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THE DUE PROCESS CLAUSES AND "THE
SUBSTANCE OF INDIVIDUAL RIGHTS."*

INTRODUCTORY.

THE United States Supreme Court has repeatedly declared that the due process clauses of the Federal Constitution relate not only to procedure but also to substantive law. The reasons for that declaration have received but little attention from either judges or text-writers. As, however, the declaration is unquestionably of great importance, we shall in this article consider briefly some of those reasons.

"THE SUBSTANCE OF INDIVIDUAL RIGHTS."

The clearest argument in support of the position that the due process clauses concern more than procedure seems to have been made in the opinion in *Hurtado v. California*,¹ in which the court admitted that in England the legislative department of government was not in any respect whatever restricted by the constitutional provision, which the court has declared to be closely akin to the due process requirement,² that no one should be deprived of life, liberty or

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¹ (1884) 110 U. S. 516, 4 Sup. Ct. 111, 292.

² See cases in note 14, *infra*.

property except in accordance with the law of the land. The court said that, although the provisions of Magna Carta were directed against the King and Acts of Parliament were always regarded as consistent with the law of the land, yet in this country the provisions in our Bills of Rights are limitations upon all departments of government, and for that reason provisions taken from the English constitution have a broader meaning than they had in England and must be held to guarantee not particular forms of procedure but the very substance of individual rights to life, liberty and property.³

* "The concessions of Magna Carta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case*, (1609) 8 Coke, 114a, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Carta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property:" *Hurtado v. California*, (1884) 110 U. S. 516, 531, 532, 4 Sup. Ct. 111, 292, 119. See also 110 U. S. at 535-537, 4 Sup. Ct. at 120, 121; *Davidson v. New Orleans*, (1877) 96 U. S. 97, 102; and concurring opinion in the latter case. Compare 96 U. S. at 103, 104. The court, in the *Hurtado* case, added, "Restrictions that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while in every instance laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as insti-

In that case the statute under consideration, which dealt only with a question of procedure, was sustained. The opinion furnishes, however, what is apparently the clearest argument which has been made in support of the position, which the court has taken in other cases, that the due process clauses restrict all departments of government,⁴ and are not sufficiently complied with by a mere observance of formalities.⁵ The court practically assumed that all of the provisions in our Bills of Rights apply to all organs of government and said that for that reason the provision must relate to more than procedure.

COMPARISON OF AMENDMENTS.

Before taking up the definite argument of the court, we must note that in our discussion of the due process clauses

tuted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, 'may alter the mode and application but have no power over the substance of original justice.'

⁴See, e. g., *Murray's Lessee v. Hoboken L. & I. Co.*, (1855) 18 How. 272, 276; *Chicago, B. & Q. R. Co. v. Chicago*, (1897) 166 U. S. 226, 233, 234, 17 Sup. Ct. 581, 583; *Hovey v. Elliott*, (1897) 167 U. S. 409, 417, 17 Sup. Ct. 841, 844; and also *Westervelt v. Gregg*, (1854) 12 N. Y. 202, 212; *Bank of Columbia v. Okely*, (1819) 4 Wheat. 235, 244. Compare *Walker v. Sauvinet*, (1875) 92 U. S. 90, 93.

⁵See language used in *Long I. W. S. Co. v. Brooklyn*, (1897) 166 U. S. 685, 695, 17 Sup. Ct. 718, 722; *Lochner v. New York*, (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 542; *Fayerweather v. Ritch*, (1904) 195 U. S. 276, 297, 298, 25 Sup. Ct. 58, 63, 64; *Simon v. Craft*, (1901) 182 U. S. 427, 436, 21 Sup. Ct. 836, 839; and also *King v. Hatfield*, (1900) 130 Fed. 564, 582; *Scott v. City of Toledo*, (1888) 36 Fed. 385, 393; decisions to the same effect in *Chicago, B. & Q. Ry. Co. v. People*, (1906) 200 U. S. 561, 26 Sup. Ct. 241; *Lochner v. New York*, *supra*; *Dobbins v. Los Angeles*, (1904) 195 U. S. 223, 25 Sup. Ct. 18; *Prout v. Starr*, (1903) 188 U. S. 537, 23 Sup. Ct. 398; *Chicago, M. & St. P. Ry. Co. v. Tompkins*, (1900) 176 U. S. 167, 20 Sup. Ct. 336; *Green B. & M. C. Co. v. Patten P. Co.*, (1898) 172 U. S. 58, 82, 19 Sup. Ct. 97, 106, (1899) 173 U. S. 179, 19 Sup. Ct. 316; *Allgeyer v. Louisiana*, (1897) 165 U. S. 578, 17 Sup. Ct. 427; *Missouri P. Ry. Co. v. Nebraska*, (1896) 164 U. S. 403, 17 Sup. Ct. 130; *Kaukauna W. P. Co. v. Green B. & M. C. Co.*, (1891) 142 U. S. 254, 269, 271, 12 Sup. Ct. 173, 176, 177. But compare *Fallbrook Irr. Dist. v. Bradley*, (1896) 164 U. S. 112, 157, 158, 17 Sup. Ct. 56, 62, 63; *Walker v. Sauvinet*, (1875) 92 U. S. 90, 93; concurring opinion in *Taylor and Marshall v. Beckham*, (1900) 178 U. S. 548, 585, 20 Sup. Ct. 890, 1009, 903, 904.

we shall assume that, standing alone, their terms have the same meaning in both the Fifth Amendment and the Fourteenth Amendment.⁶ The United States Supreme Court makes this assumption as a working hypothesis;⁷ and,

⁶ Of course, other provisions of the Federal Constitution secure to the individual procedural as well as substantive rights against the federal government which they do not secure to him against state action: see e. g., *West v. Louisiana*, (1904) 194 U. S. 258, 24 Sup. Ct. 650; *Maxwell v. Dow*, (1900) 176 U. S. 581, 20 Sup. Ct. 448, 494. This point is to be considered in connection with pages 205, 206, *infra*.

⁷ "While we need not affirm that in no instance could a distinction be taken, ordinarily if an Act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth." *Carroll v. Greenwich I. Co.*, (1905) 199 U. S. 401, 410, 26 Sup. Ct. 66, 67. "The purpose of [the Fourteenth] Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress:" *Tonawanda v. Lyon*, (1901) 181 U. S. 389, 391, 21 Sup. Ct. 609, 610, quoted approvingly in *Hibben v. Smith*, (1903) 191 U. S. 310, 325, 24 Sup. Ct. 88, 92. We "shall proceed, in the present case, on the assumption that the legal import of the phrase 'due process of law' is the same in both Amendments. Certainly, it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the states, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the federal government, in a similar exercise of power, by the Fifth Amendment." *French v. Barber A. P. Co.*, (1901) 181 U. S. 324, 329, 21 Sup. Ct. 625, 627. See also *Detroit v. Parker*, (1901) 181 U. S. 399, 401, 21 Sup. Ct. 624, 625; dissenting opinion in *Tonawanda v. Lyon*, (1901) 181 U. S. 389, 393, 21 Sup. Ct. 609, 611; *In re Kemmler*, (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934; *Hurtado v. California*, (1884) 110 U. S. 516, 534, 535, 4 Sup. Ct. 111, 292, 120 (in the latter two cases, however, it is possible that a distinction is made); dissenting opinion in *Wight v. Davidson*, (1901) 181 U. S. 371, 387, 21 Sup. Ct. 616, 622. "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment." *Davidson v. New Orleans*, (1877) 96 U. S. 97, 103, 104. Compare *Wight v. Davidson*, (1901) 181 U. S. 371, 384, 21 Sup. Ct. 616, 621, where it is said: "It by no means necessarily follows that a long and consistent construction

indeed, as both Amendments are part of the same Constitution such a working hypothesis is not unnatural.⁸

