University of Pennsylvania
Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 112 MARCH 1964 No. 5

NEW VISTAS IN CONSTITUTIONAL LAW *

PAUL A. FREUND †

Anniversaries are a time for retrospect and prospect, looking into the murky past and peering into the misty future. In 1889, to mark the centennial of the Constitution, a celebration was held at the University of Michigan. One of the speakers, Professor Charles A. Kent, speaking on constitutional development since 1864, took a backward and forward look at the due process clause of the fourteenth amendment.[1] Pointing out that a large number of cases had reached the Supreme Court on this ground, he quoted the impatient remark of Justice Miller in 1877, in *Davidson v. New Orleans*, that "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," and 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 . . . ."[2] The speaker reviewed the efforts, all of them futile, to induce the Supreme Court to set aside state laws prohibiting the sale of intoxicating liquors and of oleomargarine, laws

* This Article was presented orally as the Owen J. Roberts Memorial Lecture, delivered November 7, 1963, under the auspices of the Pennsylvania Chapter of the Order of the Coif and the University of Pennsylvania Law School.

† Professor of Law, Harvard University. A.B. 1928, Washington University; LL.B. 1931, S.J.D. 1932, Harvard University; LL.D. 1954, Columbia University, 1956, Washington University, University of Louisville, 1961, University of Chicago.

[1] Kent, *Constitutional Development in the United States, as Influenced by Decisions of the Supreme Court Since 1864*, in MICHIGAN UNIVERSITY, CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW (1889).

[2] *Id.* at 231-32, quoting Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

fixing maximum rates and charges for railroads and storage elevators, and laws dispensing with the petty jury or the grand jury in state courts. The speaker concluded:

> These and other decisions show that for the protection of all the ordinary rights of life, liberty, and property, each individual must rely mainly on the constitution, statutes, and judiciary of his own State, and that the jurisdiction of the Supreme Court of the United States can be successfully invoked, at present, only in extreme cases. Still, the jurisdiction exists in all this class of cases, and the time may come when that court, with a changed membership and changed tendencies, may set aside State laws deemed most important for the proper administration of justice.[3]

Within a year of that address, the Supreme Court decided the case of *Chicago, M. & St. P. Ry. v. Minnesota*,[4] holding that the due process clause was violated by a state law making the findings of a state commission conclusive on the subject of equal and reasonable charges for railroad transportation. The case can be seen as one of those bridge decisions that open up new terrain by connecting it with familiar ground. The deprivation of property, it was insisted, must be the result in the end of a judicial determination as a matter of due procedure in the strict sense, and the judicial function must ultimately include a decision on the reason of the law and the order. From that decision, wrote Judge Hough in 1919, "I date the flood." [5]

At almost the same time as the Michigan celebration, the Harvard Law School Association was awarding a prize for the best essay by a member of the graduating class. The award went to Charles E. Shattuck for his paper entitled "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty, and Property.' " [6] The prize-winning author noted the tendency of state courts to give the term "liberty" a meaning considerably broader than physical freedom of the person, and specifically to include the right to follow any ordinary calling. Setting himself against this latitude of meaning and protection, the author concluded:

> One is obliged to ask why it should include thus much and no more. If it includes the right to pursue any lawful trade, why should it not include the right to worship in any lawful manner, to print or speak in any lawful manner, and to exer-

[3] *Id.* at 233.

[4] 134 U.S. 418 (1890).

[5] Hough, *Due Process of Law—To-day*, 32 HARV. L. REV. 218, 228 (1919).

[6] 4 HARV. L. REV. 365 (1891).

> cise one's political privileges in any lawful manner? Possibly, if the point should arise, it would be held to include all the above liberties, although the writer has not found any statements in the books to that effect. The reasons for supposing that the term should not be so interpreted have already been set forth.[7]

