecticut, supra note 86, at 325-26.

100. Wolf v. Colorado, 338 U.S. 25, 29 (1949). "The notion that the 'due process of Law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. See e.g. Hurtado v. California, 110 U.S. 516; Twining v. New Jersey, 211 U.S. 78; Brown v. Mississippi, 297 U.S. 278; Palko v. Connecticut, 302 U.S. 319. Only the other day the court reaffirmed this rejection after thorough reexamination of the scope and function of the Due Process Clause of the fourteenth amendment. Adamson v. California, 332 U.S. 46. The issue is closed."

101. Malloy v. Hogan, supra note 93. Every single case cited as "authority" by Frankfurter, to demonstrate the "closed" issue was overruled by the Warren Court; Hurtado v. California, supra note 5, was overruled by Duncan v. Louisiana,
The witness privilege of freedom from self-incrimination, "a symbol of America," which stirs our hearts,\textsuperscript{103} had become five to four, "one of the principles of a free government."

No amount of chutzpah about relevance "evolution" or modernism in construction of a modest document allocating powers and setting out amending procedures can gloss in adverbial bustle roots of five, but power to overrule millions in construction of just about anything at all\textsuperscript{104} implicit to an ordered liberty of due process.

\textsuperscript{102} GRIZWOLD, THE FIFTH AMENDMENT TODAY 73 (1955); Malloy v. Hogan, supra note 93, at 9.

\textsuperscript{103} Malloy v. Hogan, supra note 93. "In thus returning to the Boyd view that the privilege is one of the 'principles of a free government,' 116 U.S. at 632, \textit{Mapp} necessarily repudiated the \textit{Twining} concept of the privilege as a mere rule of evidence. . . ." Malloy v. Hogan, supra note 93, at 9.

The \textit{Mapp} decision was an extension of Wolf v. Colorado, supra note 100, which incorporated to the states the fourth amendment. At least the 1964 \textit{Malloy} Court acknowledged the root of the branch or "where it's all at, so to speak." " . . . [T]he view which has thus far prevailed dates from the decision in 1897 in Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 [supra note 22], which held that the Due Process Clause requires the States to pay just compensation for private property taken for public use." Malloy v. Hogan, supra note 93, at 4.

\textsuperscript{104} Malloy v. Hogan, supra note 93, at 9. See, e.g., Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) "As we discuss below, we believe that the due process clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests . . . . We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the 'liberty' assurance of the Due Process Clause, requiring a 'compelling' showing by the state before it may be impaired. Yet 'liberty' seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability to enjoy their liberty. As the court stated in Union Pacific Railway v. Botsford, 141 U.S. 250, 251 (1891), 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law' . . . ." Id. at 1285.

For more on the thicket to due process, hair, moustaches, black berets [Hernandez v. School Dist. No. 1, 315 F. Supp. 289 (D. Colo. 1970)], or freedom buttons [Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966)] rights implicit to about half the
The Constitution was not about implicit liberty, ordered by the Third Branch of government. It was about the powers of others to legislate and to govern.105 An implicit constitution is an Honorable Lie.

In Lord Coke's day, supremacy of one King over most men had been overcome by his vision of a fundamental law higher than all men. In poetic irony, a democracy of most men was overruled by fundamental law determined by five to nine men cum tenure sans election. In 1890 there occurred misconstruction by the worst Court in American History. The Constitution then became “flexible,” for when interpreter became lawmaker, procedure became substance; all had become the Judges. Indeed in Per Legem Terram, a Review Mandate stolen by the Barons, but relished by every court thereafter lies Revolutionary Truth. In ten years, the demise of Union apportioned by Constitution, the Death of E Pluribus Unum.

Federal District Court's judges which have ruled on them in the last few years see Goldstein, The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis 117 U. Pa. L. Rev. 373 (1969).

The recent areas of “constitutional” dimension seem more centered on the men than the law. In recent cases two judges ruled pro and con long hair; both were members of the same district court, each used due process, but only one saw David's right to shoulder length lifestyle as implicit to the concept of ordered liberty. See Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1970). Perhaps it is time to amend the Constitution to define the phrase.

The most interesting of the due process amendments proposed yesterday was made by the late Dean Clark of the Yale Law School. SR-3 in the 74th Congress 1st Session 1936 reads: “Due process of law provisions of the 5th and 14th amendments to this Constitution shall have reference only to the requirements that every person in any manner aggrieved by an act of another shall be entitled to a fair and impartial trial or hearing and adjudication if his grievance according to the recognized processes of law.”

105. In the author's opinion the better solution to the problems posed by a subjective, personal, due process lacking genuine historicity and bench marks is to rescue the judges from their onerous mandate where Congress or the states have duly enacted legislative laws of due process.

An amendment then would simply provide that the phrase shall refer to procedures according to the laws of Congress or the states. This would not affect Bill of Rights specifics, (amend. 1-8) or required in Federal courts, nor would it necessarily forbid interum court Due Process Common Law. The amendment would however, make it clear and explicit that in Constitutional supremacy terms laws enacted by Constitutional law makers shall be due process of law.
APPENDIX A*

**Comparison of Supreme Court Justices with Legislators**

Only protection from institutional oppression can justify appointed judges as due process supreme law makers in a voting democracy or republic. On a checks or balance basis the Supreme Court judges, as per chart may demonstrate, fare rather badly in comparison with elected legislators of Congress or the states.