The variations in the texts of the two provisions are unimportant,⁹ save, of course, that the provisions relate to different governments;¹⁰ and while the contexts of the provisions are unlike,¹¹ the court apparently does not consider that fact important. It is true that a period of nearly eighty years separated the adoptions of the two Amendments, and it has been said that for that reason "it may be that questions may arise in which different constructions and applications

put upon the Fifth Amendment . . . is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation;" and *French v. Barber A. P. Co.*, (1901) 181 U. S. 324, 328, 21 Sup. Ct. 625, 626, where it is said: "While the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in widely different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper."

⁸ "The Constitution of the United States, with the several Amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity;" *Prout v. Starr*, (1903) 188 U. S. 537, 543, 23 Sup. Ct. 398, 400. "While the [state] constitution as it now stands it to be considered as a whole as if enacted at one time, to ascertain the meaning of particular expressions it may be necessary to give attention to the circumstances under which they became parts of the instrument;" *Thompson v. Kidder*, (1906) 74 N. H. 89, 91, 65 Atl. 392, 393.

⁹ Neither provision is expressly addressed to or confined to any particular branch of government to which it relates, so that it is difficult to see from the texts that either relates to fewer or more branches of government than the other. So far as the texts are concerned, there are as strong reasons for implying "by any organ of government" in one provision as in the other—and no stronger reasons.

¹⁰ The Fifth Amendment applies only to the federal government: *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 Sup. Ct. 582; *Jack v. Kansas*, (1905) 199 U. S. 372, 26 Sup. Ct. 73; *Ohio v. Dollison*, (1904) 194 U. S. 445, 24 Sup. Ct. 703; *Winous P. S. C. v. Casperson*, (1904) 193 U. S. 189, 24 Sup. Ct. 431; *Capital C. D. Co. v. Ohio*, (1902) 183 U. S. 238, 22 Sup. Ct. 120. That the Fourteenth Amendment applies to the state governments and does not apply to the federal government is clear in spite of expressions in *Patterson v. Bark Eudora*, (1903) 190 U. S. 169, 23 Sup. Ct. 821; *Plessy v. Ferguson*, (1896) 163 U. S. 537, 551, 16 Sup. Ct. 1138, 1143.

¹¹ See pages 212, 216, *infra*.

of their provisions may be proper;"¹² but the court does not seek to interpret either provision from the standpoint of the time of its adoption.¹³

"THE LAW OF THE LAND."

Before taking up the argument of the court it seems advisable to consider also the bearing of the statement which is sometimes made,¹⁴ and which the court referred to in the *Hurtado* case,¹⁵ that the due process provision is akin to the English provision that named deprivations must not be made unless by the law of the land.

It seems that when the term "the law of the land" was

¹² *French v. Barber A. P. Co.*, (1901) 181 U. S. 324, 328, 21 Sup. Ct. 625, 626, quoted at end of note 7, *supra*.

¹³ Yet see *United States v. Burr*, (1807) 4 Cr. 469, 470; *Schick v. United States*, (1904) 195 U. S. 65, 69, 24 Sup. Ct. 826, 827; *Robertson v. Baldwin*, (1897) 165 U. S. 275, 281, 17 Sup. Ct. 326, 329; on the duty of determining whether terms had established meanings when used and, if so, of applying them in accordance with those meanings. Consider also *Maxwell v. Dow*, (1900) 176 U. S. 581, 602, 20 Sup. Ct. 448, 494, 456; *Pittman v. Byars*, (1908) Tex. Civ. App., 112 S. W. 102.—In the interval between the adoptions of the two Amendments the United States Supreme Court interpreted the provision in the Fifth Amendment and many state courts interpreted similar provisions in state constitutions. The courts so often relied upon unconvincing reasoning that permanent interpretation and uniformity among the several jurisdictions alike seem extremely improbable, although an examination of the state decisions would require too much time to warrant its being made for purposes of this article. Yet if it were shown that the various decisions were in general accord at the time of the adoption of the Fourteenth Amendment, those decisions should help to fix the meaning of the Fourteenth Amendment, even though they were erroneous as to the provisions they interpreted and were now all overruled. Of course we must remember that a great deal of weight is due to the interpretations, and especially the unchallenged interpretations, which other departments of the state and federal governments showed by their actions that they placed upon the provisions: see *Patterson*, *The United States and the States Under the Constitution*, 2d ed., p. 234.

¹⁴ *Twining v. New Jersey*, (1908) 211 U. S. 78, 100, 105, 108, 29 Sup. Ct. 14, 20, 22, 23; *Walker v. Sauvinet*, (1875) 92 U. S. 90, 93; *Murray's Lessee v. Hoboken L. & I. Co.*, (1855) 18 How. 272, 276; and see *Missouri P. Ry. Co. v. Humes*, (1885) 115 U. S. 512, 519, 6 Sup. Ct. 110, 112; *Davidson v. New Orleans*, (1877) 96 U. S. 97, 101, 102; *French v. Barber A. P. Co.*, (1901) 181 U. S. 324, 333, 21 Sup. Ct. 625, 628; *In re Kemmler*, (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934.

¹⁵ In connection with language from opinion in that case quoted in note 3, *supra*, see language later in opinion at 110 U. S. 535, 4 Sup. Ct. 120.

used in chapter 39 of Magna Carta it related largely if not exclusively to procedure,¹⁶ and it is possible that it referred simply to the particular forms of procedure which were lawful in the year 1215.¹⁷ In later royal charters the term "due process of law" was substituted, showing that then if not in 1215 the desire related simply to procedure,¹⁸ and it seems that the desire was for procedure which was lawful at the time of trial. In other words, it is quite possible that the "law of the land" provision of Magna Carta was intended merely as a requirement that there should be a procedure which was in accordance with the law of the land, and that the due process provision in the later charters was intended merely as a requirement of a procedure which was made due by the law of the land. Indeed, the two provisions must be so understood if the court has been correct in declaring that the provisions are closely akin. Of course, if there was any difference in meaning between the two provisions the provision for "due process of law" supplanted the provision for "the law of the land."

The term "the law of the land" is also sometimes used¹⁹ in a broader sense as meaning the law of the state or the law of the country and as relating to more than procedure. While the provision for "the law of the land" when used in chapter 39 of Magna Carta probably related merely to procedure and was intended simply as a requirement of what was later called "due process of law," it certainly does not follow that, on the other hand, the provision for due process of law is equivalent to a provision for the law of the land when the latter term is used in its broadest sense—as relating to more than procedure.

¹⁶ See McKechnie, *Magna Carta*, 440, 441; Thayer, *Preliminary Treatise on Evidence*, 199-201; Bigelow, *History of Procedure*, 155, note; Baldwin, *The Courts as Conservators of Social Justice*, 9 Col. L. Rev. 571.

