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The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment

"No person shall . . . be deprived of life, liberty or property, without due process of law."—Amendment V to the Constitution of the United States.

The above quotation, known as "the due process clause" of the Federal Constitution, forms a part of the American Bill of Rights, as the first ten amendments are often called. When compared with the other parts of the Bill of Rights, this inhibition on its face is decidedly perplexing. Most of the other parts, *e.g.*:

"Congress shall make no law respecting the establishment of a religion, . . . (Amendment I)

"No soldier shall in time of peace be quartered in any house, without the consent of the owner, . . . (Amendment III)

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . ." (Amendment V.)

are clear and understandable limitations upon the powers of the government. But to the uninitiated, the phrase "due process of law" can convey little meaning. Its meaning has been evolved out of the numerous judicial decisions given on questions in which the validity of governmental action has been questioned.

The phrase, "due process of law," was interpreted by the Supreme Court in the case of *Murray v. Hoboken Land and Improvement Company*,¹ in 1855. In that case the Court said:

"The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, 'by the judgment of his peers, or by the law of the land.'

¹ (1855) 59 U. S. (18 How.) 272.

The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words."²

A study of English and American constitutional history leads to the conclusion that the principle embodied in what is known as "due process of law" developed in part from the idea aimed at in the "law of the land" clause of Magna Charta. The latter clause provided that:

"No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed . . . save by the lawful judgment of his peers or by the law of the land."³

In the middle of the fourteenth century, Chapter 3 of 28 Edward III made for the further protection of his subjects, reading "by due process of the law" instead of "by the law of the land"; and in the Petition of Right, of Charles First's time, it was prayed "that freemen be imprisoned or detained only by the law of the land," or by "due process of law," and not by the king's special command without any charge. In America the state constitutions in almost every case contained similar clauses, some using the words "due process of law," and others "law of the land." In interpreting these clauses the state courts have assumed, as in *Murray v. Hoboken Land and Improvement Company*, that "due process of law" meant "law of the land."

Although in both England and America the two expressions are used interchangeably, the American courts have given to these expressions a meaning quite different from that given to them by English courts. The paragraph quoted above, from the decision in *Murray v. Hoboken Land and Improvement Company*, would justify the conclusion that the constitutional provisions as to "due process" require only that the process be in conformity with statutes enacted by legislative bodies, and put no restrictions on legislative power. However, the Court immediately dispels this impression when it goes on to say:

"That the warrant now in question is legal process, is not denied. It is issued in conformity with an act of Congress. But is it 'due process of law'? The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be construed as to leave Congress free to make any process 'due process of law' by its mere will."⁴

² 59 U. S. (18 How.) at 276. Similar interpretations have been placed on the phrase in *Greene v. Briggs* (C. C. R. I. 1852) Fed. Cas. No. 5764; *Sears v. Cottrell* (1858) 5 Mich. 250; *Wynehamer v. People* (1856) 13 N. Y. 378.

³ Magna Charta §39.

⁴ 59 U. S. (18 How.) at 276.

Before the Civil War there were few cases in the federal courts in which the "due process" clause was the decisive factor, but since then a large number of decisions have turned upon it, and upon the similar limitation placed upon the powers of the states by the Fourteenth Amendment.

Two late decisions will serve to show the limitations which the two clauses place upon the freedom of action of the legislative bodies in this country.

In 1919 the Florida legislature enacted a statute providing for the organization of a land clearing district. In *St. Paul Trust & Savings Bank v. American Clearing Company*,⁵ this statute was held invalid as permitting the taking of property without "due process of law," in that it did not require notice to the mortgagee of land within the district, and because it made taxes levied over the district a prior lien over preëxisting mortgages.

Another late case arose as the result of an act of the legislature of the state of Nebraska in 1919, which prohibited the teaching of any subject in any language other than the English language in any school, or the teaching of languages other than the English language below the eighth grade. This act was held to be unconstitutional,⁶ as arbitrary and without reasonable relation to any end within the competency of the state, as depriving teachers and parents of liberty without "due process of law" in violation of the Fourteenth Amendment. In delivering the opinion of the Court, Justice McReynolds said:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men . . . The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."⁷

These cases are alike in holding that not every enactment of a legislative body is *ipso facto* a part of the law. Moreover, in each

⁵ (S. D. Fla. 1923) 291 Fed. 212.

⁶ *Meyer v. Nebraska* (1923) 262 U. S. 390, 43 Sup. Ct. 625.

⁷ 262 U. S. at 399, 43 Sup. Ct. at 626.

decision enactments are held unconstitutional and void although the legislature, in passing them, has not disregarded any specific constitutional inhibition. In another respect they are different. In the first case, the taking of a right from an individual is held unconstitutional for lacking "due process" because the one losing the right is not given a proper notice and hearing; in other words, because the procedure of the taking is defective. In the second case, the Court is not concerned with the procedure of the taking, but bases its decision on the assumption that individuals have certain rights which no legislative body can take away regardless of its procedure. Moreover, in the second case, the law in question is held unconstitutional regardless of the fact that it operates alike upon all persons within the state. The thing done is held to be beyond the power of the legislature. These two cases may be taken as fair illustrations of how the "due process" clause is being interpreted in the United States.

The fundamental difference between the "due process" clause in the United States and in England is that in the United States it is a limitation upon the legislative branch of the government, while in England it is not. Furthermore, in the United States the clause is interpreted as placing limitations upon the legislative power that are not specifically enumerated as limitations within the words of the written constitution. Cooley, in his commentary on the Constitution, wrote:

"It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition" [on legislative power]⁸

The English attitude toward legislative power is expressed by Blackstone as follows:

[The British Parliament] ". . . has sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations."⁹

The expression "law of the land" was placed in Magna Charta to bind the Crown not to take from individuals, rights which they enjoyed, without legal procedure including a hearing and judgment. Never in the documents which form the basis of English liberties were words written with the intent that they should act as a limitation upon the authority of Parliament. But a written constitution, defining the different branches of government and their duties, postulates limitations upon the legislative body. If such limitations are disregarded in the enactment of a statute it becomes the duty of the judiciary,

⁸ COOLEY, *CONSTITUTIONAL LIMITATIONS* (1868) 174.

⁹ 1 BLACKSTONE, *COMMENTARIES* (Jones ed.) 267.

when adjudicating the rights of litigants, to treat the statute as void, *i.e.*, to disregard it.¹⁰ But this only explains the American decisions on the "due process" clause in part. Granting that the clause limits the power of the legislative branch of the government, how can it forbid legislative acts not specifically prohibited by the Constitution? The Court in *Meyer v. State of Nebraska*¹¹ enumerates privileges not mentioned in the Constitution, which it says the "due process" clause secures to the individual. Cooley writes that the legislature cannot levy taxes arbitrarily, nor for any but a public use, and that it cannot take property from one person and give it to another.¹² How did the American courts attach this meaning to "due process of law"? Evidently the explanation must be looked for elsewhere than in the English documents in which the expression is to be found.

