

IS UNREASONABLE LEGISLATION UNCONSTITUTIONAL?*

The United States Supreme Court upon several occasions has decided that the due process clauses authorize the court to declare that actions by other organs of government which the court considers unreasonable¹ or arbitrary² are unconstitutional even though they do not violate any procedural requirements of the Constitution; and in addition to these cases in which governmental action was declared invalid, there are a number of other cases in which the court has either said or suggested that such action would violate the due process provision if unrea-

*From Reeder, *VALIDITY OF RATE REGULATIONS* (copyright, 1913, by T. & J. W. Johnson Co.), where many additional authorities will be cited.

¹In *Eubank v. Richmond* (1912) 226 U. S. 137, that was one of the grounds upon which the court declared unconstitutional an ordinance relating to the establishment of a building line upon request of owners of two-thirds of the abutting property. The decision seems to be clearly unreasonable. In *Adair v. United States* (1908) 208 U. S. 161, that was one of the grounds upon which the court declared unconstitutional a federal statute which forbade interstate carriers and their officials to discharge employees because of membership in labor organizations. In *Lochner v. New York* (1905) 198 U. S. 45, a law which limited the number of hours of labor in bakeries, and in *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, a state law which limited the charge for mileage tickets was declared unconstitutional upon that ground.

²*Adair v. United States* (1908) 208 U. S. 161, 175, 180; *Lochner v. New York* (1905) 198 U. S. 45, 62; *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 351. In *Dobbins v. Los Angeles* (1904) 195 U. S. 223, reversing the decision of the highest state court, it declared that an ordinance which changed the territorial limits within which gas works might be erected was, under the circumstances disclosed, arbitrary and discriminatory and, therefore, in violation of the due process provision. In saying that the ordinance was arbitrary it is quite possible that the court meant that there was not a sufficient reason for its enactment. In *Scott v. McNeal* (1894) 154 U. S. 34, 45, where a state court which had jurisdiction to administer the estates of decedents exceeded that jurisdiction and administered the estate of a person who was in fact alive, the Supreme Court quoted with approval the statement in an earlier opinion that the due process provision was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." The Supreme Court case in which the language quoted, first appeared related simply to a question of procedure. See remarks on that language in 24 *HARV. L. REV.* 476, note. And see discussion of *Scott v. McNeal* in *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458.

sonable³ or arbitrary. The latter word is apparently used in the instances which are cited⁴ as meaning oppressive or unjust or not based upon a sufficient reason.

This position requires careful examination, for it is inconsistent with numerous decisions by the court that it has no constitutional right to inquire into the wisdom or justice of acts by other organs of the federal government or by the states or their organs of government;⁵ and if followed out it would place almost unlimited power in the hands of the federal judiciary,

³ See, *e. g.*, *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 66, 67; *House v. Mayes* (1911) 219 U. S. 270, 284, 285; *Brodnax v. Missouri* (1911) 219 U. S. 285, 292, 293; *Griffith v. Connecticut* (1910) 218 U. S. 563, 569; *Ling Su Fan v. United States* (1910) 218 U. S. 302, 311; *Watson v. Maryland* (1910) 218 U. S. 173, 178; *Lemieux v. Young* (1909) 211 U. S. 489, 496; *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 20; *Schmidinger v. Chicago* (1913) 226 U. S. 578, 588; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 274, 275, 276; *West C. S. R. Co. v. People* (1906) 201 U. S. 506, 526; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 592, 593; *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 476; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28, 29. Compare *Red "C" Oil Co. v. North Carolina* (1912) 222 U. S. 380, 394; *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 158, 167, 169; *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 569; *Patton v. Brady* (1902) 184 U. S. 608, 623.

