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A LOOK AT THE POLICY MAKING POWERS OF THE UNITED STATES SUPREME COURT AND THE POSITION OF THE INDIVIDUAL*

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Discussions of the *Segregation* cases as national policy making by the United States Supreme Court have sometimes seemed to assume that law making by the court on a broad scale is unique. There is no effort here to determine whether the decision was a particularly long step from the past or whether it came too soon or too late, or whether the issues were such that under our tradition they should have been left to the amending process or to Congress. The plan is simply to look at the Court's policy making powers through the use of a variety of examples. This will not solve any problems, but it may help in maintaining perspective. Such is the purpose. It would not be furthered by concentration on the segregation cases. That is being done in many places and one can readily find reading in any shade of opinion which suits him.

The first lecture had as its topic the basis of the Court's policy making powers. The second considered policy making powers and the economic life of the nation. The third is the position of the individual. In view of the general purpose, the illustrations for the third topic are taken chiefly from cases arising under the Fourteenth Amendment.

It may seem paradoxical to speak or write about liberty against government in the United States since the protection of liberty was a compelling purpose in the establishment of government. Yet liberty of the individual against the government of the United States sup-

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plied the reason for the first ten amendments as well as for other portions of the Constitution. It was a great concern of many in the heated discussion about the adoption of the Constitution. The emotion of the time is well seen in the debates of the Virginia Convention. Patrick Henry used all of his great eloquence to prevent ratification because he felt the liberty of the people depended upon the states and would be gravely endangered under a powerful central government, likely to exist under the Constitution. Strong in the debate on the side of ratification were James Madison and John Marshall, united on this occasion but not always united thereafter. Fears of many of the opponents were met by a promise of amendments to safeguard human liberties and to preserve rights of the states, the two being viewed as correlative. In the first Congress amendments to this end were offered by James Madison and by others. That Congress proposed what became the first ten amendments and these were promptly adopted.

The Ninth Amendment is rarely mentioned today. The Tenth has lost importance in judicial discussions as a firm Constitutional guarantee. It must be viewed none the less as a strong statement of guidance by those who founded our nation. The decline of the use of the Tenth Amendment is the counterpart of the increase in national power. Certainly John Marshall did as much as anyone toward this end. His belief in a strong central government doubtless received early force from sharing in the desperate condition of the army at Valley Forge, while watching the ineffectiveness of the Continental Congress. The course of later events—the industrialization of the nation, the development of a unified and interdependent economy, the impact of two World Wars and of a devastating depression, the demands of leadership by the United States in world affairs—has favored broad interpretation of granted powers. The Tenth Amendment reserves to the states respectively, or to the people, the powers not delegated. As the areas encompassed by interpretations of delegated powers increase, the areas beyond the reach of these powers shrink.

The title at the head of this paper is broad enough to include all constitutional law judicially applied or inspired. The central concern of all law is human action. The most erudite doctrines of real property law, for example, deal only with the enjoyment by people of the use of land. In the United States emphasis is on the individual separately and not simply as a small fraction of a mass.

The titular justification for preventing this discusion from assuming encyclopedic proportions is found in the word "look," a word of great range extending all the way from a glance to a survey. The look here is brief, being confined to the use of a few examples of

judicial action in applying the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Obviously many other subjects of pressing importance could be chosen to show the extensiveness of the policy making powers of the Court. Changing times may bring a change in the current prominence. In the early ninteen thirties, economic problems were in the center of the judicial stage. Today other issues may claim that spot. There is, for example, the balance between the right of Congress to conduct investigations and the right of the individual to talk or not to talk. Each right has its limits, but the marking of those limits often requires policy choices of great importance. And so it is constantly and imperatively with the right of the nation to protect itself from foes without and within and the right of the individual to freedom of speech and assembly.

