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### DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION

Surprising as it may seem, there is probably no more important clause in the United States Constitution than the Due Process Clause of the Fourteenth Amendment. A similar clause is found in the Fifth Amendment. The clause in the Fourteenth Amendment is a limitation upon the action of the state governments; the clause in the Fifth Amendment is a limitation upon the action of the Federal Government; but otherwise the clauses are the same and should be given the same meaning. The Due Process Clause in the Fifth Amendment has received very little attention from the United States Supreme Court; but that august tribunal is constantly at work upon the Due Process Clause in the Fourteenth Amendment. Already, perhaps, that clause has been involved in more litigated cases than all the other clauses of the United States Constitution combined, and the end is not yet. It has not as yet been sufficiently considered for the United States Supreme Court to attempt a definition of due process of law; nevertheless, under it, the Supreme Court has declared acts of legislatures unconstitutional, established the public policy of our government and almost rewritten our Constitution. What its future history is going to be no one can prophesy, but it is safe to prophesy that it is going to have as great a history in the future as it has had in the past.

The United States Supreme Court, largely through the influence of John Marshall and because it is appropriate that that branch of the government least affected by the Constitution should exercise such a power, has arrogated to itself the power to declare unconstitutional any executive or legislative acts (state or federal as the case may be) in violation of any of the clauses in the Constitution.<sup>1</sup> Any such act, therefore, which, in the judgment of the Supreme Court, is not due process of law, is liable to be declared unconstitutional. Hence it becomes important to know the meaning which the Supreme Court has given or is going to give to the clause due process of law. Does it apply to legislation as well as to executive acts? Does it apply to substantive law or only to legal procedure? Whatever meaning the court gives to it, how did it obtain it?

The phrase is not one coined by the Supreme Court, nor even by the Fathers of the Constitution. It was a well-known English phrase, found in important English documents, and was taken by the makers of our Constitution from such English sources. The United States Supreme Court, although it has refused to formulate a definition of due process of law, has said, "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in Magna Charta."<sup>2</sup> Any effort to determine the meaning of the words "due process of law" in United States history should, therefore, begin with an effort to determine the meaning of those words in English history.

The words "by the law of the land," with which the words "due process of law" are said to be synonymous, seem to occur for the first time in the thirty-ninth chapter of King John's Charter of Liberties, where it is said: "*Nullus liber homo capiatur, vel imprisonetur, aut disseisiat, aut utlagetur, aut exuleter, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legale terrae.*" ("No freeman shall be arrested, or detained in prison,

<sup>1</sup> *Marbury v. Madison*, 1 Cranch 137 (U. S., 1803); *Fletcher v. Peck*, 6 Cranch 87 (U. S., 1810).

<sup>2</sup> *Murray v. Hoboken L. & I. Co.*, 18 How. 272 (U. S., 1855); *Davidson v. New Orleans*, 96 U. S. 97 (1878).

or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, or send against him, unless by the lawful judgment of his peers and by the law of the land.")

Edward the III substituted "by due process of law" for "by the law of the land"; and in the Petition of Rights (to Charles I) the language used was "that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the king's special command without any charge."<sup>3</sup>

What was the meaning of the words used in Magna Charta? The word "freemen" (*liber homo*) probably included no one but John's feudal tenants in chief and their men: no one below mesne lords.<sup>4</sup> The words "set forth" (*ibimus*) and "send" (*mittemus*) referred to armed attack, without trial or process, as had been the king's practice against his barons.<sup>5</sup> The words "by the lawful judgment of his peers" (*per legale iudicium parium suorum*) meant tenants holding of the same lord and of the same fief. They did not mean jury trial.<sup>6</sup> The words "by the law of the land" (*per lex terrae*) may have meant either the mode of trial or substantive law, but probably principally substantive law. Procedure was covered by the clause "by the lawful judgment of his peers." In other words, the law of the land in 1215 meant the good laws of Edward; the custom of the realm; the law of the fief but of the whole realm (*lex Angliae*); or feudal law, applied in a feudal manner by peers of the fief.<sup>7</sup> Essentially the purpose of this section of Magna Charta was to substitute law for kingly force, but the law substituted was feudal law. A feudal interpretation of the document is necessary. But as the feudal system disappeared there was no reason why the meaning of "freemen," "peers," and "law of the land" should not be extended, and it was. However, in England, the meaning of "the law of the land" has never been extended so as to apply