¹⁷ See authorities cited in note 16, *supra*. Compare page 200, *infra*.

¹⁸ See Baldwin, *The Courts as Conservators of Social Justice*, 9 Col. L. Rev. 569.

¹⁹ As in Article VI of the Federal Constitution, where, however, there is a qualifying adjective which limits its meaning.

Still, even if we assume that "due process of law" means "the law of the land" in the broadest sense of the latter term, we must note that such a requirement would have in general the same effect in this country as it would have in England.

Of course, we have in this country a supreme law of the land and when it speaks it must be obeyed by the organ or organs of government to which it speaks. But not all of the law of the jurisdiction is contained in the constitutions. This truth is elementary. And that portion of the law of the jurisdiction which is not contained in the constitutions is, in this country as in England, changeable by the appropriate authorities, although only the appropriate authorities may change or disregard it.

In England the Parliament, subject to a veto power which has not been exercised since 1707,²⁰ may change the law in any respect,²¹ while the King has not for centuries had the power to disregard the law or to change the law without the consent of Parliament.²² And in this country the legislative department of government has a power to change the law which is different from the power of a President or governor. The state legislatures, over subject-matters not withdrawn from their control, and Congress over subject-matters entrusted to it, have all governmental powers which are not entrusted by the constitutions to other organs of government and which are not withdrawn from the control of those legislative bodies by other provisions of the constitutions, while the executive department of government, on the other hand, possesses only powers which

²⁰ Anson, *The Law and Custom of the Constitution*, 3d ed., I, 301.

²¹ See Blackstone, *Commentaries*, I, *91, *160-*162; *Lee v. Bude & T. J. Ry. Co.*, (1871) L. R. 6 C. P. 576, 582; Courtney, *The Working Constitution of the United Kingdom*, 4; Dicey, *The Law of the Constitution*, 6th ed., 58 *et seq.*; Lowell, *The Government of England*, I, 9; *Hurtado v. California*, (1884) 110 U. S. 516, 531, 4 Sup. Ct. 111, 292, 119; *Slaughter House Cases*, (1872) 16 Wall. 36, 65.

²² Bill of Rights (1689); and see Pollock and Maitland, *History of English Law*, I, 1st ed., 152, 2d ed., 173; Anson, *The Law and Custom of the Constitution*, 3d ed., I, chap. 9, II, pp. 33, 34; Lowell, *The Government of England*, I, 22; 12 Coke, 76 (1611). Compare Lowell, *op. cit.*, I, 23, 24.

are granted to it by law, and those powers must be exercised in a manner recognized by law.²³ In other words, we have profited by the struggles which our ancestors had with their kings and, by the distribution of governmental powers in our constitutions, we have made it clear that our executives are without power to act contrary to the law and have not that power to change the law which our legislatures do possess. The various departments of government stand in the same relation to each other as regards the law of the state or the law of the country in the United States as they did in England.

To say, then, that all parts of the law of the land are equally unchangeable, or to say that that part of the law of the land which is not the supreme law of the land is unchangeable by the legislature because unchangeable by the executive, would be to disregard thoroughly established distinctions. While other departments of government are restrained by the law of the land, only that part of the law of the land which the constitution makes the supreme law of the land is unchangeable by legislation.²⁴

One point more remains to be noticed. It might be claimed that a stipulation of a constitution that the law of the land should be observed would require the observance of the law of the jurisdiction as it stood at the time when the provision was placed in the constitution.²⁵ And in support of that contention it might be said with truth that in interpreting a provision of a constitution it must be given the meaning which it had at the time of its adoption.²⁶ No organ of government can change that meaning. Such a change can be made only by constitutional amendment.

But while the *meaning* which the term "the law of the land" had when placed in the constitution might not be

²³ See authorities cited in U. of Pa. L. Rev., Nov., 1908, pp. 64, 65, 69.

²⁴ See also *Sumpter v. State*, (1906) 81 Ark. 60, 62, 98 S. W. 719, 720.

²⁵ Consider *Twining v. New Jersey*, (1908) 211 U. S. 78, 100, 101, 29 Sup. Ct. 14, 20.

²⁶ See authorities cited at beginning of note 13, *supra*.

changed, it certainly does not follow that the *contents* of the law of the land, except so much of it as is the supreme law of the land, might not be changed by ordinary legislation. The distinction will be shown best by referring to a case which seems to be analogous. Congress cannot so narrow the meaning of the word "crimes" in the second clause of Article III of the Federal Constitution as to allow the infliction of heavy penalties where the guilt of the person convicted has not been determined by a jury; yet, while it cannot change the meaning of the word "crimes," it can unquestionably increase or diminish the number of crimes.²⁷ The Constitution did not crystallize and render unchangeable the criminal law of a hundred and twenty years ago. And so also the fact that the meaning of the term "the law of the land" might not be altered by legislation certainly does not show that the provisions of the law of the land might not be changed in that manner.

Moreover, just as the meaning of the due process provision of the Fourteenth Amendment remains the same from year to year, so also it doubtless has the same meaning in one state as it has in another.²⁸ But it does not follow from this that the provision has the same ultimate legal effect in all states, or, in other words, that a procedure which must be observed in one state in order to afford due process of law there must be observed in another state in order to afford due process of law in the latter state, or *vice versa*. Just as, as previously pointed out, there may be changes in the law from time to time, so also it seems clear that the law may be different in different states.²⁹

ALL ORGANS OF GOVERNMENT RESTRAINED.

Returning to the argument of the Supreme Court in the *Hurtado* case,³⁰ we may note that in saying that the pro-

²⁷ See *Schick v. United States*, (1904) 195 U. S. 65, 24 Sup. Ct. 826.

²⁸ See *King v. Mullins*, (1898) 171 U. S. 404, 422, 18 Sup. Ct. 925, 932.

²⁹ See *Walker v. Sauvinet*, (1875) 92 U. S. 90, 93.

³⁰ See pages 191 to 193, *supra*.

visions of our constitutions apply to all organs of government the court was probably influenced by the fact that our Bills of Rights do contain some provisions which restrict our legislative bodies. Yet obviously it does not follow therefrom that all of the provisions are restraints upon our legislatures. The fact that a constitution imposes restraints upon each of the departments of government no more makes every restraint which that constitution imposes upon one department binding upon the rest than the fact that the Federal Constitution imposes restraints upon the federal government and restraints upon the states makes every restraint which that Constitution imposes upon the one binding upon the other.

And certainly it is not self-evident that every restraint set forth in our constitutions is necessarily directed against every department of government, especially where the provision is not unlimited in its terms. The requirement that no taxes shall be levied except in accordance with a law which originated in the House of Representatives does not constitute any restraint upon the House of Representatives. And so also if when the due process provision was placed in the Federal Constitution it meant that no person should be deprived of life, liberty or property except in the manner prescribed by the law of the jurisdiction, the court cannot properly say that the provision restricts a department of government which was authorized to change procedure in making such changes, and that if the original meaning of the term "due process of law" does not fit in with the assumption that all portions of the Constitution apply to all departments of government the meaning of the term must be changed rather than the assumption that the provision restrains all departments of government.