The extensive and detailed judicial definition of fundamental human rights is not old in our law. The first Charter of the London Company under which the Colony at Jamestown was established, granted to the colonists and their children "all liberties, franchises, and immunities... to all intents and purposes, as if they had been abiding and were born within this our realm of England...." The colonists thus shared in the fruit of the long struggle of Englishmen for human liberty. By modern standards, the fruits were in 1607 fundamental but limited. The trial of Sir Walter Raleigh in 1603 shows scant concern for the protection of the defendant. It also shows dramatically the change which may be brought about by judicial office if comparision is made between Coke as Attorney General and brutal prosecutor and Coke later as Chief Justice.

The early and uncrowded America did not have many of the problems of liberty with which we have become familiar. There is an appealing account of questions put to a veteran of the American Revolution. The veteran had been asked about the intolerable oppressions by the British, about the tea-tax and about Locke and eternal principles of liberty. His replies showed he did not like tea, he did not know anything about the oppressions and he had never heard of Locke or been concerned with the eternal principles of liberty. The inquisitor asked why, then, did he fight. The reply was: "Young man what we meant in going for those red-coats was this: we always had governed ourselves, and we always meant to. They didn't mean that we should."[1]

The period of the American Civil War brought to the United

[1]Mellen Chamberlain, Account of Conversation with Veteran of the Revolutionary War, 1842; from *John Adams,* 1890. Quoted here from the American Treasury, 1455-1955: Edited by Clifton Fadiman and Charles Van Doren, at pages 372-373.

States Supreme Court a number of cases involving the liberty of the individual. The most famous of these is, of course, the *Dred Scott* case,[2] in 1857. This was the first time since *Marbury v. Madison,*[3] in 1803, that an Act of Congress was held unconstitutional by the Court.

In *Ex parte Merryman,*[4] Chief Justice Taney found in 1861 that the suspension of the writ of habeas corpus on order of President Lincoln was in violation of the Constitution. However, President Lincoln continued to act on his own interpretation. Congress ratified his action in 1863.[5] In *Ex parte Milligan,*[6] the Court made clear the right of civilians in time of war to be tried in the civil courts, where such courts were open, rather than by military commissions. Both Merryman and Milligan were charged with actively aiding the Confederacy, one in Baltimore and the other in Indiana, and the decisions brought a storm of protest in each case. *Cummings v. Missouri*[7] and *Ex parte Garland*[8] in this period, are closely similar cases. The former involved a provision of the Missouri Constitution which as here applied required an oath of a minister of the gospel, as a prerequisite to continuing in his profession, that he had not by word or deed aided the Confederacy. The latter was under an Act of Congress and a rule of court in pursuance thereof requiring a similar oath of an attorney at law. The Missouri constitutional provision and the federal statute were found invalid as being *ex post facto* laws within the meaning of the First Article of the Constitution. In *Ex parte Garland* there was the added factor of the effect of a pardon from the President.

The Fourteenth Amendment proved ultimately to be an extensive reservoir of judicial power. The Due Process Clause of the Fourteenth Amendment now includes many though not all of the guarantees of the first eight amendments, making them applicable to the states. This is on its face a paradox of interpretation. For if the words "due process" in the Fifth Amendment have the same scope in limitation of government action as the identical words have in the Fourteenth, much of the Bill of Rights is repetitious. The overlap is in part due to making more specific certain guarantees as to procedure. It is in large part due to the growth of the content of "due process of law" through interpretation.

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[2]Scott v. Sandford, 19 How. 393 (U. S. 1857).
[3]1 Cranch 137 (U. S. 1803).
[4]17 Fed. Cas. 144, No. 9,487 (C. C. Md. 1861).
[5]12 Stat. 755.
[6]4 Wall. 2 (U. S. 1866).
[7]4 Wall. 277 (U. S. 1867).
[8]4 Wall. 333 (U. S. 1867).

The concept of natural law, widely accepted at the beginning of the American Constitution, involved the belief in an ideal or eternal law deriving from the very nature of things, or from God. The idea is as old as is man's search for justice. It has reflection in the invocation of unalienable rights in the Declaration of Independence. However, it was not contained in the words "due process of law" as understood by the draftsmen of the Fifth Amendment.