<sup>3</sup> 1 Stat. at Large (Eng.) 10; 7 Stat. at Large (Eng.) 318; TAYLOR'S DUE PROCESS OF LAW, I, 9.

<sup>4</sup> 14 COL. L. REV. 42.

<sup>5</sup> 14 COL. L. REV. 43.

<sup>6</sup> 14 COL. L. REV. 44.

<sup>7</sup> 14 COL. L. REV. 50; COKE'S INST. 46.

to the control of legislation. Any act of Parliament is the law of the land, or due process of law. And it should be noted that in England the phrase due process of law has received practically no judicial construction in litigated cases.

Coke is responsible for the dictum that the common law will control acts of Parliament, that is, that there are certain fundamental rights which are supreme over legislation;<sup>8</sup> but this dictum was disavowed in England in the case of *Lee v. Bude, etc., Ry.*;<sup>9</sup> and Coke did not base his dictum upon the guarantee of due process of law.

This is the only light English history throws upon the meaning of due process of law.

Now, let us turn to United States history. What is the meaning of due process as developed by the United States Supreme Court?

The history of the development of the due process clause by the United States Supreme Court seems to be as follows. At first and early in the history of the court the Supreme Court approved of Coke's dictum of a supreme fundamental law.<sup>10</sup> Until the court took this position there is nothing to show that it set aside or intimated that it would set aside acts of legislation unless in violation of a direct prohibition in the Constitution, like the prohibition against violating the obligation of a contract, the prohibition against *ex post facto* laws, and the prohibition against taking private property for public use without just compensation. After the approval of Coke's dictum it both intimated that legislation in violation of fundamental law would be void, and in three decisions actually set aside acts of state legislatures. The case of *Loan Ass'n v. Topeka*,<sup>11</sup> was decided even after the Fourteenth Amendment, and in deciding, in that case, that a public purpose was necessary for taxation the court, in-

<sup>8</sup> Dr. Bonham's Case, 8 Rep. 118a.

<sup>9</sup> L. R. 6 C. P. 576, 582 (Eng., 1871).

<sup>10</sup> *Calder v. Bull*, 3 Dall. 386 (U. S., 1798); *Fletcher v. Peck*, 6 Cranch 87, 135 (U. S., 1810); *Terrett, et al., v. Taylor, et al.*, 9 Cranch 43, 50 (U. S., 1815); *Wilkinson v. Leland*, 2 Pet. 627, 657 (U. S., 1829); *Webster v. Reid*, 11 How. 437, 440 (U. S., 1851); *Pacific Mail Stm. Co.*, 17 How. 596 (U. S., 1854); *Loan Ass. v. Topeka*, 20 Wall. 655, 662 (U. S., 1875).

<sup>11</sup> *Supra*.

stead of placing the unconstitutionality of a law levying a tax for a private purpose on the lack of due process, placed it on Coke's dictum and used the following language:

"There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Prior to this decision there had been only one case, the case of *Murray v. Hoboken L. & I. Co.*,<sup>12</sup> in which the Supreme Court had set aside legislation on the ground that it was not due process of law, and this was a case involving legal procedure and not substantive law. The due process clause was rarely invoked so long as it was only written into the Fifth Amendment, but after it was written into the Fourteenth Amendment the docket of the court was "crowded with cases in which," the Court says, "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." Finally, with the case of *Davidson v. New Orleans* (1878),<sup>13</sup> and a long line of cases following it,<sup>14</sup> Coke's doctrine of a supreme fundamental law was merged in the doctrine of due process of law; and legislation has since then been set aside because not due process of law, but not because in violation of some supreme fundamental law.