Mr. Shattuck had to wait a little longer than Professor Kent to find that his rhetorical question was not so rhetorical after all. Here the progression was from property to proprietary liberties—liberty to pursue a lawful calling, to make contracts, and to manage one's business—and so at length to liberty of the mind and in the forum of ideas. The judicial bridgework was constructed of questions, of concessions for the sake of argument, and finally of solid holdings. The story is familiar enough, but it may be worth recalling briefly at a time when we are inclined to account liberties of the mind and forum as the starting point and to ask in turn whether these may not imply parallel liberties of a proprietary kind. In 1907, Justice Holmes could say, in a case on contempt of a state court by a newspaper publication, "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First."[8] In 1922, answering a contention that a state law requiring employers to give a letter to an employee upon discharge or termination of service describing the cause of his leaving was an infringement of a right of the corporation derived from the guarantee of freedom of speech, the Court observed that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations."[9] Meanwhile, questions began to be raised. In his dissenting opinion in *Gilbert v. Minnesota*, Justice Brandeis concluded with a sharp confrontation: "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property."[10] In *Gitlow v. New York*, argued and reargued in 1923 and decided in 1925, Justice Holmes, joined by Justice Brandeis, introduced his dissenting opinion with the flat assertion:

> The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as

[7] *Id.* at 392.
[8] Patterson v. Colorado, 205 U.S. 454, 462 (1907).
[9] Prudential Ins. Co. of America v. Cheek, 259 U.S. 530, 543 (1922).
[10] 254 U.S. 325, 343 (1920).

> there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.[11]

The majority in that case were impelled to make an assumption which proved in the long run more significant than the decision: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." [12]

The rest of the story is well-known, and it is one in which Justice Roberts played a significant role. The chief justiceship of Charles Evans Hughes was the watershed. Beginning with *Near v. Minnesota* in 1931,[13] in which Justice Roberts was an indispensable member of the majority of five, liberty of the press was firmly assimilated to the other liberties that had received shelter under the Fourteenth Amendment. Freedom of religious belief and exercise was established in an opinion by Justice Roberts himself in *Cantwell v. Connecticut*,[14] and the foundation for liberty of association was laid in *DeJonge v. Oregon*.[15] In the same period the guarantees in favor of defendants in criminal cases were given new vitality, notably in the right to counsel,[16] the exclusion of coerced confessions,[17] and the scrutiny of jury lists for evidence of racial discrimination;[18] and the separate but equal doctrine began to be eroded in decisions on state provision of higher education.[19]

All of this movement and ferment, so obscure to the vision of 1889, reflected a sensitivity to values that had emerged in the society and that were sharpened by visible and powerful threats here and abroad. It is no accident, after all, that during the tenure of Justice Roberts, which coincided with the rise of totalitarian dictatorships, the Court found occasion to set aside the action of Mayor Hague of Jersey City in handpicking the speakers permitted to use the public square, the action of a Huey Long-dominated legislature of Louisiana levying

---

[11] 268 U.S. 652, 672 (1925).
[12] *Id.* at 666.
[13] 283 U.S. 697 (1931).
[14] 310 U.S. 296 (1940).
[15] 299 U.S. 353 (1937).
[16] Powell v. Alabama, 287 U.S. 45 (1932).
[17] Brown v. Mississippi, 297 U.S. 278 (1936).
[18] Norris v. Alabama, 294 U.S. 587 (1935).
[19] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

an oppressive tax on the big-city press, and the action of Governor Sterling of Texas in declaring martial law in defiance of a federal court order.[20]

Today we are in the centennial year of the Emancipation Proclamation and are approaching the hundredth anniversary of the fourteenth amendment itself. For all of the warnings posted by the examples of anniversary prophecies, the temptation is nevertheless strong to cast an eye on the vistas opened by recent developments. But before venturing on that hazardous course, a few words ought to be said about the process of deriving meaning from, or infusing meaning into, the noble and spacious clauses of the amendment. I have said that the process obscured to the vision of 1889 reflected a heightened sense of values in the contemporary world. To say this is to raise the perennial and nagging question of objectivity in constitutional law.

It is no disparagement of a work of art or of its interpreters that it takes on new relevance, yields new insights, answers to new concerns, as the generations pass. Nor is it a reproach to a Constitution "intended to endure for ages to come, and to meet the various crises in human affairs" or to its interpreters that it too responds to changing concerns of the society to which it ministers. As *Hamlet* has at one time or another been seen as a story of revenge, a study of the borderland of sanity, a search for rational instead of spectral modes of evidence, an analysis of mother-fixation or a death-wish, and as none of these can be said to be wrong, each having some relevance and some validity, so it need not be cause for despair that to one generation the Constitution was primarily a means of cementing the Union, to another a safeguard of property, to another a shield of access to political participation and equality before the law.