⁴ See, *e. g.*, *Barrett v. Indiana* (1913) 229 U. S. 26, 29; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 274, 275, 276; *New York v. Hesterberg* (1908) 211 U. S. 31, 39; *Interstate Com. Comm. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 553; *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 316; *Brodnax v. Missouri* (1911) 219 U. S. 285, 292, 293; *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 66; *Ling Su Fan v. United States* (1910) 218 U. S. 302, 311; *McLean v. Arkansas* (1909) 211 U. S. 539, 547, 548; *West C. S. R. Co. v. People* (1906) 201 U. S. 506, 524, 526; *People v. Van de Carr* (1905) 199 U. S. 552, 563; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 320; *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 476; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28; *Lawton v. Steele* (1894) 152 U. S. 133, 140. And see *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 69; *Quong Wing v. Kirkendall* (1912) 223 U. S. 59, 62; *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 234; *Chicago, R. I. & P. Ry. Co. v. Arkansas* (1911) 219 U. S. 453, 465, 466; *Hodgson v. Vermont* (1897) 168 U. S. 262, 272; *Barbier v. Connolly* (1885) 113 U. S. 27, 31; *United States v. Cruikshank* (1875) 92 U. S. 542, 554; *Welch v. Swasey* (1909) 214 U. S. 91, 105. And the following cases which deal with the question of procedure: *Bank of Columbia v. Okely* (1819) 4 Wheat. 235, 244; *Caldwell v. Texas* (1891) 137 U. S. 692, 697, 698; *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 161; *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 43; concurring opinion in *Davidson v. New Orleans* (1877) 96 U. S. 97, 107. On *Bank of Columbia v. Okely*, *supra*, see 24 HARV. L. REV. 476, note. With the cases in the present note compare *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 158.

⁵ See *Reeder, Constitutional and Extra-constitutional Restraints*, 61 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 441.

and under it the Fourteenth Amendment would radically change the relations which before its adoption existed between the state and federal governments and between both governments and the people.⁶

The court has also said or suggested in several cases that it may pass upon the necessity for legislative⁷ or administrative⁸ action, although such statements and suggestions also are clearly inconsistent with the position which the court has taken in other cases.⁹

⁶The court has declared repeatedly that the Amendment did not bring about such a change. As was said by Knox, J., in his separate opinion in *Sharpless v. Mayor of Philadelphia* (1853) 21 Pa. 147, 186, 187, "There is, to my mind, great danger in recognizing the existence of a power in the judiciary to annul legislative action, without some fixed rule by which such power is to be measured. Our opinions are so diversified and varied, that what to one mind may seem clearly right and proper, to another will appear to be fraught with imminent danger. If we have not a certain standard by which to test the constitutionality of legislative enactments; if each judge is to be governed by his own convictions of what is right or otherwise, I fear that restraints upon judicial, rather than upon legislative action, will be demanded by a people ever jealous of the accumulation of power in the hands of the few." Clifford, J., dissenting, said in *Loan Ass'n v. Topeka* (1874) 20 Wall. 655, 669, "Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism." See also Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238, especially latter part of that article.

⁷*Lochner v. New York* (1905) 198 U. S. 45, 56; *Lawton v. Steele* (1894) 152 U. S. 133, 137; *House v. Mayes* (1911) 219 U. S. 270, 282, 284, 285; *Welch v. Swasey* (1909) 214 U. S. 91, 105; *Brodnax v. Missouri* (1911) 219 U. S. 285, 292, 293; *Engel v. O'Malley* (1911) 219 U. S. 128, 136; *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 113; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 318; *Gardner v. Michigan* (1905) 199 U. S. 325, 332; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28; *Gundling v. Chicago* (1900) 177 U. S. 183, 188.

⁸*Washington v. Fairchild* (1912) 224 U. S. 510.

⁹In *McCulloch v. Maryland* (1819) 4 Wheat. 316, 423, without reference to the Fifth Amendment, Marshall, C. J., says concerning legislation by Congress, which differs from state legislatures in that it has only powers expressly or impliedly granted, that "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." And in *Oceanic Nav. Co. v. Stranahan* (1909) 214 U. S. 320, 340, the court, by White, J., speaks of "the assumption that it is within the competency of judicial authority to control legislative action as to subjects over which there is complete legislative authority, on the theory

In support of these positions of the court there is very little reasoning expressed in the opinions, but from citations and quotations in a number of those opinions it seems clear that the court is often basing such decisions under the due process clauses upon other lines of decision which the court deems to be either directly in point or else analogous. We shall, therefore, inquire into the bearing of those other lines of decision upon the questions under consideration.