In applying this new doctrine the Supreme Court proceeded gradually, and it was at first very liberal in construing statutes. It at first applied the doctrine only to matters of procedure,<sup>15</sup> and upheld as due process of law not only the legal procedure known at the time of the adoption of the Constitution but new forms

<sup>12</sup> 18 How. 272 (U. S., 1855).

<sup>13</sup> 96 U. S. 97 (1878).

<sup>14</sup> *Hurtado v. California*, 110 U. S. 516 (1883); *Chicago, etc., Co. v. Minnesota, etc., Com.*, 134 U. S. 418 (1890); *Scott v. McNeal*, 154 U. S. 34 (1894); *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362 (1894); *C. B. & Q. Ry. v. Chicago*, 166 U. S. 226, 241 (1897); *Dewey v. Des Moines*, 173 U. S. 193 (1899); *Butler v. Holly*, 176 U. S. 398 (1900).

<sup>15</sup> *Bank v. Okely*, 4 Wheat. 235 (U. S., 1819); *Murray v. Hoboken L. & I. Co.*, 18 How. 272 (U. S., 1855); *Davidson v. New Orleans*, 96 U. S. 97 (1878); *Lawton v. Steele*, 110 U. S. 516 (1894).

of legal procedure, like information for indictment<sup>16</sup> and a jury of eight instead of twelve.<sup>17</sup> To hold otherwise, the Court said: "Would be to deny every quality of the law but its age, and to render it incapable of progress or improvement."<sup>18</sup> After the adoption of the Fourteenth Amendment the court at first also expressed the opinion:

"We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."<sup>19</sup>

The view that due process of law should be confined to matters of legal procedure was well expressed by Judge Edwards of New York in *Westervelt v. Gregg*:<sup>20</sup>

"Due process of law undoubtedly means in the due course of legal proceedings, according to the rules and forms established for the protection of private rights."

After the Supreme Court had made the due process clause apply to legislation so far as concerned matters of legal procedure, it was easy for it to extend the doctrine to legislation so far as concerned matters of substantive law. This was the next step in the development of the doctrine of due process of law in the United States. In *Hurtado v. California* (1884),<sup>21</sup> the Court intimated, though by way of dictum, that the concessions of Magna Charta (apparently including due process of law), "applied in England only as guards against executive usurpation and tyranny," have here not only "become bulwarks also against

<sup>16</sup> *Hurtado v. California*, 110 U. S. 516 (1883).

<sup>17</sup> *Maxwell v. Dow*, 176 U. S. 516 (1900).

<sup>18</sup> *Hurtado v. California*, *supra*.

<sup>19</sup> *Slaughterhouse Cases*, 16 Wall. 36 (U. S., 1873).

<sup>20</sup> 12 N. Y. 202, at p. 209. Justice Miller, of the United States Supreme Court, expressed the same view in the following language: "It is not possible to hold that where by the laws of the state the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case, that he has been deprived of that property without due process of law." *Davidson v. New Orleans*, 96 U. S. 97 (1878).

<sup>21</sup> 110 U. S. 516 (1883).

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." This dictum was soon followed as precedent,<sup>22</sup> and now it is no uncommon thing to have legislation set aside because it is not due process of law as a matter of substance, that is, because in the judgment of the members of the Supreme Court, or a majority of them the legislation is unreasonable.<sup>23</sup> Finally, the Supreme Court extended the protection of the due process clause of the Fourteenth Amendment, not only to other individuals than negroes, but to the protection of the property rights of corporations.<sup>24</sup> This made the Fourteenth Amendment read as though it was written, nor shall any state deprive any person of life or liberty or any person or corporation of property without due process of law. This result was brought about through the efforts of corporations; through a change in the personnel of the bench; and through the personal activity of Justice Field, who had always championed this doctrine and who strangely, in writing an opinion for the Supreme Court cited his own opinion while a circuit judge as the opinion of the Supreme Court.<sup>25</sup> It gave litigants what Justice Miller, in *Davidson v. New Orleans*,<sup>26</sup> intimated that they desired "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." As a consequence it