A judicial point of view laying the foundation for the American interpretation of "due process of law" was stated by Justice Chase in *Calder v. Bull*,¹³ decided by the Supreme Court of the United States in 1798. On this occasion the question to be decided was the constitutionality of a statute of a state legislature setting aside the decree of a court which disapproved a will. Justice Chase said:

"I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state. The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are proper objects of it. The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal, or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law, in governments established on express compact, and on republican principles,

¹⁰ *Marbury v. Madison* (1803) 5 U. S. (1 Cranch) 137.

¹¹ (1923) 262 U. S. 390, 43 Sup. Ct. 625.

¹² COOLEY, *op. cit. supra* note 8, at 175.

¹³ (1798) 3 U. S. (3 Dall.) 386.

must be determined by the nature of the power on which it is founded.

"A few instances will suffice to explain what I mean. A law that punishes a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man judge in his own cause; or a law that takes property from A and gives it to B; it is against all reason and justice, for a people to intrust a legislature with such powers; and therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them."¹⁴

Here Justice Chase goes outside the written constitution for a criterion to test the validity of a legislative act. He says, in effect, that the scope of the power of the legislature, or for that matter, of any governmental body, is determined by the purpose for which it is brought into being, and that certain acts, which he enumerates, are beyond the power of the legislature. This idea was by no means original with Chase. It was a dominating political theory of the seventeenth and eighteenth centuries, and, while political theory is not constitutional law, this theory had much to do with the development of American constitutional law and particularly with the American interpretation of "due process of law."

The major premise of Justice Chase's argument is substantially the "social compact" and he refers to it by that name. This idea was made an influential political theory by its presentation in John Locke's *Two Treatises of Government*. Its guiding principal is that civil rulers hold their power not absolutely but conditionally, government being essentially a moral trust, forfeited if the conditions are not fulfilled by the trustees. After explaining this theory, Locke wrote:

"The great and chief end, therefore, of men's uniting into commonwealths and putting themselves under government, is the preservation of property. . . ."¹⁵

"The supreme power cannot take from any man any part of his property without his own consent: for the preservation of property being the end of government, and that for which men enter into society."¹⁶

Rousseau stated substantially the same doctrine in the following words:

"Each of us gives in common his person and all his force under the supreme direction of the general will; and we receive each member as an indivisible part of the whole. . . ."¹⁷

"What, then, is an act of sovereignty properly speaking? It is not an agreement between a superior and an inferior, but an agreement of a body

¹⁴ 3 U. S. (3 Dall.) at 388.

¹⁵ LOCKE, *TWO TREATISES OF GOVERNMENT*, Bk. II, §124.

¹⁶ *Ibid.*, Bk. II, §138.

¹⁷ ROUSSEAU, *SOCIAL CONTRACT*, Bk. I, c. 6.

with each of its members,—a legitimate agreement, because it is common to all, useful because it can have no other object than the common good, and solid because it has for guaranty the public force and the supreme power. . . .

“It will be seen from this that sovereign power, absolute, sacred, inviolable as it is, does not overstep the limits of general agreement, and that any man can dispose fully of what is left him of goods and liberty by these agreements; so that sovereignty never has the right to demand of one subject more than of another.”¹⁸

This concept of a social compact limiting the powers of governmental bodies was an influential force in the thought of the Revolutionary period. It was made the basis of the argument in the Declaration of Independence:

“We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; . . . that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.”

Compare these words with the words in the decision delivered by Justice Chase:

“The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are proper objects of it.”¹⁹

The idea of social compact, as introduced into American decisions, was substantially that of John Locke and Rousseau. It holds as its major premise that the scope of the power of any governmental body is determined by the purposes for which it was brought into being. The minor premise is that American government was created to secure to the individuals the enjoyment of life, liberty and property. The resulting conclusion is that the American government cannot take from any person life, liberty or property except when such a taking is necessary to secure life, liberty and property to the individuals generally who compose society. Carrying this reasoning to its actual application, it follows that when property has vested in a person under an existing law, it can only be taken from him, or his right to use it abridged by some law having as its purpose the security of life, liberty and property to the public generally.

¹⁸ *Ibid.*, Bk. II, c. 4.

¹⁹ 3 U. S. (3 Dall.) at 388.

Out of this concept of a social compact determining the scope of legislative power have come the two leading doctrines of American constitutional law, *i.e.*, the Doctrine of Vested Rights and the Doctrine of Police Power; and it is the interaction of these two doctrines each upon the other, that now determines the validity of state legislative enactments under the "due process" clause of the Fourteenth Amendment.

In *Calder v. Bull*,²⁰ and in succeeding cases which will be discussed later, acts were tested judicially by the same criterion that is used now in determining whether or not acts conform to the "due process" clause. However, in many of these early cases, no reference was made to the clause, but other reasons were given as justification for the Court's attitude.

The doctrine of vested rights, *i.e.*, that it is not within legislative power to take from an individual a right which vested under an existing law, is upheld by Justice Chase because a violation of it was a violation of the social compact and of "the nature and spirit of our state governments." Thus he set up an extra-constitutional, unwritten basis for judicial review. Courts before and since the delivering of this opinion, have been satisfied with an unwritten guide in this matter. They have referred to it as "common right," "natural justice," and the "law of nature." Examples of this will appear later; but two English examples will be given here, to show that the idea was not new. In 1610 Lord Coke said in *Dr. Bonham's Case*:²¹

"It appears in our books, that in many cases the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Acts to be void."

In *Day v. Savage*,²² decided in 1615, Lord Hobart said:

"By that which hath been said it appears, that though in pleading it were confessed, that the custom of the certificate of customs of London is confirmed by Parliament, yet it made no change in this case, both because it is none of the customs intended, and because even an act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself."

However desirable it might be that courts recognize the vested rights doctrine, this use of "the law of nature," and the "nature and spirit of our state governments" as a basis for holding legislative enactments

²⁰ (1798) 3 U. S. (3 Dall.) 386.

²¹ (1610) 8 Co. Rep. 114a; MCGOVNEY, CASES ON CONSTITUTIONAL LAW (1929) 3.

²² (1614) Hobart 85; MCGOVNEY, *op. cit. supra* note 21, at 6.

void suggested practical difficulties. These terms might be used for purposes other than that of protecting vested rights. In the last analysis, the law of nature is nothing more nor less than the popular conception of justice and right. Jefferson's use of it as a justification for revolution is less troublesome than its use by Chase as a basis for judicial review. A revolution will occur only when a group, powerful enough to overthrow the government, demands a change. But may the application of an unwritten law be left to a court with safety? When applying the common law, the discretion of the judge is limited by written decisions. But if the law exists only in the opinion of mankind, the judge has as a guide only his guess as to what that opinion is. To give him such discretion is to give him a veto power over legislative enactments. This difficulty was foreseen by Justice Iredell, who sat with Chase in the hearing of *Calder v. Bull*, and he dissented in the following words:

"It is true that some speculative jurists have held, that a legislative act, against natural justice, must, in itself, be void; but I cannot think that under such a government any court of justice would possess a power to declare it so. . . .