Let us first note that the fact that English courts and those which applied state law¹⁰ have declared invalid ordinances which the municipalities were not expressly empowered to make which the courts considered unreasonable¹¹ does not justify the Supreme Court in inquiring into the reasonableness of an ordi-

that there was no necessity calling for the exertion of legislative power. . . . The constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts. The suggestion that if this view be applied, grave abuses may arise from the mistaken or wrongful exertion by the legislative department of its authority, but intimates that if the legislative power be permitted its full sway within its Constitutional sphere, harm and wrong will follow, and therefore it behooves the judiciary to apply a corrective by exceeding its own authority. But as was pointed out in *Cary v. Curtis* (1845) 3 How. 236, and as has been often since emphasized by this court, *McCray v. United States* (1904) 195 U. S. 27, the proposition but mistakenly assumes that the courts can alone be safely entrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished." See also *District of Columbia v. Brooke* (1909) 214 U. S. 138, 150; *The Lottery Case—Champion v. Ames* (1903) 188 U. S. 321, 358; *United States v. Chandler-Dunbar Co.* (1913) 229 U. S. 53, 62; *McDermott v. Wisconsin* (1913) 228 U. S. 115, 128; *Hoke v. United States* (1913) 227 U. S. 308, 323; *Minneapolis etc. R. Co. v. Railroad Comm. of Wisconsin* (1908) 136 Wis. 146, 160, 116 N. W. 905, 910, 17 L. R. A. N. S. 821, 829. Compare *United States v. Joint T. Ass'n* (1898) 171 U. S. 505, 571, where the statement of the court is inconclusive; and note in 17 L. R. A. 838.

¹⁰ *I. e.*, state courts and also federal courts when the latter acquired jurisdiction by reason of the diverse citizenship of the parties.

¹¹ See *Dillon, Municipal Corporations* (5th Ed.) §589, *et seq.*; *McQuillin, Municipal Ordinances*, §181, *et seq.*; *McQuillin, Municipal Corporations*, §724, *et seq.*; *Paul v. Gloucester County* (1888) 50 N. J. L. 585, 600; *New O. & N. W. R. Co. v. Vidalia* (1906) 117 La. 560; and also *People v. Daniels* (1889) 6 Utah, 288, 292, 293, which points out that territories are in the same position as municipalities in this respect. It seems that originally the rule was a qualification to the admission that municipalities possessed implied powers, and was not a limitation concerning the propriety of exercises of express powers, and that the extent to which the rule is at present frequently applied in this country is due to later usurpations of power by the courts.

nance upon appeal from a state court,¹² nor does it by itself show anything as to the bearing of the due process provision upon legislation. It has not been shown, by reference to those clauses or to any other clauses, that the men who adopted the Constitution sought to place Congress in the same relation to the federal judiciary as municipal governments stood towards the local courts;¹³ and they certainly did not place the state legislatures in that position; for while Congress is somewhat like such municipal governments in that it possesses only powers which have been bestowed upon it, expressly or impliedly, a state legislature has all powers not denied to it by the federal or state constitution, and the state itself, in adopting a constitution, has all powers not denied to it by the federal Constitution.¹⁴

It is possible that the decisions concerning the reasonableness of ordinances may show by way of analogy that the appropriate courts may pass upon the reasonableness of administrative regulations under some circumstances, depending upon the terms of the grant of power to the administrative organ. But those decisions do not seem to have any bearing whatever upon state or federal legislation.