In a very recent essay, Professor Stuart Hughes has set out his view of the problem of objectivity for the historian:

> I remember that at one time I really believed that the writer or teacher of history could and should attain to a sublime detachment. As the French put it, he should be above the mêlée of human events, delivering with sovereign confidence the "verdict of posterity." Since then, an intense exposure to the ideas of Benedetto Croce has cured me of such notions: I have learned that the result of the historian's efforts to be detached has usually been the very opposite of what anyone would call great history. It has been bloodless history, with no clear focus, arising from antiquarian curiosity rather than from deep personal concern, and shot through with meta-

[20] Hague v. C.I.O., 307 U.S. 496 (1939); Grosjean v. American Press Co., 297 U.S. 233 (1936); Sterling v. Constantin, 287 U.S. 378 (1932).

physical and moral assumptions that are all the more insidious for being artfully concealed.

> This does not mean that I—and others like me—have learned from Croce to write partisan history with a good conscience. Far from it: we detest mere polemic, and we certainly know how to distinguish between fine historical writing and writing designed to serve a cause. We recognize that historians have been right in striving for serenity and the world-embracing view. But we understand this aspiration in rather a different sense from the way in which it used to be taught to us. What we have learned from Croce and his like is that "objectivity" is to be valued only if it is hard-won—only if it is the end result of a desperate *and conscious* battle to rise above partisan passion. The man who does not feel issues deeply cannot write great history about them. Unaware of his own prejudices, he cannot bring them to full consciousness and thus transcend them, nor will his prose be infused with that quality of tension and excitement that comes from strong emotion just barely held under control. Only after he has mastered his own limitations can the historian begin to make constructive use of them. "Man's capacity to rise above his social and historical situation," as Carr puts it, "seems to be conditioned by the sensitivity with which he recognizes the extent of his involvement in it." [21]

I venture to think that even Chief Justice Hughes, without making allowance for grandfatherly pride, would have found that portrayal of the historian's art to be a fair statement, *mutatis mutandis*, of the constitutional jurist's as well.

I wish to consider three recent developments in the law of the fourteenth amendment: first, the extension of the idea of due process in criminal cases; second, the new concept of equal protection in the reapportionment cases; third, the expanding notion of state action or, better, state responsibility. Obviously a rounded treatment of all these thorny issues is not possible. What I shall try to explore is the extent to which these developments open up straight, unclouded vistas or disclose curtained patches of haze that may call for circumspection in the judicial passage.

I. Due Process in Criminal Cases

The extension of the idea of due process in criminal cases is symbolized by *Mapp v. Ohio*,[22] ruling that the products of an unconstitu-

[21] Hughes, *Is Contemporary History Real History?*, 32 The American Scholar 516, 520 (1963).

[22] 367 U.S. 643 (1961).

tional search and seizure must be excluded from evidence in a state no less than a federal criminal trial. This development was in fact foreseen by Justice Roberts, though with no enthusiasm. In his Holmes lectures at Harvard in 1951, he pointed out that the concept of due process was being extended by assumptions for the sake of argument: "We are led to speculate when the Court will hold that the Fourteenth has absorbed the Fifth and Eighth Amendments" (compare the evolution of the guarantees of speech), while the logical result of that extension, the reversal of state convictions, was being withheld. It was an uneasy compromise—"a strange medley," he called it, "of federal and state law"—that could not, in his judgment, endure.[23]

Now that the compromise has been abandoned and the exclusionary rule of evidence made mandatory, will there be a reexamination of the federal substantive rules of search and seizure themselves to determine more precisely than was necessary heretofore just what rules may be ascribed to the Constitution and what to the supervisory power over the federal, as distinct from the state, courts? We have already seen an equal division of the Court on this issue: whether the requirement of self-identification of the officers at the door is indeed a constitutional command for all or only the better practice demanded of federal officers.[24] Since the common law did not impose an exclusionary consequence on illegal searches and seizures, an absolute equation of common-law rules of conduct with the new demands of the fourteenth amendment is, from a functional or operational point of view, a redefinition of the rules themselves. It does not require a tongue of prophecy to predict that some reexamination at the fringes of constitutional standards will be undertaken, and that there may be some latitude left for state variations.