We shall not pause here to consider the actual meaning of the term "due process of law." It is sufficient for our present purpose to point out that the court is not warranted in slurring over the particular provisions without careful examination and assuming that all of the provisions in our Bills of Rights necessarily restrain all depart-

ments of government, and that the meanings of the provisions must be such as will correspond with this assumption.

It will be observed that the court did not merely say that a provision of the Constitution restricts all departments of government to which, regardless of its original application, it might be applied without changing its original meaning. The court went further than that: it went further than it would have gone if it had said, for instance, that, while in England a provision in the constitution for trial by jury would not have been a restraint upon legislative regulation of judicial procedure, in this country such a provision would limit the activity of the legislature in that respect; for, regardless of the effect of such a provision in the mother country, there is nothing in the nature or terms or history of that provision which would make it inapplicable as a restraint upon legislation. But the court has gone even further than the assumption that our legislatures are restrained by all of the provisions of the constitutions which, regardless of their original applications, might be treated as restraints upon legislation without changing their original meanings, and has practically assumed that all of the provisions in our Bills of Rights necessarily restrain all of the departments of government. And such an assumption, it is submitted, is not justifiable.

SIGNIFICANCE OF WORD "STATE."

In interpreting the due process clause of the Fourteenth Amendment, the court in some cases has laid stress upon the fact that the requirement is that no "state" shall deprive without due process of law, and has said that the word "state" must necessarily cover all organs of state government.³¹

³¹ *Ex parte Virginia*, (1879) 100 U. S. 339, 347; *Neal v. Delaware*, (1880) 103 U. S. 370, 397; *Chicago B. & Q. R. Co. v. Chicago*, (1897) 166 U. S. 226, 233, 234, 17 Sup. Ct. 581, 583; and see *Lochner v. New York*, (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 542; *Davidson v. New Orleans*, (1877) 96 U. S. 97, 102; dissenting opinion in *Taylor and Marshall v. Beckham*, (1900) 178 U. S. 548, 599, 600, 20 Sup. Ct. 904, 1014.

Those who adopted the Fourteenth Amendment, by the language which they used, showed unquestionably that they intended to provide that organs of the state governments should be bound by the due process requirement which had theretofore bound only organs of the federal government, and that if an organ of the federal government was bound by the due process clause of the Fifth Amendment the similar organ of state government should be bound by the provision of the Fourteenth Amendment. Yet it is not clear that they intended that their use of the word "state" should have any greater significance than this.³²

Of course, if the due process clause had been the only provision which was placed in the Constitution in Reconstruction times, it might possibly be said that to decide that any organ of state government was not restrained by it would be to make that sole protection for the freedmen so inadequate that it could hardly be supposed that those who amended the Constitution in those stirring times intended that the provision should have simply that restraining force. But that is not the situation. The due process clause is only one out of a number of provisions which were placed in the Constitution at the same period. For example, slavery was forbidden and legislation against the freedmen was prevented in large measure by provisions concerning the suffrage and representation. And so there is no such reason as that which has just been suggested for saying that the due process clause must be regarded as a restraint upon all departments of government.

Still less can any one go on to claim that any particular clause of the Amendments must, of necessity, have been so framed as to meet every emergency; for that claim could not be made even for the Reconstruction Amendments as a whole. Nor is there anything in the contention that unless all organs of government are restrained the provision is useless.³³ By the Federal Constitution the federal govern-

³² See note 9, *supra*.

³³ See cases in note 31, *supra*.

ment is prevented from doing some things which a state government may do, and *vice versa*. It is not said that because a provision applies to only one government it does not amount to any restraint whatever; and so also it cannot be said that if a provision applies to only one department of government it has no restraining force.³⁴ And it certainly cannot be contended that a provision must have as extensive an effect as those who interpret it may consider desirable.

ARGUMENT CONCERNING REDUNDANCY.

We have thus seen the inadequacy of several reasons which have been or might be advanced in support of the proposition that the due process clauses restrain Congress and the state legislatures. Yet there is one other argument which might be advanced and which, after a few explanatory remarks, we must consider at greater length.

The due process provision does not declare what constitutes a "due" process. But, reading the words in their natural sense, it seems clear that "due" process means simply the process which the person involved is entitled to receive. The Constitution does not say that the process must be a suitable process or a desirable process. It does not purport to create any new procedural rights. It simply says that the person involved shall receive the process which is due to him. The "due"-ness of the process is thus left to depend upon tests which are extrinsic to that clause of the Constitution; and the question, therefore, arises, What are those tests?

The United States Supreme Court in *Walker v. Sauvinet*³⁵ answered this question by saying that "due process of law is process due according to the law of the land." In view of the history of the provision this statement is plausible and it must be accepted unless it can be shown to be

³⁴ The weakness of the contention is also shown by a consideration of the language of the Constitution of Massachusetts, Part I, Articles 10 and 30.

³⁵ (1875) 92 U. S. 90, 93.

incorrect or unless the validity of some other test can be established. It must be noted, however, that the law of the land which is binding is not the law of the land as it stood when the Amendment was adopted, but the law of the land as it stands from time to time.³⁶ That law consists of the constitution, the statutory law, the common law, and administrative regulations, naming the various kinds of law in the order of their supremacy. And the larger part of that law may be altered from time to time by the appropriate authorities, although it may be altered only by the appropriate authorities.³⁷

But if the due process provision were so interpreted it would be superfluous in the Fifth Amendment, although, for reasons which will be pointed out, it would not be superfluous in the Fourteenth Amendment. And it may be urged that an interpretation of a clause of the Constitution under which that clause must be considered useless is necessarily unsound and that, therefore, the provision must have some other meaning.

If the due process clause of the Fifth Amendment were held to require merely that the procedure followed when a person is deprived of life, liberty or property must be that procedure which has been prescribed by the governmental organ which has authority to prescribe the procedure, the clause would be unnecessary, since the same restraint is contained in those clauses of the Constitution which distribute governmental powers among three departments of government.

The due process clause of the Fifth Amendment would still be superfluous even though it were held to require also that the procedure do not violate procedural rights which are secured by other provisions of the Federal Constitution; and so also would the clause in the Fourteenth Amendment be superfluous if it referred merely to those procedural rights which are secured by other provisions of the Federal

³⁶ See pp. 198-200, *supra*.

³⁷ See pp. 198-200, *supra*.

Constitution, such as the prohibition of bills of attainder and the full faith and credit clause.

The due process clause of the latter Amendment could not be regarded as superfluous if it were held to include in its protection procedural rights secured by the respective state constitutions or by statutes or subordinate regulations³⁸ in those states, inasmuch as questions of compliance with the procedural requirements would thus be made federal questions. But, as a matter of fact, the United States Supreme Court in cases coming from state courts does not inquire whether the action of an organ of state government conforms to the procedural requirements of the state constitution³⁹ or to other valid procedural restraints upon the organs of government;⁴⁰ and in cases arising in federal

³⁸ As rules of court, ordinances, administrative regulations.