<table>
<thead>
<tr>
<th>Supreme Court Justice</th>
<th>State or Federal Legislator</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Appointing Agency</strong></td>
<td>Term president with Senate approval</td>
</tr>
<tr>
<td><strong>Vesting Process</strong></td>
<td>Term President's nomination and Senate vote</td>
</tr>
<tr>
<td><strong>Platform</strong></td>
<td>Senate hearings prior to approval</td>
</tr>
<tr>
<td><strong>Inventory</strong></td>
<td>A couple of thousand cert. options a term</td>
</tr>
<tr>
<td><strong>Legislative Visibility Level</strong></td>
<td>Partisan cases, written briefs and oral arguments; Amicus Curiae; law clerks, law reviews, cases, and the man himself</td>
</tr>
<tr>
<td><strong>Change of Law</strong></td>
<td>Cases appealing to disobedience of prior law</td>
</tr>
<tr>
<td><strong>Prior Experience</strong></td>
<td>If judge's experience was legislative, he is suspect as &quot;political.&quot; If it was judicial, it is not particularly relevant to legislating due process at a Supreme Court level.</td>
</tr>
<tr>
<td><strong>Term</strong></td>
<td>Life</td>
</tr>
<tr>
<td><strong>Recall</strong></td>
<td>Senate impeachment</td>
</tr>
<tr>
<td><strong>Settled Criteria for Appointment</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Predictable Term of Service</strong></td>
<td>None</td>
</tr>
<tr>
<td><strong>Number</strong></td>
<td>Nine (5)</td>
</tr>
</tbody>
</table>
APPENDIX B*

PROPOSED CONSTITUTIONAL AMENDMENT

XXVI

DUE PROCESS OF LAW SHALL, WHEN USED IN THE CONSTITUTION, REFER ONLY TO NOTICE, PROCEDURES, HEARINGS OR TRIALS ACCORDING TO THE LAWS OF CONGRESS OR THE STATES RESPECTIVELY, EXCEPT AND PROVIDED THAT THIS AMENDMENT SHALL NOT BE CONSTRUED TO DENY OR ABRIDGE IN FEDERAL COURTS RIGHTS OR PROCEDURES REQUIRED BY AMENDMENTS I TO VIII (THE BILL OF RIGHTS).

The great question which, in all ages, has disturbed mankind and brought on them the greatest part of those mischiefs which have ruined cities, depopulated countries and disordered the peace of the world, has been not whether there is power in the world, not whence it came, but who should have it.

John Locke
Treatise of Government
1690

* Author's Note

Separation of powers was once the essence of the American Constitution. In vertical apportionment, all powers not stated (federal) were reserved (state). At the horizontal level, powers of lawmaker, executive and judiciary, were compartmentalized through definitions into numbered articles. The whole schema of separateness, borrowed from the Continent and Montesquieu (1689-1775) seemed utterly inconsistent with an American House of Lords. In fact the Founding Fathers had considered and rejected a Supreme Council to revise laws of Congress or the states. This was the Union which survived the Civil War fought to preserve it. Even so, perhaps from Lord Acton in action (a good reason for or against separating governmental powers), few could doubt that as early as Roosevelt's Packing Plan, or as late as the tawdry, Fortas, Haynesworth and Carswell's affairs, the real managerial class in the U.S. that counted, had become the Justices of the United States Supreme Court. The resulting human effects from a constitution nearly void for vagueness may be over-stated by Robert Hutchins, Director of the Center for the study of Democratic Institutions. He writes in 1968:

The limits of dissent cannot be limits set by law, because nobody knows what the law is, and while the Supreme Court sits, nobody will. What was illegal yesterday is lawful today, because the Court changes its composition or its mind. The only way to find out whether an ordinance, regulation or statute is Constitutional is to violate it and see what happens.

(Center Magazine—1968)

The Author contends the main problem lies in lost courts victimized by discretions and inclusions addressed to definitional ambiguity in the "who is it" and the "what of it" to the phrase Due Process of Law.

An ecological amendment, addressed to power and definition is proposed to effect a lot less sail and a little more anchor to our American Constitution. Hopefully, issues will not be left conveniently obscured by pettifogging over "strict and liberal construction" or the relevance to the property v. liberty versions of fundamentals in due process of law. The exercise of stolen powers by appointees in defense of re-
quiring states to pay fifth amendment "just" compensation for taking intra-state property for public uses (the First Bill of Rights incorporated into Due Process—1897), or to rescue freedom of speech in state courts (the Second Mandate—1925), will remain forgotten vice or proclaimed virtue only in tired analysis suspiciously separate and inexpediently aged, as if it were that properti privati was not the like of the other liberties. Maybe the new property ought to be the old due process of states and the powers of eminent domain. At least if due process cannot be "cabined" (see Cox, supra Note 81), it is time we let the smoke out. Due process and Amicus Curiae have too long kept us from humble truths about the Union and the Constitution.

The proferred amendment restores to states and to Congress, (except as modified by the Bill of Rights) some awesome pre-1890 prerogatives left primary government over liberty or property by the Constitution of 1787 as it was purged of racism in its color amendments of 1868. We might just be astonished at the flexibility and potential for safe, novel law change and experiment under that system. Maybe we owe a second try at it to the ghost of the First Substantive Due Process Court Decision, Scott v. Sanford (1857).