The court has also said that in view of the due process provision a governmental action cannot be a valid exercise of the police power unless it is reasonable;¹⁵ and in reaching this

¹² *Railroad Co. v. Richmond* (1877) 96 U. S. 521, 528. Consider, however, the character of the citations in *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28; and see *Yick Wo. v. Hopkins* (1886) 118 U. S. 356; and dissenting opinion in *Slaughter House Cases* (1872) 16 Wall. 36, 108. Acts by municipalities which are in excess of authority from the state do not for that reason violate the due process provision: *Owensboro W. Co. v. Owensboro* (1906) 200 U. S. 38. The United States Supreme Court declares that it is its duty to follow the interpretations which have been given to the state constitutions and the state statutes by the state courts.

¹³ Had they done so, it seems that the rule would have related only to the implied powers of Congress.

¹⁴ See *City of New York v. Miln* (1837) 11 Pet. 102, 139; *Martin v. Hunter's Lessee* (1816) 1 Wheat. 304, 325; *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 192-193; *Sutherland, Notes on the United States Constitution*, 677.

¹⁵ *Eubank v. Richmond* (1912) 226 U. S. 137, 144; *Lochner v. New York* (1905) 198 U. S. 45, 53, 56; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 689, 691; *House v. Mayes* (1911) 219 U. S. 270, 282; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 592, 593; *New York v. Hesterberg* (1908) 211 U. S. 31, 39. See also *McLean v. Arkansas* (1909) 211

conclusion it has referred to cases which arose under other provisions of the Constitution and in which it had considered the occasion for governmental action in order to determine therefrom whether such action were within the police power of a state.¹⁶ Such references to decisions under other provisions of the Constitution are in point if the term "police power" is used in the same sense in all cases.¹⁷

In the cases which arose under other provisions of the Constitution the term "police power" is apparently used to denote a power the existence of which limits the scope of provisions of the Constitution. The court recognizes the fact that it cannot carry out a constitution "with mathematical nicety to logical extremes."¹⁸ It does not always interpret stringently the limitations upon state action which are contained in the Constitution.¹⁹ Instead of so doing, it inquires into the char-

U. S. 539, 547; *Welch v. Swasey* (1909) 214 U. S. 91, 105; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 25, 28; *Gundling v. Chicago* (1900) 177 U. S. 183, 188; *Holden v. Hardy* (1898) 169 U. S. 366, 392, 395, 398; *Lawton v. Steele* (1894) 152 U. S. 133, 137; *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 316.

¹⁶ Note the references in the following cases which arose under the due process provisions to cases which were decided under other provisions of the Constitution: *Lawton v. Steele* (1894) 152 U. S. 133, 137; *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 316, 317; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 318, 319; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 25, 28; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 584, 585.

¹⁷ But see *Hand, The Commodities Clause and the Fifth Amendment*, 22 *HARV. L. REV.* 250, 259; *Blayney, The Term "Police Power,"* 59 *CENT. L. J.* 486, 489.

¹⁸ "You cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we should never have heard of the police power": *Paddell v. New York* (1908) 211 U. S. 446, 450. See also *Noble State Bk. v. Haskell* (1911) 219 U. S. 104, 110; *Hudson C. W. Co. v. McCarter* (1908) 209 U. S. 349, 355, 357; *Danforth v. Groton W. Co.* (1901) 178 *Mass.* 472, 476, 477; *Dunbar v. Boston & P. R. Co.* (1902) 181 *Mass.* 383. *Holmes, J.*, speaking for himself, said in *Interstate C. S. Ry. Co. v. Commonwealth* (1907) 207 U. S. 79, 86, 87, "I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation." See also cases there cited.

¹⁹ The court, in cases arising under the impairment of contract clause, has declared that, in spite of supposed contracts, a state may enact legis-

acter of the legislation and it says that the legislation which it upholds is within the police power of the state.