"In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have individually, framed their state constitutions . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of congress, or of the legislature of a state, violates these constitutional provisions, it is unquestionably void. . . . If, on the other hand, the legislature of the Union, or the legislatures of any members of the Union shall pass a law, within the general scope of their constitutional powers, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed on the subject; and all that the court could probably 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. There are then but two lights in which the subject can be viewed: 1st. If the legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon, as judges, to determine the validity of a legislative act." ²³

In 1792 the South Carolina Supreme Court decided a case in the following fashion.²⁴ An act of the assembly had provided for the transfer

²³ (1798) 3 U. S. (3 Dall.) 386, 398.

²⁴ *Bowman v. Middleton* (1792) 1 Bay (S. C.) 252; *McGovney, op. cit. supra* note 21, at 14.

of a freehold from the heir at law to another person, and also from the eldest son of an intestate and vested it in a second son, without a jury trial. The court said:

"The plaintiffs could claim no title under the act in question, as it was against common right, as well as against Magna Charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by jury of the country, to determine the right in question."

Had this case been decided seventy-five years later the act would probably have been held void because it lacked "due process," but the court did not mention "law of the land," or "due process of law." Instead, it held "that the law was ipso facto void" because it was contrary to "natural law" and "common right."

Other state courts have adopted the same point of view, as may be seen by the following quotations:

"Independent of that instrument [the Constitution of the United States], and of any express restrictions in the constitution of the state, there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact, . . . the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property from violation in the unjust exercise of legislative power."²⁵

"The security of life, liberty and property, lies at the foundation of the social compact; and to say that this grant of 'legislative power' includes the right to attack private property, is equivalent to saying that the people have delegated to their servants the power of defeating one of the great ends for which the government was established."²⁶

"I maintain, therefore, that the security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon these negatives. . . . The exercise of such a power is incompatible with the nature and object of all government, and is destructive of the great end and aim for which the government is instituted, and is subversive of the fundamental principles upon which all free governments are organized."²⁷

²⁵ *Regents of the University of Maryland v. Williams* (1838) 9 G. & J. (Md.) 365, 408, 31 Am. Dec. 72, 96.

²⁶ *Taylor v. Porter* (1843) 4 Hill. (N. Y.) 140, 145, 40 Am. Dec. 274, 277; *McGOVNEY, op. cit. supra* note 21, at 604.

²⁷ *White v. White* (1849) 5 Barb. (N. Y.) 474, 484. Also see *Ham v. McClaws* (1789) 1 Bay (S. C.) 93; *McGOVNEY, op. cit. supra* note 21, at 13. Also see *Gardner v. Newburgh* (1816) 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *Benson v. Mayor* (1850) 10 Barb. (N. Y.) 223; *Mayo v. Wilson* (1817) 1 N. H. 53; *Trustees of the University of North Carolina v. Foy* (1805) 5 N. C. 57, 3 Am. Dec. 672.

In 1795 Justice Paterson of the Supreme Court of the United States, sitting in the Circuit Court, said:²⁸

"The legislature, therefore, had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; . . . it is contrary to the principles of social alliance, in every free government; and lastly, it is contrary to the letter and spirit of the constitution."

The theory behind this recognition of an extra-constitutional basis for judicial enactments is substantially that of the social compact. It would explain the Constitution as an attempt to reduce to writing the social compact which established the governmental organization. Governmental authority, according to this theory, is a trust which, save for the grant of it in the compact, would not exist, and private rights, being previous in existence, continue although not enumerated in the Constitution. Rights regarded as fundamental, are not fundamental merely because placed in the Constitution, but if they were placed in the Constitution they were so placed because they were in their nature fundamental. It follows that a legislative enactment taking away a fundamental right is beyond the power of the legislative body and therefore void, regardless of whether that right was mentioned in the Constitution. The weakness in the theory, as pointed out by Justice Iredell, *supra*, is that, when made a basis for judicial review, it merely substitutes the opinion of the judge for that of the legislator as to what is fundamentally just.

Of course when the court's ideas of natural justice coincide with that of the legislature the latter is sustained. An example of this is found in *Goshen v. Stonington*,²⁹ a Connecticut case, decided in 1822. The legislature had passed an act declaring that all marriages previously celebrated in the state by a minister empowered to celebrate marriages according to the forms and usages of any religious denomination, were valid. In order to determine which of two towns should pay for the support given certain paupers prior to the enactment, it became necessary to decide whether one of the paupers, the mother of the rest, was legally married. The court said:

"The retrospection of the act is indisputable, and equally so is its purpose to change the legal rights of the litigating parties . . .

"It is universally admitted, and unsusceptible of dispute, that there may be retrospective laws impairing vested rights, which are unjust, neither according with sound legislation, nor the fundamental principles 'of the social compact.' . . . On the other hand, laws of a retroactive nature, affecting the rights of individuals, not adverse to equitable principle, and

²⁸ *Van Horne's Lessee v. Dorrance* (1795) 2 U. S. (2 Dall.) 304, 309.

²⁹ (1822) 4 Conn. 209, 221, 10 Am. Dec. 121, 126.

highly promotive of general good, have been passed, and as often approved. . . . At the same time the retrospective law, thus far operating on vested rights, is admitted to be unquestionably valid, because it is manifestly just."

A distrust on the part of some courts of this use of natural law may be responsible for a number of decisions which hold some acts impairing vested rights invalid by making a strained application of the "obligation of contracts" clause. In *Regents of the University of Maryland v. Williams*,³⁰ the law in question was a legislative act taking from the University of Maryland a grant of land made by a preceding legislature. The court held the law invalid because contrary to natural law, but strengthened its position by construing the first act as a contract and holding that the second act impaired the obligation of the first.

In 1810 Chief Justice Marshall delivered an opinion in *Fletcher v. Peck*³¹ which laid a basis for bringing the whole vested rights doctrine within the governmental limitations set forth in the written constitution. He said:

"It may well be doubted, whether the nature of society and of government does not prescribe some limits to legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature, all legislative power is granted; but the question, whether the act transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection. It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the work of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated."

This quotation opens up the possibility of bringing the vested rights doctrine within the limitations prescribed in the written constitution. If only general rules for the government of society in the future are within the scope of legislative power, they only, of all the legislative enactments, are law. Since the legislature has only legislative power, its action is limited to the making of such general rules. Since the courts have only judicial power, their actions are limited to the application of such laws as the legislature shall make in accordance with the Constitution. It is a reasonable view to hold that the separation of powers, as provided in the Constitution, thus postulates to some extent the vested rights doctrine, and this seems to be the purport of Marshall's opinion. However, this construction of the Constitution was

³⁰ (1838) 9 G. & J. (Md.) 365, 31 Am. Dec. 72.