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<sup>22</sup> Chicago, etc., Ry. Co. v. Minnesota, etc., Com., 134 U. S. 418 (1890); Reagan v. Farmers' Loan and Trust Co., 154 U. S. 362 (1894); Allgeyer v. Louisiana, 165 U. S. 578 (1897); Lockner v. New York, 198 U. S. 45 (1905).

<sup>23</sup> Truax v. Corrigan, 257 U. S. 312 (1921); United Mine Workers of America v. Coronado, etc., Co. 259 U. S. 344 (1922); Wolff v. Court of Industrial Relations of Kansas, 262 U. S. 522 (1923), 267 U. S. 552 (1925); Minimum Wage Board v. Children's Hospital, 261 U. S. 525 (1923); Meyer v. State of Nebraska, 262 U. S. 390 (1923).

<sup>24</sup> Scott v. McNeal, 154 U. S. 34 (1894) (as to judiciary); Minneapolis Ry. Co. v. Beckwith, 129 U. S. 26 (1898).

<sup>25</sup> Minneapolis Railway Co. v. Beckwith, *supra*; County of San Mateo v. Southern, etc., Co., 13 Fed. 722 (1882).

<sup>26</sup> *Supra*.

may now be said that the prohibition of due process of law applies to legislation as well as to executive and judicial acts, to substantive law as well as to legal procedure and to corporations as well as to natural persons so far as their property rights are concerned. The Supreme Court still refuses to define the meaning of due process of law. It leaves the question of what is due process to the opinion of the court in each individual case. But it now has the power to decide whether or not legislation as well as executive and judicial acts are due process of law, both as to substantive law and as to legal procedure, and for corporations as well as natural persons.<sup>26a</sup> In deciding these questions,

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<sup>26a</sup> There is nothing more that can be said as to the meaning of Due Process of Law under the United States Constitution. To say that whatever a majority of the Supreme Court thinks is reasonable is due process of law adds little to the meaning of the phrase. It is true the Supreme Court has held many different kinds of legislation either reasonable or unreasonable, and therefore due process of law or not due process of law. Under the police power it has held reasonable, the prohibition of option contracts for future delivery of grain, *Booth v. Illinois*, 184 U. S. 425 (1902); the prohibition of the intermarriage of the different races, *Pheasy v. Ferguson*, 163 U. S. 537 (1896); the prohibition of combinations in restraint of trade, *Aikens v. Wisconsin*, 195 U. S. 194 (1904); the regulation of public callings, *Munn v. Illinois*, 94 U. S. 113 (1876); Workmen's Compensation Acts, *Arizona Copper Co. v. Hammer*, 250 U. S. 400 (1919); the making of housing a public calling in times of emergency, *Block v. Hirsh*, 256 U. S. 135 (1921); the North Dakota industrial program, *Green v. Frazier*, 253 U. S. 233 (1920); and it has held unreasonable, the requirement of the teaching of the English language alone in the public schools, *Myers v. Nebraska*, 262 U. S. 390 (1923); the regulation of the size of loaves of bread, *Jay Burns Bakery v. Bryan*, 264 U. S. 504 (1924); a minimum wage for women, *Minimum Wage Board v. Children's Hospital*, ——— v. *Lyons*, 261 U. S. 525 (1923); the Kansas Industrial Court Act, *Wolfe v. Kansas*, 262 U. S. 522 (1923), 45 Sup. Ct. 441 (1925), and the Oregon School Law, *Pierce v. Society*, 45 Sup. Ct. 571 (1925). Under the power of taxation it has held reasonable, the taxation of intangible chattels according to the unit rule, *Adams Express Co. v. Ohio State*, 166 U. S. 185 (1895); progressive taxation, *Knowlton v. Moore*, 178 U. S. 41 (1900); the establishment of taxing districts regardless of benefit, *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112 (1896); and it has held unreasonable the giving of money to a single individual, *Loan Association v. Topeka*, 20 Wall. 655 (1874), and the taxation of a mere debt at the residence of the debtor, *State Tax, etc.*, 15 Wall. 300 (1872). Under the power of eminent domain it has held reasonable, the condemnation of land for a pleasure highway, *Rindge Co. v. Los Angeles Co.*, 262 U. S. 700 (1923); the building of spur tracks, *Union Terminal Co. v. C. & N. W. Ry.*, 233 U. S. 211 (1914); the authorization of individual land owners in arid parts of the United States to secure the right of way for ditches, *Clark v. Nash*, 198 U. S. 361 (1905), and it has held that it is unreasonable for a state to tax federal or for the federal government to tax state property; *Utah, etc., Co. v. United States*, 243 U. S. 389 (1917). From such decisions it might be possible to prophesy what would be the decision in another case exactly analogous, and it might be possible to make a safe guess as to what would be the decision in some other cases, but it is submitted that up to the present time very little can be learned as to the meaning of due process of law from the decisions of the Supreme Court as to what