³⁹ *West v. Louisiana*, (1904) 194 U. S. 258, 24 Sup. Ct. 650; *Brown v. New Jersey*, (1899) 175 U. S. 172, 20 Sup. Ct. 77; *Hallinger v. Davis*, (1892) 146 U. S. 314, 319, 13 Sup. Ct. 105, 107; *Smith v. Jennings*, (1907) 206 U. S. 276, 278, 27 Sup. Ct. 610, 611; and see *Walker v. Sauvignet*, (1875) 92 U. S. 90; *Stickney v. Kelsey*, (1908) 209 U. S. 419, 420, 28 Sup. Ct. 508, 509; *Patterson v. Colorado*, (1907) 205 U. S. 454, 27 Sup. Ct. 556; *Burt v. Smith*, (1906) 203 U. S. 129, 135, 27 Sup. Ct. 37, 39; *Forsyth v. Hammond*, (1897) 166 U. S. 506, 518, 17 Sup. Ct. 665, 670; *Long I. W. S. Co. v. Brooklyn*, (1897) 166 U. S. 685, 17 Sup. Ct. 718; *Fallbrook Irr. Dist. v. Bradley*, (1896) 164 U. S. 112, 154, 155, 17 Sup. Ct. 56, 61, 62; *Hunter v. Pittsburgh*, (1907) 207 U. S. 161, 170, 176, 28 Sup. Ct. 40, 44, 45. The court has decided in *Berea College v. Kentucky*, (1908) 211 U. S. 45, 29 Sup. Ct. 33; *Chanler v. Kelsey*, (1907) 205 U. S. 466, 27 Sup. Ct. 550; *Western T. Assn. v. Greenberg*, (1907) 204 U. S. 359, 27 Sup. Ct. 384; *St. Mary's F.-A. P. Co. v. West Virginia*, (1906) 203 U. S. 183, 192, 27 Sup. Ct. 132, 135; *Jack v. Kansas*, (1905) 199 U. S. 372, 26 Sup. Ct. 73; *Orr v. Gilman*, (1902) 183 U. S. 278, 283, 22 Sup. Ct. 213, 217; *Merchants' & M. Bank v. Pennsylvania*, (1897) 167 U. S. 461, 17 Sup. Ct. 829, that it would not inquire into the correctness of a decision of a state court that the action of an organ of state government conformed to requirements of the state constitution which were other than procedural. Of course, the state court may not by any alteration by construction of the state constitution destroy any substantial rights which have accrued under a valid contract: see *Patterson*, *The United States and the States Under the Constitution*, 2d ed., p. 139.

⁴⁰ *Castillo v. McConnico*, (1898) 168 U. S. 674, 683, 684, 18 Sup. Ct. 229, 233; *Ballard v. Hunter*, (1907) 204 U. S. 241, 259, 260, 27 Sup. Ct. 261, 268; *French v. Taylor*, (1905) 199 U. S. 274, 26 Sup. Ct. 76; *Patterson v. Colorado*, (1907) 205 U. S. 454, 27 Sup. Ct. 556; *Rawlins v. Georgia*, (1906) 201 U. S. 638, 26 Sup. Ct. 560; *Long I. W. S. Co. v. Brooklyn*, (1897) 166 U. S. 685, 688, 17 Sup. Ct. 718, 719; *Iowa C. Ry. Co. v. Iowa*, (1896) 160 U. S. 389, 16 Sup. Ct. 344. See also *Londoner v. Denver*,

courts those courts follow the interpretations which have been given to the state constitutions and the state statutes by the state courts.⁴¹

Now, unless the United States Supreme Court has decided incorrectly when it declared that the Fourteenth Amendment "did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people,"⁴² the federal courts unquestionably ought, as a general rule, to follow the decisions of state courts in matters of state law. But, in view of the due process clause, it is quite possible that they would be justified in going so far as to inquire into the observance of procedural requirements; and the failure of the federal courts to make such inquiries may be due to the fact that they have never considered sufficiently the propriety of doing so.⁴³

(1908) 210 U. S. 373, 379, 28 Sup. Ct. 708, 711 (the latter report of the case being more complete than the former); *Barrington v. Missouri*, (1907) 205 U. S. 483, 27 Sup. Ct. 582; *National C. O. Co. v. Texas*, (1905) 197 U. S. 115, 130, 131, 25 Sup. Ct. 379, 382; *Forsyth v. Hammond*, (1897) 166 U. S. 506, 518, 519, 17 Sup. Ct. 665, 670; *Olsen v. Smith*, (1904) 195 U. S. 332, 342, 25 Sup. Ct. 52, 54; *W. W. Cargill Co. v. Minnesota*, (1901) 180 U. S. 452, 466, 21 Sup. Ct. 423, 428; *Maiorano v. Baltimore & O. R. Co.*, (1909) 213 U. S. 268, 29 Sup. Ct. 424; *Consolidated R. Co. v. Vermont*, (1908) 207 U. S. 541, 551, 28 Sup. Ct. 178, 180.

⁴¹ See *Fallbrook Irr. Dist. v. Bradley*, (1896) 164 U. S. 112, 154, 155, 17 Sup. Ct. 56, 61, 62; *Michigan C. R. Co. v. Powers*, (1906) 201 U. S. 245, 291, 26 Sup. Ct. 459, 461; and also authorities cited in Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 282.

⁴² *Felts v. Murphy*, (1906) 201 U. S. 123, 129, 26 Sup. Ct. 366, 368; *Orr v. Gilman*, (1902) 183 U. S. 278, 286, 22 Sup. Ct. 213, 216; *Maxwell v. Dow*, (1900) 176 U. S. 581, 593, 20 Sup. Ct. 448, 494, 453; *McPherson v. Blacker*, (1892) 146 U. S. 1, 39, 13 Sup. Ct. 3, 12; *In re Kemmler*, (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934. See also *Slaughter House Cases*, (1872) 16 Wall. 36, 78; *Fallbrook Irr. Dist. v. Bradley*, (1896) 164 U. S. 112, 157, 17 Sup. Ct. 56, 62; *Giozza v. Tiernan*, (1893) 148 U. S. 657, 662, 13 Sup. Ct. 721, 723; *Davidson v. New Orleans*, (1877) 96 U. S. 97, 103, 104; *Hodges v. United States*, (1906) 203 U. S. 1, 16, 27 Sup. Ct. 6, 8; and the quotation of *Provident Bank v. Billings*, (1830) 4 Pet. 514, 563, with apparent approval, in *Michigan C. R. Co. v. Powers*, (1906) 201 U. S. 246, 296, 26 Sup. Ct. 459, 463. Compare 32 Am. L. Reg., N. S. 1096, 1097.

⁴³ Professor Henry Schofield, in 3 Ill. L. Rev. 195, contends that the United States Supreme Court should inquire whether state courts clearly disregard or misapply the laws of their respective states. He does not, however, limit his contention to laws dealing with procedure.

Still, under any of the interpretations of the due process provision which have just been suggested, the clause in the Fifth Amendment must be regarded as superfluous.

But it is not self-evident that there can be no repetition of thought in the Constitution, and while the fact that under a particular interpretation a provision of the Constitution would be superfluous is entitled to weight,⁴⁴ it is not sufficient to prove that that interpretation is incorrect. Certainly if the provision had that meaning before it was placed in the Constitution, or if there is a sufficient explanation of its insertion, although superfluous, in the Constitution, or if a different interpretation would require an exercise by the courts of power which was not granted to them by the Constitution—such circumstances must outweigh any argument concerning redundancy.