³¹ (1810) 10 U. S. (6 Cranch) 87, 153.

not made the turning point of the case. The act in question was a rescission by the legislature of a land grant made by a preceding legislature and, as in *Regents of the University of Maryland v. Williams*, *supra*, the Court held the act invalid because it impaired the obligation of a contract.

The use of the separation of powers concept was suggested by the same Court six years earlier in *Ogden v. Blackledge*.³² The assembly of North Carolina, in 1715, passed an act which directed that unless the creditors of a deceased person made their claim within seven years after the death of the debtor, such claims should be barred. In 1789 the assembly repealed the act, but in 1799 the statute of 1715 was reënacted. The effect of the last act upon rights acquired while the intermediate act was in force was the subject of controversy in the case. The plaintiff's argument stated:

"But the legislature of North Carolina passed a law in 1799, which declares, in substance that notwithstanding the 6th section of the act of 1789, the 9th section of the act of 1715 was not repealed. . . . that act could not alter the past law, and make that to have been the law which was not the law at the time. To declare what the law is, or has been, is a judicial power; to declare what the law is to be, is legislative. One of the fundamental principles of all our government is, that the legislative power shall be separated from the judicial."³³

Here the Court stopped the counsel, observing that it was unnecessary to argue that point.

Side by side with the doctrine of vested rights, the courts were working out a definition of "legislative power." In 1818 the New Hampshire court³⁴ held that an act of the legislature awarding a new trial, in an action which had already been decided by a court of law, was an exercise of judicial power and therefore void. The same view was again expounded by this court, in 1829, in an advisory opinion, in which it said:

"It is the province of the legislature to prescribe the rule of law, but to apply it to a particular case is the business of the courts of law."³⁵

In *Dash v. Van Kleeck*,³⁶ the New York court was confronted with a situation in which a vested right appeared to be taken by a legislative act. The act in question created a defense to a tort action which had already been commenced. Since the right involved arose out of a tort the court could not hold that the act violated the prohibition of *ex post facto* laws, or impaired the validity of a contract, or that it

³² (1804) 6 U. S. (2 Cranch) 271.

³³ 6 U. S. (2 Cranch) at 276.

³⁴ *Merrill v. Sherburne* (1818) 1 N. H. 199, 8 Am. Dec. 52.

³⁵ *Opinion of the Judges* (1829) 4 N. H. 565, 572.

³⁶ (1811) 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

violated any other express provision of the Constitution. The court avoided passing upon the validity of the statute by construing it not to act retroactively. However, it should be noted that it chose this construction, when the language of the statute might easily have been interpreted to give it a retrospective effect, because the latter effect "would make the statute operate unjustly." The judicial attitude toward retrospective legislation was stated in the opinion of Chancellor Kent as follows:

"The very essence of a new law is a rule for future cases. The construction here contended for, on the part of the defendant, would make the statute operate unjustly. It would make it defeat a suit already commenced, upon a right already vested. . . . A statute ought never to receive such a construction, if it be susceptible of any other, and the statute before us can have a reasonable object and full operation without it."³⁷

A similar attitude was taken in *Wilkinson v. Leland*,³⁸ when Justice Story, speaking for the United States Supreme Court, said:

"The fundamental maxims of a free government seem to require, that the right of personal liberty and of private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people."

From these cases it would seem to be only a step to bring a large part of the vested rights doctrine within the written Constitution by means of the separation of powers concept. However, the step was never taken. In a later case, Story held a legislative grant of lands to be irrevocable, "standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the constitution."³⁹

The attitude of Justice Iredell, that judicial review should not be based upon natural justice but should rest exclusively upon the limitations placed in the written Constitution, was adopted in some jurisdictions. In Pennsylvania the court held that it was bound to uphold all enactments of the legislature not transgressing some specific provision of the written Constitution.⁴⁰ Because of this distrust of the judicial use of "natural law" it is not strange that the vested rights doctrine was eventually held to be within the provisions of the written Constitution. When this was done the means used was the "due process

³⁷ 7 Johns. (N. Y.) at 502, 5 Am. Dec. at 308.

³⁸ (1829) 27 U. S. (2 Pet.) 627, 657.

³⁹ *Terrett v. Taylor* (1815) 13 U. S. (9 Cranch) 43, 52.

⁴⁰ *Bedford v. Shilling* (1818) 4 Serg. & R. (Pa.) 401, 8 Am. Dec. 719; *Eakin v. Raub* (1825) 12 Serg. & R. (Pa.) 330; *Mercer v. Watson* (1833) 1 Watts (Pa.) 330; *Menges v. Wertman* (1845) 1 Pa. 218.

of law" clause rather than the "separation of powers" concept. The first case in this direction was that of *Trustees of the University of North Carolina v. Foy*.⁴¹ Here the question was the constitutionality of an act of the legislature repealing a prior grant of lands to the university. The court rendered its decision against the law partly because the institution was erected in accordance with a mandate from the constitution and therefore stood upon "higher grounds than any other aggregate corporation." The interesting part of the decision is its reliance upon the "law of the land" clause in the state Bill of Rights, which it held was a limitation upon legislative power, and which it defined to mean that no one should be deprived of his liberty or property without the intervention of a court of justice. The court said:

"But one great and important reason which influences us in deciding this question is section 10 of the Bill of Rights, which declares 'that no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land' . . . It is also insisted that the term, 'law of the land,' does not impose any restrictions on the Legislature, who are capable of making the law of the land, and was only intended to prevent abuses in the other branches of Government. . . . It is evident that the framers of the Constitution intended the provision as a restriction upon some branch of the Government, either the executive, legislative or judicial. To suppose its application to the executive would be absurd on account of the limited powers conferred on that officer; and from the subjects enumerated in that clause, no danger could be apprehended from the Executive Department, being intrusted with the exercise of no powers by which the principles thereby intended to be secured could be affected. To apply it to the judiciary would, if possible, be still more idle, if the Legislature can make the '*law of the land*.' For the judiciary are only to expound and enforce the law, and have no discretionary powers enabling them to judge of the propriety or impropriety of the laws. They are bound, wlether agreeable to their ideas of justice or not, to carry into effect the acts of the legislature as far as they are binding and do not contravene the Constitution. If, then, this clause is applicable to the Legislature (and to presume otherwise is to render this article a dead letter), let us next inquire what will be the operation which this clause will or ought to have on the present question. It seems to us to warrant a belief that members of a corporation as well as individuals shall not be deprived of their liberties or property unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution."⁴²

A "due process of law" clause, or "law of the land" clause admits of two possible interpretations. It may be a command to the executive and judicial branches of government to perform their respective func-

⁴¹ (1805) 5 N. C. 57, 3 Am. Dec. 672.