A related problem is the temporal, rather than the territorial, reach of the *Mapp* case—the issue of retrospective application to prisoners seeking release or a new trial through habeas corpus. Since the new evidentiary rule goes not to the intrinsic fairness of the trial but to an effective sanction for the enforcement of rules of police conduct, and since that sanction will operate prospectively, the compulsion to apply the exclusionary policy retrospectively is relatively weak; latitude here too may well be left for local option. A more difficult question of retrospective application is posed by the rule requiring the appointment of counsel for indigent defendants in state cases involving serious charges. The answer may well turn on a question of the relation of

[23] ROBERTS, THE COURT AND THE CONSTITUTION 87-89 (1951).

[24] Ker v. California, 374 U.S. 23 (1963).

the recent *Gideon v. Wainwright* decision [25] to the predecessor doctrine deriving from the opinion of Justice Roberts in *Betts v. Brady*.[26] In overruling that case, did the Court mean to lay it down that a trial without counsel is necessarily unfair, or only that the effort to apply *Betts v. Brady* on a case-by-case basis, looking for aggregate unfairness in the conviction under review, proved to be weariness of flesh and spirit and ought to be superseded by a flat rule of judicial administration in the state courts, a rule, moreover, that experience with *Betts v. Brady* might well have moved them to adopt for themselves in the interim? Here the mode of opinion-writing in overruling is more than a matter of style or manners; it has operative implications for an important class of cases. Perhaps the style of the *Gideon* opinion was meant deliberately to foreclose this question in favor of a retrospective command; but the Court has chosen not to say so, electing to put the question in the first instance to a state court.[27] Whatever the outcome may be, it would be regrettable if a supposed necessity to conform the criteria on habeas corpus to evolving standards of judicial administration and review in criminal trials should in the future prove to be a dogma reflexively inhibiting the Court in the evolution of those standards themselves.

II. Equal Protection in Reapportionment Cases

If the reapportionment case [28]—to turn to the new vista of equal protection of the laws—was an extraordinary decision, it was a response to an extraordinary problem. The obstacles in the way of federal judicial review were formidable. The standing of the complainants ought to be linked to their substantive rights as voters, and since plainly they had no right to absolute fractional equality with voters in every district, and since principles of representation have long been a matter of diversity—resting on population, or area, or other interests, or a combination of these—, a formulation of the complainants' legal rights may ultimately have to probe deep into the foundations of political philosophy. Moreover, the problem of equity jurisdiction, the shaping and enforcement of a decree, was no less formidable, given the awkward solution of an election at large with no proportionality through districting, and the risk of inaction or stalemate in the lawmaking branches of state government.

---

[25] 372 U.S. 335 (1963).

[26] 316 U.S. 455 (1942).

[27] Pickelseimer v. Wainwright, 375 U.S. 2 (1963); see Daegele v. Kansas, 375 U.S. 1, 89 (1963), *remanded for consideration in light of* Douglas v. California, 372 U.S. 353 (1963).

[28] Baker v. Carr, 369 U.S. 186 (1962). For some of the complexities in a theory of democratic representation see Buchanan & Tulloch, The Calculus of Consent (1962).

But the case before the Court was a particularly insistent one. The state constitution itself had resolved the issue of the basis of political representation in favor of the principle of numbers; the actual apportionment was not the product of legislative policy but of legislative inaction for sixty years; and no popular procedure like the initiative and referendum, independent of the legislature, was available under state law. It is sometimes said that when legislatures and executives cannot be moved to advance the cause of liberalism, the opportunity and responsibility devolve on the courts. Stated thus baldly, the counsel is surely a dangerous invitation, dangerous to the standing of the Court and false to the liberalism in whose name it is propounded. But in the context of the Tennessee apportionment case the default of the lawmaking machinery had special relevance, for the very structure and processes that are presupposed in representative government had become distorted.

The future will test the Court's resourcefulness in defining the rational bounds of patterns of representation without resorting to a simplistic criterion of one man, one vote—a criterion meaningful in an election for a single state-wide office or for a particular representative but question-begging in the case of a collegial body to be chosen with a view to balanced representation. This is the kind of challenge that even a John Marshall did not always succeed in meeting satisfactorily. That the power to tax is the power to destroy—asserted in order to strike down a state tax discriminating against the United States Bank[29]—, that the power over commerce among the states is exclusively lodged in Congress—asserted in order to set aside a state-granted monopoly[30]—, these were doctrines going beyond the necessities of the case or the problem, doctrines which plagued constitutional law for a long time, because they could not contain the counter-pressures from state interests that had been slighted in the formulas. The general direction of Marshall was characteristically wise, but the momentum of doctrine shot beyond its mark, and other generations were obliged to retrace some giant steps in order to follow a viable course. The problem for the courts in reapportionment, I suggest, is similar: to maintain direction while avoiding the confounding of the rational with the doctrinaire.