the Court is sometimes progressive and liberal, sometimes conservative, or even reactionary, depending mostly upon the personnel of the court.

As a result of this short study, we are now in a position to decide how the due process clause came to have the meaning which it has under the United States Constitution. The most important use which it has in the United States is to enable the United States Supreme Court to declare unconstitutional any acts of legislation which it thinks unreasonable. Whatever other uses the clause may have had in England, it never had this use. Instead of English usage affording any authority for employing the words due process of law as a limitation upon the powers of legislative bodies, it affords authority to the contrary. Yet the words due process of law in our Constitution were borrowed from England. Ordinarily our Supreme Court says that it will give to words in the Constitution the meaning which they had at the time of its adoption. It so held, for example, in the primary election case,<sup>27</sup> and in the pardon case.<sup>28</sup> If it had taken the same position with regard to the words due process of law they would not apply to legislation. But since in this country the due process clause is held to be a limitation upon the powers of legislatures, this doctrine cannot be said to be of English origin. Due process of law was never given any such meaning by the English courts. Coke's dictum, even if it was not bad law, would be no authority for giving any such meaning to the due process clause. The real origin of the doctrine is in the United States Supreme Court itself. It did not find the law; it made it. It made it by its interpretation of the Constitution. The language of the Fourteenth Amendment seems to apply to all branches of the state governments. Therefore, the court inferred, that it was a limitation upon the state legislatures. The words in the Fifth Amendment must have the same meaning as

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in its judgment is reasonable and what unreasonable. They neither give us a rule of law, nor a definition. Hence for the meaning of due process under the United States Constitution we shall have to be content with the statement given in the text above.

<sup>27</sup> *Newberry v. United States*, 256 U. S. 232 (1921).

<sup>28</sup> *Ex parte Grossman*, 267 U. S. 87 (1924).

those in the Fourteenth Amendment. Therefore, the court held, that the due process clause applies to acts of Congress. This would not have been so startling if the court had confined the operation of the clause to legal procedure, but when it extended its meaning to embrace substantive law it included such matters as police power, taxation, eminent domain, and violation of the obligation of contracts. On three of these there are other direct prohibitions in the Constitution. If the makers of the Constitution had intended due process of law to have this scope they evidently would have omitted the other provisions. Hence, the only conclusion to which we can come is that by the meaning which it has given to the due process clause the United States Supreme Court has amended the United States Constitution. This is not one of the constitutional methods of amendment. Consequently, it looks like a revolutionary act.<sup>29</sup>

However, if it is an amendment, it is an amendment completed, not one proposed for adoption. For this reason it would be a work of superogation to discuss the question of whether or not such a change in our constitutional law should be made. The most that can be done is to discuss the relative advantages and disadvantages of the change, unless, perchance, it should be proposed in turn to change and abrogate the meaning which the Court has given to due process of law by a constitutional amendment.