⁴² 5 N. C. at 62, 3 Am. Dec. at 676.

tions in accordance with the laws enacted by the legislative branch. It may also mean that the life, liberty and property of the individual are rights which the governmental organization must protect and never confiscate. The latter meaning is read into the North Carolina "law of the land" clause in *Trustees of the University of North Carolina v. Foy*. This interpretation closely resembles the theory that the scope of the power of a governmental body is determined by the purposes for which it was brought into being, the social compact doctrine used by Chase in *Calder v. Bull*. Here the doctrine of vested rights was upheld without the evil of an unwritten basis for judicial review.

The *Trustees of the University of North Carolina v. Foy* was decided in 1804. Twelve years later the same court, in *Allen v. Peden*,⁴³ decided a case in which they gave the clause the same construction. The legislature had passed an act emancipating two slaves because their deceased owner had expressed a wish to have them emancipated. The court said:

"The administrator in this case, was, in the law the owner of the persons emancipated by the General Assembly. The act of emancipation passed not only without his consent, but against it. However laudable the motives which led to the act of emancipation, it is too plainly in violation of the fundamental law of the land to be sanctioned by judicial authority."⁴⁴

The court did not consider it necessary to justify its construction of "the law of the land," seeming to assume without argument that the clause placed limitations upon the legislature. Moreover, the law was not held void because of any bad procedure prescribed by it. The law was bad because the thing attempted to be done was a thing which no legislative body has the power to do. And the reason it lacks this power is, according to *Allen v. Peden*, the "law of the land" clause. But in *Hoke v. Henderson*,⁴⁵ decided by the same court in 1833, the decision plainly interprets the "law of the land" clause to mean that vested rights are secure from legislative attack. In that case, the act in question was a statute providing for the future election of court clerks for a term of years and providing for an election of such officers in each county at the next general election. Previously such officers were appointed for good behavior, and the act, if put into effect as provided, would deprive some of the previous incumbents of their positions. In behalf of the statute it was urged, first, that it was general in terms, "wanting in the precision and direct operation usually belonging to and distinguishing judicial proceedings," and second, that

⁴³ (1816) 4 N. C. 442.

⁴⁴ *Ibid.*

⁴⁵ (1833) 15 N. C. 1, 25 Am. Dec. 677.

it was enacted from the standpoint of the legislative view of public interest and without any intention of passing sentence upon those detrimentally affected by it, who in fact were not charged with any delinquency so the measure was not a bill of pains and penalties. The court, however, held:

" . . . that there are limitations upon legislative power, . . . and the clause itself means that such legislative acts, as profess in themselves directly to punish persons or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually 'laws of the land,' for those purposes."⁴⁶

These words not only bring vested rights within the protection of the "law of the land" clause but they define vested rights so that, with reference to any particular property right, the existing law is elevated to the position of a constitutional limitation upon the body which enacted it and it can never be altered to the diminution of that right. In *In re Dorsey*,⁴⁷ decided in Alabama five years later, the doctrine of vested rights was held to be supported by the written constitution but upon different words than "due process of law." The first section of the declaration of rights in the Alabama Constitution announced the principle that "All freemen, when they form a social compact, are equal in rights, and no man or set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services." The court said:

"I consider the declaration of rights, as the governing and controlling part of the constitution; and with reference to this, are all its general provisions to be expounded, and their operation extended or restrained. The declaration itself, is nothing more than an enumeration of certain rights, which are expressly retained and excepted out of the powers granted; but as it was impossible, in the nature of things, to provide for every case of exception, — a general declaration was added, that the particular enumeration should not be construed to disparage or deny others retained by the people. What those other rights are, which are thus reserved, may be readily ascertained by a recurrence to the preamble to the declaration of rights."⁴⁸

In re Dorsey is of interest at this point for two reasons: First, the declaration of rights reflects the origin of the doctrine of vested rights in the idea of the social compact, and, second, the case is another example of the new tendency to justify the doctrine, not upon fundamental right and natural law, but upon a written constitution. In this

⁴⁶ 15 N. C. at 16, 25 Am. Dec. at 689.

⁴⁷ (1838) 8 Ala. 295. Also see *In re Shorter* (D. Ala. 1865) Fed. Cas. No. 12,811; *Ex parte Hunter* (1867) 2 W. Va. 122.

⁴⁸ 8 Ala. at 359.

case there were two additional opinions. One of them, delivered by Justice Ormond, was in accord, but basing the decision upon the "due process of law" clause of the state constitution. In the other, Justice Collier dissented, holding that the state constitution was not a grant of powers, but the organization of inherent powers, which accordingly are available to the legislature unless specifically withheld.

The doctrine of the security of vested rights from legislative attack was brought within the scope of the "due process of law" clause in New York in *Taylor v. Porter*,⁴⁹ decided in 1843. An act, authorizing a private road across the land of another under the right of eminent domain, was under review. The act was held unconstitutional and the phrase "due process of law" of the New York Constitution was used as a justification for the decision. Setting out with the proposition that the people alone are absolutely sovereign, the court asserts that the legislature can exercise only such powers as have been delegated to it. Then citing *Hoke v. Henderson*, *supra*, as authority, the "law of the land" is asserted to mean that before a man can be deprived of his property "it must be ascertained judicially that he has forfeited his privileges, or that someone else has a superior title to the property he possesses."⁵⁰ Again in *Westervelt v. Gregg*,⁵¹ the New York court held unconstitutional a "Married Woman's Act" in so far as it deprived a husband of rights in a legacy to his wife when such rights vested in him prior to the passage of the act. Here the court said:

"Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. Such an act as the legislature may, in the uncontrolled exercise of its powers, think fit to pass, is, in no sense, the process of law designated by the constitution."⁵²

In 1856 the New York court decided the case of *Wynehamer v. State of New York*.⁵³ This case is important, first, because it definitely transferred the doctrine of vested rights from the natural rights theory to the "due process" clause, and, second, because it enlarged the scope of the vested rights doctrine. In overruling the theory of natural rights as a protection to property, the court said:

"It has been urged upon us, that the power of the legislature is restricted, not only by the express provisions of the written constitution, but by limitations implied from the nature and form of our government; that, aside from all special restrictions, the right to enact such laws is not among the delegated powers of the legislature, and that the act in

⁴⁹ (1843) 4 Hill (N. Y.) 140, 40 Am. Dec. 274.

⁵⁰ 4 Hill (N. Y.) at 148, 40 Am. Dec. at 279.

⁵¹ (1854) 12 N. Y. 202.

⁵² 12 N. Y. at 209.

⁵³ (1856) 13 N. Y. 378.

question is void, as against the fundamental principles of liberty, and against common reason and natural rights. . . .