III. The Expanding Notion of State Responsibility

The unfolding concept of state action, or state responsibility, has made a strong appeal to those students of our society who see in the

[29] McCulloch v. Maryland, 18 U.S. (4 Wheat.) 316 (1819).
[30] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

modern corporation, the labor union, and other forms of association a microcosm of the state itself. In strength, in importance, in their impact on their members and on the community, some at least of these organizations do appear to rival and resemble formal governmental units. What more natural, then, than that they should be "constitutionalized," subjected to the restraints which have been leveled by the Constitution at government itself?

The decisions which have thus far brought certain "private" action under the restrictions of the fourteenth amendment have taken us a long way beyond a formalistic view of the responsibility which that amendment attaches to deprivations by the "State." The Court has shown a sense of realism in this development, but has so far declined to take the step of unhinging the amendment from close state involvement, and to overrule the Civil Rights Cases. Where the state has delegated certain governmental functions to private groups, the groups are held to constitutional duties in carrying them out, as in the conduct of party primaries, which are an integral part of the political electoral process,[31] and the normally governmental conduct of a company-owned town.[32] The latter case is of special interest because it concerns rights of public assembly and religious exercise, illustrating the reach of the amendment beyond acts of discrimination. Another class includes cases where the state may fairly be held responsible for the private conduct, by granting an exclusive or near-exclusive franchise, or by providing special facilities to carry out the private plan.[33] A further group includes cases where state-owned facilities are involved, through lease or similar arrangement.[34] The decision in *Shelley v. Kraemer*,[35] holding unconstitutional the judicial enforcement of a racially restrictive housing covenant, is susceptible of various interpretations, but the reiteration in the opinion of that there were a willing seller and a willing buyer suggests that the state court was in those circumstances regarded as the effective cause of the discrimination. Or the decision may be rationalized by assimilating the enforcement of a neighborhood covenant, binding on all successors in interest, to a municipal zoning ordinance binding on all neighborhood property owners when a certain majority of them have approved a racial restriction.

The further vista of an overruling of the Civil Rights Cases has been opened to some eyes by the public-accommodations bill and the

[31] Smith v. Allwright, 321 U.S. 649 (1944).
[32] Marsh v. Alabama, 326 U.S. 501 (1946).
[33] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); *cf.* Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570 (1958).
[34] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
[35] 334 U.S. 1 (1948).

controversy over its more proper constitutional basis—the commerce clause or the fourteenth amendment. The immediate purpose of the fourteenth amendment was to validate the Civil Rights Act of 1866, which was directed to acts under color of state law. When in 1875 Congress undertook to prohibit not acts under color of state law, but discriminatory practices by public carriers, inns, and theatres, the statute was held to exceed the authority conferred by the amendment.[36]

When it is asked why the Civil Rights Cases have not been overruled, and what the prospects of overruling are, the best clue to an answer lies in the cloudiness of the meaning of the question—"overruling" the decision. It is easy enough to state the principle on which the cases were decided: that only acts for which the state is in some meaningful way responsible are comprehended by the amendment. But to state the principle that would underlie an overruling is far from easy. The dissent of Justice Harlan is itself not wholly clear, but at all events he did not take the position that all private action permitted by state law could be reached by Congress because all such action is philosophically a delegation of sovereign power. What would be involved is not simply an *ad hoc* determination, or an appeal to moral sentiment, or a problem of choice between the slogan of property rights and the slogan of public responsibility of public enterprises. Because the fourteenth amendment is spacious in its guarantees and is cast largely in terms of prohibitions that are self-executing (by way at least of injunctive relief and defenses to legal claims, without enforcement legislation), any decision "overruling" the Civil Rights Cases has implications for judicial power and duty that transcend the immediate controversy. Such a decision would have a momentum of principle that might carry it far beyond the issue of racial discrimination or public accommodations. The point is not that the step must therefore be rejected; it is that if the step is taken, it should be done with clear awareness of its larger implications. In this respect it differs qualitatively from a step taken under the commerce clause, for that is primarily a grant of legislative power to Congress, which can be exercised in large or small measure, flexibly, pragmatically, tentatively, progressively, while the recognition of guaranteed rights, if they are declared to be conferred by the Constitution, is not to be granted or withheld in fragments. Therefore, it is necessary to arrive at some conception of the range of rights which an overruling of the Civil Rights Cases would create for the courts and the Congress to enforce.