The due process provision did not appear for the first time in the Fifth Amendment.⁴⁵ It had an English origin. The meaning which the provision possessed before it was placed in the Federal Constitution may properly be considered by the court; and for that reason it was justifiable for the court to declare in *Walker v. Sauvinet*⁴⁶ that "due process of law is process due according to the law of the land."

The provision occurs in the Federal Constitution apparently as a survival from earlier times. Those who adopted the Fifth Amendment probably did not realize when they placed the due process provision in the Constitution that those clauses of the Constitution which distribute governmental powers among three departments of government by necessary implication require that the procedure followed must be one which has been prescribed by the governmental organ which has authority to prescribe the procedure and that it was unnecessary for them to follow precedent and

⁴⁴ *Hurtado v. California*, (1884) 110 U. S. 516, 534, 4 Sup. Ct. 111, 292, 120. See also *Davidson v. New Orleans*, (1877) 96 U. S. 97, 105; *Mackin v. United States*, (1886) 117 U. S. 348, 351, 352, 6 Sup. Ct. 777, 778, 779. Compare *Yesler v. Washington H. L. Comrs.*, (1892) 146 U. S. 646, 655, 13 Sup. Ct. 190, 194.

⁴⁵ See pp. 197, *supra*, 213, *infra*.

⁴⁶ (1875) 92 U. S. 90, 93.

insert the same restraint also in the form in which it appeared in the English Constitution. Or they may have desired, even at the expense of repetition, to make this restraint perfectly clear, through fear that there might some day come into power a President who would not have a scrupulous regard for the constitutional limitations upon his authority.

Moreover, there is no other natural meaning of the words "due process of law" than "the process to which the person involved is entitled under the law of the land." There is nothing in the Constitution to show that those who adopted the Fifth Amendment intended to create any other test of "due"-ness than that which would have existed if the due process provision had been omitted from the Constitution. In *Murray's Lessee v. Hoboken L. & I. Co.*,⁴⁷ the court said that "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 Carta," and then fell into error⁴⁸ through its failure to realize that "the law of the land" does not mean the law of the land as it stood when the Amendment was adopted but the law of the land as it stands from time to time.⁴⁹ And the court, by the language used in a recent case,⁵⁰ has shown that it does not yet understand the nature of its error in the earlier case. But when the term "the law of the land" is interpreted correctly it will be clear that the Fifth Amendment did not create any new test of due-ness.

For the courts, then, to declare tests of due-ness which are not authorized by the Federal Constitution is to exercise a veto-power which it was never intended that they should exercise,⁵¹ and is judicial usurpation of the most serious character.

⁴⁷ (1855) 18 How. 272, 276.

⁴⁸ Page 277.

⁴⁹ See pp. 198-200, *supra*.

⁵⁰ *Twining v. New Jersey*, (1908) 211 U. S. 78, 100, 101, 29 Sup. Ct. 14, 20.

⁵¹ See authorities cited in note 54, *infra*.

RESTRAINT MORE THAN PROCEDURAL.

Yet even if it were clearly shown that the due process provision constituted an independent restriction upon legislative regulation of procedure, it certainly would not follow that the provision related also to substantive law. The Amendments concerning jury trials limit the power of Congress over judicial procedure; but no one would think of contending that those provisions deal with anything except jury trials; and in the argument in the opinion in the *Hurtado* case⁵² the court does not show any stronger reason for saying that the due process clauses must relate to more than procedure.

Of course, our constitutions do in places deal with substantive law. The provisions relating to religious freedom and the provisions relating to slavery are instances of such provisions. But it is also clear beyond dispute that those who adopted our constitutions at other times sought to secure good government indirectly, and only indirectly, by provisions concerning governmental methods.

The men who adopted the Fifth Amendment were men who placed a large amount of dependence upon forms and institutions.⁵³ They relied largely upon what they considered an appropriate distribution and separation of the powers of government, upon popular representation in the legislature, and upon trial by jury. In conformity with

⁵² See pp. 191-193, *supra*.

⁵³ Sir Frederick Pollock speaks of "the very common error, especially prevalent in the eighteenth century, of attributing a constant and infallible efficacy to the forms of government." Pollock's *Maine's Ancient Law*, 175. Professor Thayer says, "The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power." *Legal Essays*, 11, 7 *Harv. L. Rev.* 137, note. Chief Justice Marshall says, "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." *Gibbons v. Ogden*, (1824) 9 *Wheat.* 1, 197. See also 7 *Harv. L. Rev.* 136; 2 *Kent, Com.* *11.

these views they were unwilling that the judiciary should pass upon the desirability of legislation;⁵⁴ and they were so well satisfied with trial by jury that by the Seventh Amendment, which was adopted at the same time as the Fifth Amendment, they were careful to provide that no appellate federal tribunal should consider whether the verdict of a jury in a trial at common law were against the weight of the evidence.⁵⁵ Moreover, in the Reconstruction Amendments provisions concerning elections and office-holding take up fully one-half of the space and show that those who adopted the Reconstruction Amendments relied largely upon the organization of the state governments for the securing of fair treatment to the freedmen.

These illustrations show that those who adopted the first ten Amendments and those who adopted the Reconstruction Amendments believed that by providing carefully as to the agencies of government they were doing much towards securing good government. Such provisions cannot by any flight of the imagination be construed as relating directly to substantive law; and there are other provisions of the United States Constitution which are unquestionably strictly procedural. Therefore, we cannot say that a clause of the Constitution necessarily "must be held to guarantee not particular forms of procedure, but the very substance of indi-

⁵⁴ Elliot's Debates, V. 151, 155, 164, 166, 344, 428; note 53, *supra*; and see 32 Am. L. Reg. N. S. 1094, 1100, 1103.

⁵⁵ *Chicago, B. & O. R. Co. v. Chicago*, (1897) 166 U. S. 226, 242, 246, 17 Sup. Ct. 581, 587, 588. See also *Chrisman v. Miller*, (1905) 197 U. S. 313, 25 Sup. Ct. 468, cases there cited, and *Backus v. Fort S. U. D. Co.*, (1898) 169 U. S. 557, 565, 18 Sup. Ct. 445, 449; *Mammoth M. Co. v. Grand C. M. Co.*, (1909) 213 U. S. 72, 73, 29 Sup. Ct. 413, 414. Compare *Capital T Co. v. Hof*, (1899) 174 U. S. 1, 19 Sup. Ct. 580; *Ubarri v. Laborde*, (1909) 214 U. S. 168, 171, 29 Sup. Ct. 549, 551; *Empire S. C. Co. v. Atchison, T. & S. F. Ry. Co.*, (1908), 210 U. S. 1, 28 Sup. Ct. 607. Under the judiciary act the United States Supreme Court cannot review findings of fact by state courts: *Dower v. Richards*, (1894) 151 U. S. 658, 14 Sup. Ct. 452; *Bement v. National H. Co.*, (1902) 185 U. S. 70, 22 Sup. Ct. 747; *Minneapolis & St. L. R. Co. v. Minnesota*, (1904) 193 U. S. 53, 24 Sup. Ct. 396. The court may, however, it seems, review findings of fact by lower federal courts in so far as they involve questions of the jurisdiction of those courts: see *Commercial M. A. Co. v. Davis*, (1909) 213 U. S. 245, 256, 29 Sup. Ct. 445, 448.

vidual rights to life, liberty and property,"⁵⁶ but we must, instead, inquire as to the particular clause whether it has in fact that effect.