But the term "police power" is also used in a broader sense to denote all the power of government which the states did not expressly or impliedly²⁰ surrender by the adoption of the Constitution, a power which has no bounds except those imposed by the Constitution.²¹

lation to secure the safety or to protect the health or the morals of its citizens: *Texas & N. O. R. Co. v. Miller* (1911) 221 U. S. 408, 414; *Northern P. Ry. Co. v. State* (1908) 208 U. S. 583, 596, 597, 598; and cases cited there and in *Patterson, The United States and the States Under the Constitution*, (2d Ed.), p. 178. And the court for a long time held, and to some extent still holds, that the state may enact such and similar legislation, although it affects interstate commerce, where Congress has not expressly shown a determination that the commerce should be free from state regulation: *Chicago, R. I. & P. Ry. Co. v. Arkansas* (1911) 219 U. S. 453; and cases cited there and in *Patterson, ubi supra*, chap. 4. See also *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 54, 55; compare *Adams Ex. Co. v. Kentucky* (1909) 214 U. S. 218, 222; *Leisy v. Hardin* (1890) 135 U. S. 100. So also it has said that in spite of the impairment of contract clause a state may make changes in statutes of limitation affecting existing rights of action if the time allowed before the bar takes effect is not palpably unreasonable: *Terry v. Anderson* (1877) 95 U. S. 628; see also *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 156, 157. While the court holds that the equal protection provision protects against discriminatory legislation, it also holds that a state in legislating may make classifications which are not unreasonable: *Haller v. Nebraska* (1907) 205 U. S. 34; *Bacon v. Walker* (1907) 204 U. S. 311; *St. Mary's F. A. P. Co. v. West Virginia* (1906) 203 U. S. 183; *Campbell v. California* (1906) 200 U. S. 87, 95; *Plessy v. Ferguson* (1896) 163 U. S. 537, 550; and see *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co., supra*.—On the subject of this note see also *Martin v. District of Columbia* (1907) 205 U. S. 135, 139; *Allen v. Riley* (1906) 203 U. S. 347; *Woods v. Carl* (1906) 203 U. S. 358; *Railroad Co. v. Fuller* (1873) 17 Wall. 560, 567, 568; *Escanaba & L. M. T. Co. v. Chicago* (1882) 107 U. S. 678; *Lake S. & M. S. Ry. Co. v. Ohio* (1899) 173 U. S. 285; *Territory of New Mexico v. Denver & R. G. R. Co.* (1906) 203 U. S. 38, 55; *Asbell v. Kansas* (1908) 209 U. S. 251; *Morgan's S. Co. v. Louisiana* (1886) 118 U. S. 455, 462, 464; *Louisville & N. R. Co. v. Kentucky* (1896) 161 U. S. 577, 695; *New York v. Hesterberg* (1908) 211 U. S. 31. Compare *North Dakota v. Tanson* (1910) 215 U. S. 515, 525.

²⁰For example, the court holds that the grant to Congress of power over interstate commerce constitutes a restraint upon the state governments.

²¹See: *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 111; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 592; *New O. G. Co. v. Louisiana L. Co.* (1885) 115 U. S. 650, 661; *License Cases* (1847) 5 How. 504, 583; *House v. Mayes* (1911) 219 U. S. 270, 282; *German A. L. Co. v. Hale* (1911) 219 U. S. 307, 317; *Keller v. United States* (1909) 213 U. S. 138; *Bacon v. Walker* (1907) 204 U. S. 311, 317; *Halter v. Nebraska* (1907) 205 U. S. 34, 40; *Cincinnati, I. & W. Ry. Co. v. Connersville* (1910) 218 U. S. 336, 344; *Northwestern N. L. I. Co. v. Riggs* (1906) 203 U. S. 243, 253; *Western T. Ass'n v. Greenberg* (1907) 204 U. S. 359, 363; *Mutual L. Ass'n v. Martell* (1911) 222 U. S. 225. The term is also used to denote

And, of course, the fact that the court has inquired whether legislation was within the police power of the state, as that term is used in its narrower significance, does not necessarily show that the court should inquire into the necessity or propriety of legislation in all cases. The decisions concerning the police power to which we have referred and in which the term is used in its narrower sense, do not justify the court in inquiring into the character of legislation and naming instances in which it will and instances in which it will not permit legislation, unless some express or implied restraints upon governmental action are involved.²²

Those decisions may well be in point in cases arising under the due process clauses in which questions of procedure are involved. They may show the degree of strictness with which that provision of the Constitution should be enforced. But before we can say that they are in point in cases where the due process provision is invoked in controversies concerning questions of substantive law, we must first show that if stringently applied the provision might be given a sweeping effect and held to provide broadly that the legislature may not cause any person to lose his life, liberty or property. If we could say that, the decisions to which we have referred would seem to show by way of analogy that the due process provision was not to be applied stringently where in the opinion of the court the legislature was properly guarding the welfare of the citizens.