The arguments against the doctrine of due process of law, which the Supreme Court of the United States has developed, are:

(1) The doctrine is not a correct interpretation of the Constitution. If the due process clause was interpreted in the light of the Fourteenth Amendment alone, it might be inferred that it was intended as a limitation on all the branches of the government, but if it was interpreted in the light of the entire Constitution, no such meaning could be given to it, for to do so would be to make other limitations in the Constitution duplicate limitations and surplusage. If the clause was interpreted in the light

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\* X A. B. A. Jour. 509.

of the meaning which it had at the time of the adoption of the Constitution, or even of the Fourteenth Amendment there would be even less ground for giving it the meaning which the Supreme Court has given it. If there was anything in Coke's dictum, as there was not, it is abundantly covered in the Bill of Rights and other express limitations found in the Constitution.

(2) Consequently, the power of the Supreme Court to declare legislation unconstitutional because the Court believes it not due process of law is a usurped power. There is nothing in the Constitution which gives it to the Supreme Court.

(3) In exercising this power the Supreme Court is tending to destroy the doctrine of separation of powers, which is supposed to be one of the fundamental characteristics of our form of government. Thereby the judiciary not only develops judicial legislation, as perhaps it will have to be permitted to do if it is to have a part in the development of the common law in this country, but it prevents the legislative branch of the government from functioning.

(4) In exercising this power the Supreme Court is tending to destroy the doctrine of dual form of government, which is supposed to be another fundamental characteristic of our form of government. In deciding whether or not the legislatures of the various states shall pass laws which they believe to be in the social interest, the Supreme Court makes itself supreme over the states.

(5) As a result of all this the Supreme Court tends by its position to hamper legislation. In various matters it forbids the states from legislating. It does not give the power of legislation over the subjects involved to Congress. It itself does nothing affirmative.

(6) The function which the Supreme Court has taken over in this negative way is one which could better be performed by legislative bodies. Could not a large body of representatives in the halls of legislation, in close touch with the people, and elected at frequent intervals, better voice the needs of the people, that is, determine the social interests of the country, than can a small group of judges, appointed for life, and sitting in Washing-

ton all of the time? Corporations will answer that it is not merely a matter of the determination of the social interests of the country, but also a matter of the protection of private substantive rights against unreasonable legislation, as, for example, confiscatory rates. But why protection against unreasonable legislation any more than protection against unreasonable judicial decisions? The Constitution itself protects no definite things. Extending due process to matters of substance does not protect the minority against hasty action of the majority, but simply transfers to the Supreme Court from the legislatures the decision of what is reasonable. Why should corporations desire to have the question settled by the justices of the Supreme Court instead of by legislators? The result in either event would depend upon the personnel of the body acting. It is conceivable to think of a Supreme Court, appointed by a President and confirmed by a Senate, which would be more objectionable to corporations than Congress itself. As a matter of fact corporations are not clamoring for the Supreme Court instead of Congress, but instead of state legislatures. In other words, they are trying in this roundabout way, to destroy our dual form of government. If that is their purpose would it not be better to transfer to Congress instead of to the Supreme Court the functions under consideration? Unless we can trust our legislative bodies—whether state or national—to perform legislative functions (and the determination of what is reasonable would seem to be such a function) we might as well abandon all legislative government. The writer is one of those who is of the opinion that had the power in the United States to determine what is reasonable been left to legislators—either state or national—the power would have in the long run been exercised as reasonably as it has been exercised by our judges.

(7) The doctrine of the Supreme Court creates uncertainty in the law. It is never known whether an act of Congress or of a state legislature, if it can possibly touch the due process clause, is or is not constitutional until after it has run the gauntlet of the Supreme Court, and it may be ten or more years before the question is ever presented to the Supreme Court.