Equal protection and due process are the guarantees of the amendment which have been most intensively applied against official state

[36] Civil Rights Cases, 109 U.S. 3 (1883).

action. In considering their possible applications following an overruling of the Civil Rights Cases, three levels of questions are raised: to what *enterprises,* to what *activities* of those enterprises, and by what *standards* shall the applications be made?

If the extension were limited to public utilities in the strict sense, those enterprises having a duty, under the common law or statutes of the state which created them, to serve the public generally, there might be no problem, for the state itself would be discriminating in its law if its courts would enforce this duty on behalf of all except members of a particular race or religion. But public utilities in this sense are a narrow class of enterprises—public carriers and inns for lodging—, and it would have to be shown (as it was not in the Civil Rights Cases) that the state practiced discrimination in enforcement of the general legal duty to serve imposed under its own law.

It has been suggested that a right be recognized against all establishments licensed by the state; the license would be the nexus between state and private responsibility. Licensing varies in scope and function from state to state, and from city to city. It may signify only that an establishment has paid a tax, or satisfies sanitary or safety standards, or is operated by qualified persons. To make the constitutional right to be served turn on the presence or absence of a license would thus produce some anomalous results, substituting a new formalism in the movement away from an older one. Moreover, as a practical matter, a local government would not find it difficult to dispense with the requirement of a license while retaining control over sanitary, safety, and similar conditions as well as over tax liability. The standards imposed on an establishment in these respects could be enforced by injunction or civil and criminal penalties, without the device of a license.

There is one type of license which stands on a different footing—a certificate of convenience and necessity, conferring a monopoly or near-monopoly. When the state grants such a franchise, it forecloses potential competitors from operating on a possibly nondiscriminatory basis, and so in a special sense the state may be regarded as contributing to the discriminatory policy followed by its franchise holder. This penumbra of the fourteenth amendment has already been recognized without legislation, in connection with the duties of a union holding an exclusive bargaining position under law and a private bus line holding a franchise.[37]

If licensing by itself were regarded as a basis for application of the fourteenth amendment, the question would arise whether private

[37] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Boman v. Birmingham Transit Co., 280 F.2d 531 (5th Cir. 1960).

schools and colleges licensed by a state, or lawyers, or indeed all corporations operating under state charter, could properly be omitted from the coverage. Similarly, if licensing gives rise to constitutional duties and corresponding rights, it is hard to see how any exemptions could be made on the basis of size, any more than other constitutional rights, like that of freedom from censorship, can be made to turn on the size of an establishment.

An alternative basis for identifying certain enterprises with the state for purposes of the fourteenth amendment is the concept of businesses affected with a public interest, a category that for many years was used to signify those enterprises that could be subjected to state control over prices and rates. But even for this permissive purpose, the classification proved unsatisfactory and artificial, and when in 1934 this criterion was frankly abandoned by the Court in an opinion by Justice Roberts, the decision was generally welcomed as clearing the constitutional atmosphere.[38] Mr. Justice Roberts said:

> It is clear that there is no closed category of businesses affected with a public interest . . . . In several of the decisions of this court wherein the expressions "affected with a public interest," and "clothed with a public use," have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices.[39]

If agreement were reached on a definition of establishments subject to the fourteenth amendment, the further question would be faced of the activities or practices that are encompassed. Is discrimination in employment included equally with discrimination in service? If one is covered and the other is not, is Congress or the Court restricting thereby the bounds of constitutional guarantees, since injunctive remedies would normally be open even apart from statute to restrain threatened infringements of constitutional rights? Since the amendment relates to many practices besides discrimination, since indeed it now absorbs the basic guarantees of the Bill of Rights, questions will arise over the applicability of these to the establishments that are assimilated to the state: whether, for example, such an establishment could make preferential contributions to a church, and whether its intracorporate procedures must satisfy standards of due process of law.

If the private licensee takes on to some extent the constitutional duties of the public licensor, there is the further problem of the stand-

[38] Nebbia v. New York, 291 U.S. 502 (1934).
[39] *Id.* at 536.

ards for defining those duties. If an official licensor gave preference to the sons of licensees, a serious issue would be raised under the equal-protection clause.[40] If the licensee himself followed a policy of nepotism in his business, would a similar constitutional issue be raised? In all likelihood a new set of constitutional standards would have to be formulated for private practices covered by the amendment—a set conforming neither to the legal-ethical codes for purely private conduct nor to the constitutional code for governments and their agencies.