Did those who adopted the clauses intend that as a general rule they should have such an effect? Did they intend to forbid the legislature to change rules of law? Such a change usually affects rights which persons possessed before the law was enacted; and it affects them without any prior judicial proceedings. Compliance with the law may mean a recognition that rights have already been altered; and the enforcement of the

the residuary sovereignty of the state minus such ordinary powers as by constant use have acquired a separate identity and a definite name, as "taxation," "eminent domain," *etc.*: Hastings, *Police Power of the State*, 39 *Proc. Am. Phil. Soc.* 405, 414.

²²In support of this statement see *Schollenberger v. Pennsylvania* (1898) 171 U. S. 1, 16.

law has that meaning. Are the due process clauses violated when changes in the rights which persons theretofore possessed are made before there have been judicial proceedings and the judiciary is called upon simply to recognize and enforce the changes in the law?

It is true that as a general rule the government may not lay a heavy hand upon a person until he has had his day in court. But it does not follow that the rules of law which the court is to apply are to be determined then for the first time or that they must be made by that tribunal. On the contrary, we know that those who adopted the Amendments intended that as a general rule governmental commands should be made and enforced by different organs of government—an intention which was shown by their custom of distributing the governmental powers, both of the federal and of the several state governments, among three departments of government. The custom of so distributing governmental powers was so general and continued for so long a time after the adoption of the due process provision that we cannot readily adopt a construction of the due process provision which is inconsistent with that custom. We must recognize the power of the legislature to make rules of law. And the power to make the law includes the power to change the law.

On the other hand, those who adopted the constitutions clearly intended that the power to enforce the law should not include the power to pass upon legislative questions. There is nothing in the suggestion that governmental commands when made otherwise than by the tribunal which is to enforce them are subject to tests similar to those which in the absence of legislation that tribunal would apply to the acts of individuals. The legislature may unquestionably change the law; and when it does so it is the clear and inevitable duty of the courts to enforce the law as enacted by the legislature unless that law violates the Constitution.

Moreover, as was pointed out in a former article,²³ there are strong reasons for the opinion that the due process provision refers merely to those deprivations which are usually made

²³ 58 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, 212.

by way of punishment. And the establishment of a rule of law could hardly be considered the making of such a deprivation.

In short, it cannot be said that as a general rule the due process provision forbids the legislature to enact any law the enforcement of which would cause any person to lose his life, liberty or property. As a consequence, we cannot base upon the cases to which the court has referred²⁴ the broad statement that by virtue of the due process provision any legislation which affects individuals is unconstitutional if it is unreasonable. And so, while it may be said correctly that the court may inquire into the justification for exercises of the police power, this statement is true only when the term "police power" is given its more restricted meaning, and it is not true when the term is used in its broader sense.

It is quite possible that the assertion that courts may declare invalid legislation which they consider unreasonable, while it claims the support of the due process provision, is based in large measure upon the idea that legislation which conflicts with natural justice is void.²⁵ We have, however, already observed that a court is not justified in refusing to enforce legislation upon the ground that it is not in accordance with natural justice.²⁶

The court has also referred²⁷ to cases in which the Supreme Court of Massachusetts has passed upon the propriety of state legislation. But that position was taken by the state court because of a provision in the state constitution which does not appear in the federal Constitution,²⁸ so that the cases from Massachusetts are not in point.

²⁴ See note 16, *supra*.