"I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the constitution distributed to the other departments of the government. It is only the 'legislative power' which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty in attempting to define the limits of this power. . . . I am reluctant to enter upon this field of inquiry, satisfied as I am that no rule can be laid down in terms which will not contain the germs of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the legitimate powers of government. Nor is it necessary to push our inquiries in the direction indicated. There is no process of reasoning by which it can be demonstrated that the 'Act for the prevention of intemperance, pauperism and crime' is void upon principles and theories outside the constitution, which will not also and by an easier deduction, bring it in direct conflict with the constitution itself."⁵⁴

The substance of the argument upon which the court upheld the doctrine of immunity of vested rights from legislative attack is that acts of a retroactive nature are not within the scope of legislative power, so a taking of property under such an enactment is not "due process of law." A year later, in the case of *Dred Scott v. Sandford*,⁵⁵ Chief Justice Taney said:

"An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, can hardly be dignified with the name of due process of law."

Summing up the cases reviewed up to this point, it appears that the doctrine of the immunity of vested rights was adopted in several jurisdictions as a basis for judicial review; that it was first justified on the theory that there is a natural law of right that is superior to the written constitutions; but that by the time of the Civil War at least in the New York and federal jurisdictions, the doctrine was no longer based upon a natural law but upon the "due process of law" clauses of the written constitutions. Our next step will be to review the cases to ascertain more specifically what this doctrine came to mean.

There is an abundance of early cases⁵⁶ holding that the owner of

⁵⁴ 13 N. Y. at 390.

⁵⁵ (1856) 60 U. S. (19 How.) 393, 450.

⁵⁶ *Jacobs v. Levering* (C. C. D. C. 1816) Fed. Cas. No. 7,165; *Greene v. Briggs* (C. C. D. R. I. 1852) Fed. Cas. 5,764; *Greene v. James* (C. C. D. R. I. 1854) Fed. Cas. No. 5,766; *The Ned* (S. D. N. Y. 1862) Fed. Cas. No. 10,078; *Corbin v. Marsh* (1865) 63 Ky. 183; *Allen v. Peden* (1816) 4 N. C. 442; *Kramer v. Marks* (1870) 64 Pa. 151.

property cannot be deprived of title to that property by a legislative act. Thus in 1816 it was held in *Allen v. Peden*, *supra*, that the legislature could not emancipate slaves against the will of their owner. This rule is applied not only to tangibles, but to rights arising out of contract⁵⁷ and the right to damages arising out of tort.⁵⁸ A franchise or governmental grant can only be taken away under the provisions of the laws under which it was granted.⁵⁹ These interpretations of property were generally accepted when the Constitution was adopted.

In the case of *In re Dorsey*,⁶⁰ the term "property" was expanded to include not only tangible property, or specific franchises or remedies, but the general rights of an individual as a member of a community. The act under review provided among other things that an attorney at law should be required, as a prerequisite condition to his practicing in the courts of the state, to take an oath asserting not only that he would not in the future participate in a duel in any capacity, but also that he had not done so in the past. The court held that the right to practice law is as deserving of protection as property, or at least is an element of the inalienable right to pursue happiness, under the "due course of law" clause.

A question more difficult to decide has been whether a governmental body can deprive a person of the beneficial use of his property, and, if so, to what extent. On this point *Wynehamer v. State of New York*, *supra*, is a leading case in that it enlarged the scope of vested rights to include not only title and possession of the property in question, but also the right to use it in the manner permitted by law at the time it was acquired. The legislative act which this case overruled forbade all owners of intoxicating liquors to sell them under any conditions save for medicinal purposes, forbade them further to store such liquors when not designed for sale in any place but a dwelling house, made the violation of these prohibitions a misdemeanor, and ordained the destruction of forbidden liquors by summary process. In holding this limitation upon the use of liquor to be a deprivation of property, the court said:

"We must be allowed to know, what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and con-

⁵⁷ Trustees of the University of North Carolina (1805) 5 N. C. 57, 3 Am. Dec. 67; Regents of the University of Maryland v. Williams (1838) 9 G. & J. (Md.) 365, 31 Am. Dec. 72.

⁵⁸ Griffin v. Wilcox (1863) 21 Ind. 370; Dash v. Van Kleeck (1811) 7 Johns. (N. Y.) 474, 5 Am. Dec. 291.

⁵⁹ City of Baltimore v. Pittsburg & C. R. Co. (C. C. W. D. Pa. 1865) Fed. Cas. No. 827; Lathrop v. Mills (1861) 19 Cal. 514; Regents of the University of Maryland v. Williams (1838) 9 G. & J. (Md.) 365, 31 Am. Dec. 72; Hoyer v. Swan's Lessee (1853) 5 Md. 237; Williams v. Register of West Tennessee (1812) 3 Tenn. 214.

sumption as a beverage; that such has been their primary and principal use in all ages and countries; and that it is this use which has imparted to them, in this state, more than ninety-nine hundredths of their commercial value. It must follow that any scheme of legislation which, aiming at the destruction of this use, makes the keeping or sale of them as a beverage, in any quantity and by any person, a criminal offense—which declares them a public nuisance—which subjects them to seizure and physical destruction, and denies a legal remedy if they are taken by lawless force or robbery, must be deemed, in every beneficial sense, to deprive the owner of the enjoyment of his property. . . .

“ . . . When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner of it is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power. . . .

“It is certain that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. . . . between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation.”⁶¹

Here the court introduces a new element into the idea of “due process.” The power of the legislature to regulate the use of property depends upon the degree to which it is exercised, and its extent is determinable because courts are able to take cognizance of facts regarding the importance of that use and whether it is the essence of the property right.

The *Wynehamer* case is distinctive in its application of the “due process” clause, not to any department of the government but to the government as a whole. It holds that the clause is a command to the whole governmental organization not to take property from individuals which at any time legally vested in them, except by judicial decree based on a law in existence when the action arose. In the words of the court:

“The true interpretation of this constitutional phrase is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away. . . . The cause or

⁶⁰ (1838) 4 Ala. 295. North Carolina is the only jurisdiction in the United States which has regarded an office as having the characteristics of a property right; however, North Carolina no longer takes that view. See *Butler v. Pennsylvania* (1850) 51 U. S. (10 How.) 402. Not being property, nor based on a contract, the legislature can terminate it during the term of the incumbent. However, though referring to the office as property, *Hoke v. Henderson* (1813) 15 N. C. 1, 25 Am. Dec. 677, holds that the office can be abolished but contends that while kept in existence, as property it cannot be taken from one person and given to another except in case of default.

⁶¹ 13 N. Y. at 387, 398, 399.

occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be *created* by a legislative act which aims at their destruction."⁶²

In one respect the *Wynehamer* case may be distinguished from all those previously considered. Prior to this decision there were cases holding that the legislative branch of the government cannot make a law which will take property which has legally vested in an individual, away from him and give it to another or to the public generally. Some of these based their decisions upon the "due process" clauses of the state constitutions, but the majority of them did not. But the *Wynehamer* case is alone in holding that an act, general in terms and operating alike upon all persons owning a certain kind of property, was invalid because it declared that that particular kind of property should no longer be property. The nearest approach to it, *Hoke v. Henderson*, held invalid an act, general in terms and operating alike upon all persons owning a certain kind of property. In that case the act took the particular property (public offices)⁶³ away from all persons owning such property and gave it to other individuals. But there, the court made it clear that the legislature might have abolished the offices entirely and thereby deprived the persons holding them of such property.