The combination of these uncertainties—the class of establishments, the kinds of practices, and the standards to be set—may well account for the Court's adherence to the basic principle of the Civil Rights Cases. It is not a matter of lack of sympathy for the moral claims asserted; the real problem is an *institutional* one, whether at the national level those claims are to be vindicated, in private relations, through processes of legislation under a congeries of powers (commerce, defense, spending), or whether they are to open up new areas of direct constitutional relationships which will call for judicial creativity and innovation on a formidable scale.

It is ironic that some of the sentiment in Congress for a public-accommodations bill based on the fourteenth amendment rather than the commerce clause has come from legislators who are concerned that the commerce clause is too expansive and would put business to the hazard of too pervasive national regulation, while the fourteenth amendment is thought to be the safe and natural vehicle for the securing of Negro rights. It is an ironic tribute to the incantation of slogans.

IV. Conclusion

I have said enough to make it plain that the new vistas in constitutional law are not, in my judgment, boundless, that they are not free of shadows and even treacherous turns. What I am saying is perhaps simply, as others have been saying, that there are no absolutes in constitutional law.

But I would wish to dissociate myself from those who instance the recent prayer decisions[41] as a yielding to absolutes. In the result the decisions do not, as is often loosely asserted, ban prayer and Bible-reading from the public schools. They ban prescribed public prayer and devotional Bible-reading—a rather different thing. The difference between such prayer and a period of meditation during which each student may recite silently what his spirit or training prompts

[40] Kotch v. Board of Pilot Comm'rs, 330 U.S. 552 (1947).
[41] Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

is a considerable constitutional difference but hardly a drastic one in practice; to regard it as drastic in principle is to exalt the words of the mouth over the meditations of the heart in a way repugnant to the great religious traditions and to exalt official conformity over religious voluntarism in a way offensive to the American political tradition.

Not only in result but in legal foundation as well the prayer decisions hardly deserve to be condemned as absolutist. They would so deserve if they were based on a supposed principle forbidding any and all public aid to religion. Such a principle would presumably prohibit the use of public parks for religious causes (assuming them to be available for secular causes), to say nothing of chaplains in the armed services, military exemption for conscientious objectors, statutory dispensation from Sunday laws for sabbatarians, and a host of other legislative supports given on account of religion. Obviously any sweeping proscription would raise a painful dilemma when the claims of free exercise were met by so absolute a conception of establishment. But in the prayer cases the two guarantees, so far from colliding, supplement each other. In saying this, I put more central emphasis than the opinions did on the special circumstance of the psychological coercion on children toward conformity in the atmosphere of a schoolroom, and the consequent pressure on freedom of religious conscience—in sharper terms, the official pressure to yield to what is worship for most and may be idolatry for some. If it be suggested that this argument ignores the right of free exercise by the majority, or that it will be time enough to ban the ceremonies when they reach the stage of sectarian worship (meanwhile affording the nonconformists the privilege of nonparticipation, as in the flag-salute case), the answer is the same: that to vest school boards and courts with the task of drawing lines between sectarian and nonsectarian forms of a concededly religious activity would only compound the objection by vesting essentially theological disputes in secular hands and so impinging on the nonestablishment guarantee. The problem resembles that in the *Miracle* case,[42] where in order to escape from the vagueness of the criterion of "sacrilege" as a standard for censorship it would be necessary to vest in secular agencies the role of defining this theological concept and thus to become impaled on the horn of establishment. If an escape from absolutism is usually to be found in recognizing and sharpening differences of degree, that course is hardly open when it entails a decision from among competing theological positions.

I have likened the Constitution to a work of art in its capacity to respond through interpretation to changing needs, concerns, and aspira-

[42] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

tions. In a larger sense all law resembles art, for the mission of each is to impose a measure of order on the disorder of experience without stifling the underlying diversity, spontaneity, and disarray. New vistas open in art as in law. In neither discipline will the craftsman succeed unless he sees that proportion and balance are essential, that order and disorder are both virtues when held in a proper tension. The new vistas give a false light unless there are cross-lights. There are, I am afraid, no absolutes in law or art except intelligence.