²⁵ See Boudin, *Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 265. Sir Frederick Pollock (*The History of the Law of Nature*, 1 *COL. L. REV.* 29, 30) quotes St. Germain's statement (*Doctor and Student, Dialogue I, Chap. 5*) that where the canonist or civilian would speak of the law of nature, the common lawyer speaks of reason, and says: "Once pointed out, the analogy is obviously just, and a real connection is at least probable, for we are not to suppose that the judges and serjeants never knew any more of what the canonists were doing than is disclosed by the Year Books."

²⁶ See note 5, *supra*.

²⁷ See, *e. g.*, *Lawton v. Steele* (1894) 152 U. S. 133, 137.

²⁸ "The Massachusetts Supreme Court, owing to the formula by which

As we have already noted,²⁹ the court has said that the due process provision forbids arbitrary governmental action. The word "arbitrary," however, is decidedly indefinite. The court apparently means that a governmental action cannot rest for its validity simply upon the pleasure of the organ of government which has taken that action; but we cannot say with positiveness that the court is making a statement which is more definite than that.

Such a position the court certainly ought to take in some cases. It should say that, in view of the constitutional objections to delegations of legislative power which usually exist, an administrative body as a general rule cannot exercise, even under color of a legislative grant of power, a wide range of discretion, but that it may act only in accordance with pre-established rules;³⁰ and the court should say that in view of the due process provision of the Fourteenth Amendment such a requirement when based upon the state constitution may be enforced in the federal courts.

But the Supreme Court does not take that position. It declares, rather, that the due process requirement does not authorize the federal courts to enforce compliance with any of the provisions of the state constitutions, as such. And instead of limiting its statement the court seems to take, instead, the position that *no* organ of government may exercise arbitrary power. The court apparently means to say, at times at least, that the due process provision forbids governmental acts which are oppressive or unjust or not based upon a sufficient reason.

We have already seen, however, that the court cannot properly declare that the acts of other organs of government are unconstitutional simply because they bring about results which

power is vested in the Massachusetts constitution in the legislature to pass 'all manner of wholesome and reasonable' laws, had never ceased to describe the police power, even when according to it the broadest possible field of operation, as a power of 'reasonable' legislation": Corwin, *Due Process of Law Before the Civil War*, 24 *HARV. L. REV.* 460, 478. See also Corwin, *The Establishment of Judicial Review*, 9 *MICH. L. REV.* 283, 315.

²⁹ See page 191, *supra*.

³⁰ See article by author—*Rate Regulation as Affected by the Distribution of Governmental Powers in the Constitution*, 57 *UNIVERSITY OF PENNSYLVANIA LAW REVIEW*, 59.

are in the opinion of the court clearly unjustifiable from an economic or a social standpoint.³¹

And the court certainly cannot take the position that the judiciary possesses the right to review all the actions of other organs of government. As Mr. Sedgwick has well said, "If it is meant to assert that there should be no absolute power in each department of government, then it is so far from being true, that, on the contrary, without such power no government could regularly exist an hour; all would be conflict and confusion. It cannot be denied that, practically, despotic power must somewhere exist in every system that assumes to order and regularity. Appeals must terminate, controversies must cease, discussions must end, and the business of life proceed. To effect this, it is indispensable that there must be somewhere lodged, in regard to the operations of every department of government, a supreme, inexorable power whose decision is conclusive; and whether the system be that of a monarchy, an oligarchy, a democracy, or that mixed form under which we live, such power will always be found. In the very case before us, what is the result of the reasoning but to claim for the judiciary the very absolutism which is denied to the legislature? If the statute is conclusive, then the legislature is absolute;—granted. But if the judgment of the court is final,—and to be efficacious it must be so,—then you encounter the same difficulty at only one remove."³² "The law," as was said by the Supreme Court of Michigan,³³ "must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct."

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³¹ See note 5, *supra*.

³² Sedgwick, *Interpretation and Construction of Statutory and Constitutional Law* (2d Ed.) 154.

³³ *Sutherland v. Governor* (1874) 29 Mich. 320, 330, 331.