The *Wynehamer* case extends the meaning of the word "deprivation," as contained in the "due process" clause to include any regulation prohibiting the use of property, which is the essence of the property right. However, it admits that restrictions may be placed upon the use. When and to what extent may the right to use property be restricted? This leads to the Police Power Doctrine, which, together with the Vested Rights Doctrine have given the phrase, "due process of law," its present meaning.

The concept of police power as a limitation upon private property was recognized early in the judicial history of the United States. In 1799 a statute directing the corporation of Philadelphia to pass ordinances to prevent the erection of wooden buildings in certain parts of the city, as a fire protection was held constitutional.⁶⁴ Probably the most important discussion of police power in any case prior to the adoption of the Fourteenth Amendment is that in *Commonwealth v. Alger*.⁶⁵ The court said:

"We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and

⁶² 13 N. Y. at 393.

⁶³ *Respublica v. Duquet* (1799) 2 Yeates (Pa.) 493.

⁶⁴ *Ibid.*

⁶⁵ (1851) 7 Cush. (Mass.) 53, 84; *McGovney*, *op. cit. supra* note 21, at 609, 610. The case held that the legislature had power to enact the statute in ques-

unqualified may be his title, holds it under the implied liability that its use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.”

The court then pointed out that this is very different from the right of eminent domain, “the right of government to take and appropriate private property to public use, whenever the public exigency requires it, — which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall be for the good and welfare of the commonwealth, and the subjects of the same.”⁶⁶

“If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land, than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gun powder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained, . . . because it would be a noxious use.”⁶⁷

The relationship between rights in private property and public welfare was stated in 1835 by the Supreme Court of Maine as follows:

“Police regulations may forbid such a use, and such modifications, of private property as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion an inconvenience to an individual; but he has a compensation, in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power, without impairing any constitutional provision.”⁶⁸

There were many decisions prior to the Fourteenth Amendment in which the exercise of this power by the legislature was sustained. Among them were laws prohibiting the erection of wooden buildings

tion which established lines in the harbor of Boston beyond which no wharf might be extended or maintained, and declared any wharf extending or maintained beyond these lines a public nuisance.

⁶⁶ *Ibid.*

⁶⁷ 7 Cush. (Mass.) at 86; McGOVNEY, *op. cit. supra* note 21, at 611.

⁶⁸ *Wadleigh v. Gilman* (1835) 12 Me. 403, 405, 28 Am. Dec. 188, 190. Holds a statute incorporating the city of Bangor and conferring authority on it to prohibit the erection of a wooden building within certain limits, and to remove buildings erected contrary to such prohibitions, is not repugnant to the constitutional prohibition against the appropriation of private property for public use.

within certain districts of cities,⁶⁹ forbidding certain noxious industries within the limits of cities,⁷⁰ forbidding butchers from driving cattle through the city streets except during certain hours of the day,⁷¹ regulating the fencing of cattle,⁷² providing for the public sale at the owner's expense of hogs found running at large,⁷³ providing for the licensing of dogs,⁷⁴ prohibiting the taking of dirt from privately owned beaches,⁷⁵ regulating the anchoring of vessels,⁷⁶ providing for the licensing of vendors of spirituous liquor,⁷⁷ prohibiting the distillation of grain into spirituous liquor,⁷⁸ regulating travel on Sunday,⁷⁹ prohibiting the maintenance of liquor and gaming houses within a certain distance of a college,⁸⁰ and providing for the confinement of paupers, vagrants and criminals.⁸¹

The great variety of restrictions placed upon the use of property suggest the question: Is there any property right immune from legislative attack as a police power regulation? The *Wynehamer* case held that there was, and that the power could not be exercised to the extent of destroying the essence of the property right.

"It is certain that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction."⁸²

On the other hand, there are cases holding that the property itself may be destroyed as an exercise of the police power, even in cases in which the owner is in no way at fault. It has been held that when there is reasonable ground to believe it necessary, it is lawful to destroy buildings to prevent the spread of fire, a holding⁸³ inconsistent with any

⁶⁹ *Wadleigh v. Gilman* (1835) 12 Me. 403, 28 Am. Dec. 188; *Respublica v. Duquet* (1799) 2 Yeates (Pa.) 493.

⁷⁰ *Bepley v. State* (1853) 4 Ind. 264, 58 Am. Dec. 628; *People v. Hawley* (1854) 3 Mich. 330; *Tylstra v. Corporation of Charleston* (1794) 1 Bay (S. C.) 384.

⁷¹ *Cooper v. Schultz* (1866) 32 How. Prac. (N. Y.) 107.

⁷² *Griffin v. Martin* (1849) 7 Barb. (N. Y.) 297.

⁷³ *McKee v. McKee* (1848) 47 Ky. 433.

⁷⁴ *Carter v. Dow* (1862) 16 Wis. 298; *Tenney v. Lenz* (1863) 16 Wis. 566.

⁷⁵ *Commonwealth v. Tewksbury* (1846) 11 Metc. (Mass.) 55.

⁷⁶ *Vanderbilt v. Adams* (1827) 7 Cow. (N. Y.) 349.

⁷⁷ *License Cases* (1847) 46 U. S. (5 How.) 504; *State v. Learned* (1859) 47 Me. 426; *State v. Searcy* (1885) 20 Mo. 489; *City Council of Charleston v. Ahrens* (1850) 4 Strob. (S. C.) 241; *Hewitt v. State* (1860) 25 Tex. 722.

⁷⁸ *Ingram v. State* (1864) 39 Ala. 247, 84 Am. Dec. 782.

⁷⁹ *Mayo v. Wilson* (1817) 1 N. H. 53.

⁸⁰ *State v. Maxcy* (1837) 1 McMul. (S. C.) 501.

⁸¹ *In re Nott* (1834) 11 Me. 208.

⁸² (1856) 13 N. Y. 378, 399.

⁸³ *Conwell v. Emrie* (1850) 2 Ind. 35; *American Print Works v. Lawrence* (1850) 23 N. J. L. 9.

absolute limit as to the extent to which individuals can be deprived of property. Nor is the point of view taken in the *Wynehamer* case in harmony with the views of other courts. In a Michigan case⁸⁴ in which a law prohibiting the sale of intoxicating liquor was sustained, the court said:

"It is urged by the counsel for the defendant, that having a large investment of money in buildings and fixtures connected with his business of brewing ale and strong beer, which are useless for any other purpose, the legislature cannot deprive him of the use of his said property for the purpose for which it was designed, without providing compensation for his building and fixtures. But we negative this assumption. In the exercise of its police power a state has full power to prohibit, under penalties, the exercise of any trade or employment which it is found to be hazardous or injurious to its citizens and destructive of the best interests of society, without providing compensation to those upon whom the prohibition operates."