EXAMINATION OF CONTEXT OF PROVISION.

On looking at the context of the due process clause of the Fifth Amendment it will be observed that the preceding clauses and the succeeding Amendment deal exclusively with the conduct of criminal trials, thus tending to show by mere association that the clause deals solely with procedure. Indeed, the only apparent objection to deriving this interpretation from the context lies in the fact that the due process clause is immediately followed by a provision that private property shall not be taken for public use without just compensation. And at first glance the presence of the just compensation provision seems to make it impossible to draw an interpretation of the due process clause from its context.

But if we consider the probability of some logical connection between contiguous clauses of the same Amendment and examine the provisions more closely with this thought in mind we shall see that the apparent difficulty is not a real one. If the due process clause, like the preceding clauses of the Fifth Amendment, deals with the conduct of criminal trials and with a taking by the public in order to punish, it may be naturally followed by a provision relating to a taking by the public, not in order to punish but because the public wants the thing taken. There is just such a contrast in thought between the two clauses as to make it natural to place them together. And we must notice that only on that interpretation of the due process clause does it belong logically in that portion of the Constitution in which it was placed; and only on that interpretation of the due process clause was it logical to place the just compensation provision immediately after the due process provision.

Moreover, it is significant that it is not only in the Federal

⁵⁶ See *Hurtado v. California*, quoted in note 3, *supra*.

Constitution that the due process clause is so placed, but, as an able writer in the Harvard Law Review has declared with reference to the state constitutions also, the provision with which we are dealing is "in almost every instance inserted in a section of the constitution dealing exclusively with the conduct of criminal trials."⁵⁷ And the reference to deprivation of life in the due process clause shows clearly that the clause is one which relates to the enforcement of law.

The author whom we have just quoted has pointed out steps by which the provisions of Magna Carta that "no freeman shall be taken or imprisoned . . . unless by the lawful judgment of his peers and⁵⁸ by the law of the land" has become our due process provision and shown that the term "liberty" *when used in connection with the due process requirement* means "nothing more or less than freedom of the person from restraint,—the great Habeas Corpus principle of Anglican liberty,—a right the illegal invasion of which gives rise to an action of false arrest or imprisonment."⁵⁹ And he has, by an examination of other provisions of our constitutions, shown abundant reasons for saying that the term "liberty" was so understood when placed in this portion of the Federal Constitution.⁶⁰

"LIBERTY" IN THE UNITED STATES SUPREME COURT.

The United States Supreme Court, however, in recent cases has given a far different interpretation to that term, and incidentally to the entire due process provision, both

⁵⁷ Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty and Property," 4 Harv. L. Rev. 365, at 369.

⁵⁸ On this word see McKechnie, Magna Carta, 436, 442, 443.

⁵⁹ *Ubi supra*, 4 Harv. L. Rev. at 382; and see *ibid.* 376.

⁶⁰ *Ubi supra*, 4 Harv. L. Rev. at 369, 380-382. And on the meaning of the term "liberty" see also book review in 12 Harv. L. Rev. at 440; *Ex parte Boyce*, (1904) 27 Nev. 299, 354, 75 Pac. 1, 12, 65 L. R. A. 47, 64; Baldwin, The Courts of Conservators of Social Justice, 9 Col. L. Rev. 567, 569. Compare Prentice, Congress and the Regulation of Corporations, 19 Harv. L. Rev. at 180 *et seq.*; *Mitchel v. Reynolds*, (1711) 1 P. Williams, 181, 188; Coke, Institutes, II, *47; Corwin, The Supreme

in the Fifth Amendment⁶¹ and in the Fourteenth Amendment,⁶² the court saying in *Allgeyer v. Louisiana*⁶³ that the liberty mentioned "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be

Court and Unconstitutional Acts of Congress, 4 Mich. L. Rev. at 626. The term "liberty" is also used in a different sense in English law as meaning a franchise or privilege: see McKechnie, *Magna Carta*, 445; *Dominus Rex v. Kilderby*, (1671) 1 Saund. 312; Ritchie, *Natural Rights*, 7; 4 Harv. L. Rev. 372, note; *ibid.* 375. The meanings should no more be confused than should the general power of Congress to lay duties be construed as a general power to say what it shall be the duty of men to do. Nor should either meaning be confused with that which has been given to the term by the United States Supreme Court and which we shall consider at once. If the word "liberty" had a definite meaning when used in a due process provision, meanings which it had in other connections are irrelevant.

⁶¹ *Adair v. United States*, (1908) 208 U. S. 161, 28 Sup. Ct. 277. Compare *Addyston P. & S. Co. v. United States*, (1899) 175 U. S. 211, 228, 229, 20 Sup. Ct. 96, 103; *United States v. Joint T. Assn.*, (1898) 171 U. S. 505, 572, 19 Sup. Ct. 25, 33; and also *Buttfield v. Stranahan*, (1904) 192 U. S. 470, 493, 24 Sup. Ct. 349, 354.

⁶² *Allgeyer v. Louisiana*, (1897) 165 U. S. 578, 589, 17 Sup. Ct. 427, 431; *Lochner v. New York*, (1905) 198 U. S. 45, 53, 25 Sup. Ct. 539, 541; and see *McLean v. Arkansas*, (1909) 211 U. S. 539, 545, 29 Sup. Ct. 206, 207; *Muller v. Oregon*, (1908) 208 U. S. 412, 421, 28 Sup. Ct. 324, 326; *Jacobson v. Massachusetts*, (1905) 197 U. S. 11, 26, 29, 25 Sup. Ct. 358, 361, 362; *Smiley v. Kansas*, (1905) 196 U. S. 447, 456, 25 Sup. Ct. 289, 291; *Booth v. Illinois*, (1902) 184 U. S. 425, 428, 22 Sup. Ct. 425, 426; *W. W. Cargill Co. v. Minnesota*, (1901) 180 U. S. 452, 467, 21 Sup. Ct. 423, 429; *Williams v. Fears*, (1900) 179 U. S. 270, 274, 21 Sup. Ct. 128, 129; dissenting opinion in *Taylor and Marshall v. Beckham*, (1900) 178 U. S. 548, 603, 20 Sup. Ct. 890, 1016. Compare *Northwestern N. L. I. Co. v. Riggs*, (1906) 203 U. S. 243, 255, 27 Sup. Ct. 126, 129; *Berea College v. Kentucky*, (1908) 211 U. S. 45, 29 Sup. Ct. 33; *Heath & Milligan Mfg. Co. v. Worst*, (1907) 207 U. S. 338, 357, 28 Sup. Ct. 114, 120; *Western T. Assn. v. Greenberg*, (1907) 204 U. S. 359, 27 Sup. Ct. 384. —Of decisions which were similar to that in *Lochner v. New York*, *supra*, Professor Seager has said that they have "implanted in the minds of workmen a thorough distrust of the courts." *The Attitude of American Courts Towards Restrictive Labor Laws*, 19 Pol. Sci. Quar. 589. See also G. W. Alger, *Moral Overstrain*, essay entitled "Some Equivocal Rights of Labor;" and book review 24 Pol. Sci. Quar. 318, 319.