(8) The doctrine tends, by bringing extra litigation to the court, to overburden a court already overworked.

(9) The doctrine has tended to create a number of commissions, which otherwise could be abolished with a social saving of expense and effort. Then, any regulation to be done could be done directly by the legislatures.

(10) The doctrine tends to over-emphasize property, in that it takes away from state legislatures power over the property rights of corporations, but leaves them free to deal with other fundamental rights.

Over against these arguments may be set certain arguments in favor of the doctrine which the United States Supreme Court has developed.

(1) Property rights are the rights which need protection. Other rights all have. Property rights some do not have. Those who have rights need special protection from those who do not have them.

(2) Corporations also need special protection from those who think they are easy prey, and they will get better protection from the Supreme Court than they would from state legislatures.

(3) So far as the doctrine tends to destroy our dual form of government it is a good thing. The doctrine of dual form of government and sovereignty of the states has been productive of harm often, but of good seldom.

Other arguments pro and con could be given, but enough have been given to show the nature of the problem. The writer is of the opinion that the Supreme Court so far as concerns results, did right in extending the meaning of the due process clause to legal procedure, to the property rights of corporations so far as concerned legal procedure, and probably even to legislation with reference to legal procedure, but he thinks it did wrong in extending it to legislation upon matters of substantive law; and he confesses that he would like to see added to the Fourteenth Amendment a section to the effect that the due proc-

ess clause shall not be interpreted to include matters of substantive law. Most matters of substantive law, most fundamental rights, are already sufficiently safeguarded by other provisions in the Constitution. If any further safeguards are needed they should be provided for by other provisions, not by giving a false and unnatural meaning to the phrase due process of law. Perhaps one such provision should be one with reference to retroactive laws, and another, a provision preventing the federal government from violating the obligation of contracts. The Supreme Court has held that the exercise of the police power,<sup>30</sup> taxation<sup>31</sup> and eminent domain<sup>32</sup> is due process of law; that retroactive laws<sup>33</sup> are valid if they could originally have been passed under the police power, taxation, or eminent domain; and that the obligation of a contract is not impaired by the exercise of the power of eminent domain,<sup>34</sup> or the police power,<sup>35</sup> and it should hold that it is not impaired by the exercise of the power of taxation. It might be wise to add to our Constitution a clause to the effect: Neither the states nor the federal government shall pass any law violating the obligation of a contract, nor pass any other retroactive law, except in the exercise of the police power, the power of taxation and the power of eminent domain. Such a clause would give the Supreme Court sufficient opportunity for work in the fields of social interest, public purpose and public use, without opening into these fields the door of due process of law.

Yet, doubtless, neither of the amendments suggested above will ever be made. Probably the changes wrought by the Supreme Court under the due process clause have come to stay, and our dual form of government will more and more cease to be, and instead our government will become in theory as well as in fact a strong central government with the states little more

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<sup>30</sup> License Cases, 5 How. 504 (U. S., 1847).

<sup>31</sup> Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185 (1897).

<sup>32</sup> Clark v. Nash, 198 U. S. 361 (1905).

<sup>33</sup> United States v. Heinszen, 206 U. S. 370 (1907).

<sup>34</sup> Long Island Water Co. v. Brooklyn, 166 U. S. 185 (1897).

<sup>35</sup> Stone v. Mississippi, 101 U. S. 814 (1879).

than administrative units. If this is to be true, we should not merely suffer the evils of the plan but we should take advantage of its merits. We should at least avoid some of the expense incident to two systems of government where duplicate, amalgamate all of our courts—state and federal—into one great judicial system, and rid ourselves of the embarrassments and entanglements—domestic and foreign—which are the concomitants of sovereignties within a sovereignty.

*Hugh Evander Willis.*

*University of Indiana Law School.  
Bloomington, Indiana.*