And in a similar case⁸⁵ in 1853 the court said:

"It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly."

In 1863 the Supreme Court of Pennsylvania held valid the "Conscription Law" of the Federal Government,⁸⁶ and one of the objections urged against the law was that it violated the "due process" clause of the Federal Constitution. If depriving men of their liberty and jeopardizing their lives does not violate the clause, it seems reasonable to say that everything included under the terms "life," "liberty" and "property" may be taken if the reason is sufficient. On this point the *Wynehamer* case is *contra* to the other cases decided before the Fourteenth Amendment was adopted, nor has it been followed since that time.

But while the opinion then prevailed that the extent to which the police power could operate was unlimited, the courts made it clear that it could only be exercised for certain purposes. In *Vanderbilt v. Adams*,⁸⁷ *supra*, the plaintiff in error contended that a statute authorizing harbor masters to regulate and station vessels in the East and North rivers did not extend to owners of private wharves; or that if it did so extend, it assumed to authorize an interference with private property in a way that was beyond the power of the legislature. In upholding the act the court said:

"It seems to me that the power exercised in this case is essentially necessary for the purpose of protecting all concerned. It is not in the

⁸⁴ *People v. Hawley* (1854) 3 Mich. 330, 342.

⁸⁵ *Beply v. State* (1853) 4 Ind. 264, 265, 58 Am. Dec. 628, 629.

⁸⁶ *Kneedler v. Lane* (1863) 45 Pa. 238.

⁸⁷ (1827) 7 Cow. (N. Y.) 349.

legitimate sense of the term a violation of any right; but the exercise of a power indispensably necessary where an extensive commerce is carried on. . . . The right assumed under the law would not be upheld, if exerted beyond what may be considered a necessary police regulation. The line between what would be a clear invasion of the right on the one hand, and regulations not lessening the value of the right, and calculated for the benefit of all must be distinctly marked. . . . Police regulations are legal and binding, because for the general benefit; and do not proceed to the length of impairing any right in the proper sense of the term.

"The sovereign power in a community, therefore, may and ought to prescribe the manner of exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims."⁸⁸

The individual himself, as a member of society, is benefited by legitimate regulation.

In *Coates v. Mayor of the City of New York*,⁸⁹ the statute under review authorized the City of New York to make by-laws "for regulating or if they found it necessary, preventing the interment of dead" within the city. In pursuance of this statute the city had passed a prohibitory ordinance, which plaintiffs in error claimed to be inoperative in their cases because of certain grants of land held in trust by them for the sole purpose of interment. The by-law and statute were both sustained. The court said in discussing the necessity of the former:

"This necessity is not absolute. It is nearly synonymous with expediency or what is necessary for the public good."⁹⁰

To judge of that matter, however, is the function of the legislature; it being "of the nature of legislative bodies to judge of the exigency upon which their laws are founded." And the law itself is "equivalent to an averment that the exigency has arisen, been adjudicated and acted upon." The duty of the court is merely to see "that the law operates upon the subject of the power," and in exercise of this duty the court said:

"We are of the opinion that this by-law is not void, either as being unconstitutional, or as conflicting with what we acknowledge as a fundamental principle of civilized society, that private property shall not be taken even for public use, without just compensation. No property has, in this instance, been entered or taken. None are benefited by the destruction, or rather the suspension of the rights in question, in any other way than citizens always are, when one of their number is forbidden to continue a nuisance."⁹¹

⁸⁸ 7 Cow. (N. Y.) at 351.

⁸⁹ (1827) 7 Cow. (N. Y.) 585.

⁹⁰ 7 Cow. (N. Y.) at 606.

⁹¹ 7 Cow. (N. Y.) at 605.

Here the by-law was sustained, not because it was a necessity in the strict sense of the word, but because its purpose was to benefit the health of all members of the community. The test of the validity of a police regulation may be illustrated by contrasting this case with that of *Austin v. Murray*,⁹² decided by the Massachusetts Supreme Court in 1834. The question was the validity of a by-law prohibiting the bringing of the dead into the town for purposes of burial, a prohibition affecting chiefly or exclusively Catholic parishioners. The court held the law unconstitutional as "an unreasonable infringement on private rights." The opinion reads:

"The illegality of a by-law is the same whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived, unless the public good requires it. And the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. . . ."

"The by-law 'is a clear and direct infringement of the right of property, without any compensating advantages, and not a police regulation, made in good faith for the preservation of health.'"⁹³

Here, then, is defined the scope of the police power and the basis for a judicial inquiry into the validity of legislative acts purporting to be made in its exercise. The legislative power extends to the abatement of public nuisances, *i.e.*, things detrimental to the health, safety and morals of the public generally, and it is the exclusive prerogative of the legislative department to decide whether the public need is sufficient to justify the abatement. But property rights can be taken for this purpose only, and if the act obviously would not in any way tend to accomplish this result. It will not be judicially held valid merely because it is enacted under the guise of a police regulation.

From the cases studied in the preceding pages, it appears that an interpretation of the phrase "due process of law" has been developed by judicial decisions in much the same way that the common law was developed. The phrase had its origin in Magna Charta, but the American courts have given it a meaning quite different from its English meaning. In both countries its purpose is to protect the individual from arbitrary governmental action. But in England it is only a protection from executive and judicial acts not in conformity with approved procedure, while in America it defines the scope of legislative power also.

This American interpretation of the phrase did not appear after the adoption of the Fourteenth Amendment, but was developed before that

⁹² (1834) 16 Pick. (Mass.) 121.

⁹³ 16 Pick. (Mass.) at 126.

amendment, in the decisions which we have been considering. It is based upon a concept of government which dominated the political thought of American statesmen and jurists during the formative period of American constitutional law. The substance of this concept was that government is brought into being by the will of the governed for the purpose of preserving to the individual the enjoyment of life, liberty and property. It follows that a government has only a limited power delegated to it, that the scope of this power is determined by the purposes for which the governmental organization is created, and that an act of the government performed to accomplish these purposes is a valid exercise of governmental power if performed according to procedure sanctioned by usage, but an act performed for any other purpose is *ultra vires*. Adopting this view, a number of American courts, shortly after the Revolution, held legislative acts invalid because of their purpose. The scope of legislative power came to be defined in terms of the two doctrines, vested rights and police power. When a right had vested in an individual under an existing law it could not be taken away from him except for the purpose of preserving to the public generally life, liberty and property. In this way an extra-constitutional basis for judicial review was set up. Such a basis, as was pointed out by Justice Iredell, was unsatisfactory because of the large discretionary power which it gave to the courts. In spite of this objection, we find this argument used by the federal and several of the state courts during the first half of the nineteenth century to justify holding invalid legislative acts. During the same period the same doctrines were sustained by the North Carolina courts as being within the meaning of "due process of law," and in the fifties this interpretation of the clause was expressed in decisions of the New York courts and by Chief Justice Taney in his opinion in *Dred Scott v. Sanford*.

Lowell J. Howe.