⁶³ (1897) 165 U. S. 578, 589, 17 Sup. Ct. 427, 431.

proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." While later decisions have made somewhat clearer the effect which the court gives to the term "liberty," the opinions usually refer back to the Allgeyer case.

Nevertheless, the importance of the decision in the Allgeyer case is somewhat diminished by the infelicity of the language we have quoted. The passage even shows confusion in thought. It will be observed that the court alternates between the omission and use of the word "lawful" in the several phrases. The unqualified statements of freedom from restraint are obviously incorrect, for it is clear that some restraints may constitutionally be imposed. And, on the other hand, the statement that men may do anything which is lawful, while obviously correct, does not solve the question under consideration. It does not show what are the limitations upon the restraining power of the law-making department of government.

The decision in the Allgeyer case was based upon the language of Justice Bradley in *Butchers' U. Co. v. Crescent C. Co.*⁶⁴ in an opinion which did not receive the approval of a majority of the court and which if approved would have meant the reversal of an earlier decision of the court from which Justice Bradley had dissented,⁶⁵ and upon a *dictum* which a justice who had concurred in Justice

⁶⁴ (1884) 111 U. S. 746, 762, 764, 765, 4 Sup. Ct. 652, 657, 658. The use in the Declaration of Independence of the terms "liberty" and "pursuit of happiness" together does not show that the meaning of the latter term, which is omitted from the due process clause, is included in the meaning of the former term.—It is not clear that the attitude towards government when the Fifth Amendment or the Fourteenth Amendment was adopted was precisely the same as that which from a few prefatory words in the Declaration of Independence we may possibly think was taken in 1776. Did the people who adopted those Amendments show no paternalistic sentiment through their representatives in Congress?

⁶⁵ Part of the language quoted in the Allgeyer case was directly in conflict with the decision in the *Slaughter House Cases*, (1872) 16 Wall. 36, on a point concerning which the court said in *Twining v. New Jersey*, (1908) 211 U. S. 78, 96, 29 Sup. Ct. 14, 18, "This part at least of the *Slaughter House Cases* has been steadily adhered to by this court."

Bradley's opinion in the Butchers' Union case had placed in the opinion in *Powell v. Pennsylvania*.⁶⁶ The bulk of the language quoted above was copied almost *verbatim* from an opinion of the New York Court of Appeals⁶⁷ which in turn refers approvingly to the before-mentioned opinion of Justice Bradley in the Butchers' Union case, to an opinion by the same justice in circuit court which declared unconstitutional a law which the Supreme Court afterwards declared constitutional, and to a *dissenting* opinion by Justice Field. No other remarks by justices of the United States Supreme Court on "liberty" are referred to in the opinion of the New York court.⁶⁸

POSITION OF COURT CRITICISED.

The interpretation which the Supreme Court has given to the term "liberty" was given without consideration of the context of the due process provision. The court approached the question in dealing with the Fourteenth Amendment, where the context is not instructive. But as the context of the provision in the Fourteenth Amendment does not show that its meaning there is different from its meaning in the Fifth Amendment, it seems clear that any light which the context casts upon the meaning in the earlier Amendment should apply to the meaning in the subsequent Amendment. And it will be observed that the court interprets both Amendments alike.⁶⁹ Moreover, not only has the court not consid-

⁶⁶ (1888) 127 U. S. 678, 684, 7 Sup. Ct. 992, 1257, 995.

⁶⁷ *In re Jacobs*, (1885) 98 N. Y. 98. On the disastrous effect of the decision in the New York case see Kelley, Some Ethical Gains Through Legislation, 253.

⁶⁸ It may be added that the court does quote federal authorities on judicial inquiry, not into the exercise of the enumerated powers of Congress, but into the exercise of what are called the *implied* powers— inquiry whether powers which it is claimed are impliable from the enumerated powers of Congress are in reality so impliable. But it does not appear how the question, which is sometimes raised by federal statutes, can be raised by state legislation. Unless New York is different from most states, its legislature is unlike Congress in that the legislature has all powers which are not denied to it expressly or by necessary implication from grants to other departments of government. The bearing of those quotations upon state legislation is not apparent.

⁶⁹ See pp. 194, 214, *supra*.

ered the context of the due process provision, but it has not considered the historical meaning of the provision or even some of the earlier decisions of the court itself.⁷⁰

It is possible that if such matters were properly brought to the attention of the court the question would be re-examined. Certainly it is the duty of the court, when interpreting provisions of the Constitution, to ascertain whether the terms had established meanings when placed in the Constitution and, if so, to apply them in accordance with those meanings.⁷¹ And it seems clear that when the due process provision was placed in the Federal Constitution it referred simply to those deprivations which are usually made by way of punishment and that it referred simply to procedure.

CONCLUSION.

We have not attempted in this article to consider all of the grounds upon which the courts have declared that legislation which deals with substantive law may be in violation of the due process provision. But we have considered what is perhaps the clearest statement in support of that position, namely that in which the contention is made that the due process clauses are necessarily in themselves restraints upon all departments of government, and that con-

⁷⁰ See comment of C. E. Shattuck, in 4 Harv. L. Rev. at 386, on the decision in the *Slaughter House Cases*, (1872) 16 Wall. 36: "The court did not, apparently, consider it even arguable that the restraint upon following their lawful calling was a deprivation of 'liberty.' Moreover, the decision does not rest, so far as this clause is concerned, upon the ground that the act was a fair exercise of the police power, and so was due process of law. It proceeds on the ground that the Fourteenth Amendment has no application whatever to such a right as that contended for, namely, the right of every man to pursue a lawful occupation. So that the actual decision in the case is against, rather than in favor of, the broad construction of the term 'liberty.'" See also in the comment of that author on the decision in *Bradwell v. State*, (1872) 16 Wall. 130.—McGehee, *Due Process of Law*, 138 *et seq.*, quotes in the text two passages from the opinions of Justice Field which the notes show to be dissenting opinions; and Stimson, *Federal and State Constitutions of the United States*, 32, quotes from a dissenting opinion of Justice Field with the misstatement that it was the opinion of the court. The position which the court has taken in recent cases was not taken by the court in earlier cases.

⁷¹ See note 13, *supra*.

sequently they relate to more than procedure; and we have seen that the arguments in support of that contention are unconvincing. We have then endeavored to find the correct position upon this question by considering the provision in the light of its context and its history, and we have thus seen that there are abundant reasons for saying with positiveness that the courts should hold that the provision relates only to procedure.

One point remains for our final consideration. It may be admitted that when the due process provision was placed in the Federal Constitution it did not refer to substantive law. It may be admitted that upon every occasion upon which the Supreme Court nullifies a law by declaring that the provision does deal with substantive law it assumes a power which those who adopted the provision never intended to bestow upon the court. And yet it may be claimed that the interpretation of the due process provision has been settled by repeated judicial decisions and that a change in its interpretation would result in a large amount of confusion.

In reply it is sufficient to point to the present state of the decisions concerning the due process clauses. Would the law become more confused if the clauses were interpreted correctly? Or has "the gradual process of judicial inclusion and exclusion" along present lines already woven a tangled web, which must become more and more tangled as time goes on?

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