In 1833, Justice Story published his Commentaries on the Constitution. He comments very briefly on the Due Process Clause, summarizing as follows: "So that this clause in effect affirms the right of trial according to the process and proceedings of the common law."[9]

The transition from procedure to substance is often not too difficult. Many state constitutions had due process guarantees. An early state case is *Wynehamer v. New York*,[10] wherein the state court found that an act destroying certain property rights was invalid under the Due Process Clause of the New York Constitution. In the following year, Chief Justice Taney, in the *Dred Scott* case,[11] gave a suggestion of substantive due process.

Natural rights, the unalienable rights of the Declaration of Independence, were believed to be within the scope of judicial protection. With the growth and acceptance of the principle that there is no higher law than the Constitution, the natural rights tended to find their place in the concept of due process of law. An interesting illustration of this is found in the comparison of *Bonham's* case[12] with *Tumey v. Ohio*.[13] In the former, Coke declared that an Act of Parliament which was against common right and reason would be void. He made this statement with respect to an Act which under one construction would allow the judge to share in the fine imposed. Some 300 years later, the identical principle was applied by the United States Supreme Court holding that a statute under which the judge received financial gain from a conviction was a denial of due process of law.

The interpretation of the Due Process Clause of the Fourteenth Amendment got off to a slow start. When New Orleans butchers thought the Constitution protected them in a right to slaughter animals, the case was, in 1873, put chiefly under the Privileges and Im-

[9]Story, Commentaries on the Constitution of the United States (1833) § 1789. See Corwin, The Doctrine of Due Process of Law before the Civil War (1911) 24 Harv. L. Rev. 366, 368.

[10]13 N. Y. 378 (1856).

[11]19 How. 393 (U. S. 1857).

[12]8 Co. Rep. 114a, 77 Eng. Rep. 646 (K. B. 1610).

[13]273 U. S. 510 (1927).

munities Clause of the Amendment. The butchers lost.[14] As late as 1884, the Supreme Court held invalid a State statute which amounted to the taking of private property for private use and in sustaining this limitation on legislative power relied on the nature of free governments without invocation of due process of law.[15] Some years later, the identical limitation was justified under the Due Process Clause.[16]

In its early recognition, the Due Process Clause was chiefly invoked in matters largely economic. The courts have gone through a complete circle. First the state legislatures were allowed a free hand, as in *Munn v. Illinois*.[17] In this case the Court said: "For the protection against abuses by legislatures the people must resort to the polls, not to the courts."[18] Then a sharp control of the legislatures was developed to keep them from doing things which the Court thought foolish, as in *Lochner v. New York*[19] and again in *Morehead v. Tipaldo*.[20] The latter case was based on *Adkins v. The Children's Hospital*,[21] wherein the Court set aside the legislative judgment because it preferred its own in finding that minimum wage laws were unwise and therefore unconstitutional. In the Constitutional Revolution of 1937, there was a return to the view of reliance on the legislature. Under the doctrine of political review, there is the reasonable general proposition as expressed in *Munn v. Illinois*[22] that if the people of a state do not like the laws furnished by their state legislature, their remedy is to elect another legislature. At present, the Due Process Clause of the Fourteenth Amendment has little bearing on the validity of state laws dealing with economic matters, where there are no material consequences to economic interests in other states.

The doctrine of political review has appeal in the thought that the majority can pick the kind of economic situation they prefer. It loses appeal in matters wherein recourse to the ballot box is not an adequate remedy for an injured party—that is, in cases involving the distinctive separateness of each man's person, or in matters dealing with the appropriate positon of minority groups. The minority cannot make its wishes felt effectively at the polls unless the minority group hap-

[14]Slaughterhouse Cases, 16 Wall. 36 (U. S. 1873).
[15]Cole v. LaGrange, 113 U. S. 16 (1884).
[16]Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 252 (1904).
[17]94 U. S. 113 (1877).
[18]94 U. S. 113, 134 (1877).
[19]198 U. S. 45 (1905).
[20]298 U. S. 587 (1936).
[21]261 U. S. 525 (1923).
[22]94 U. S. 113 (1877).

pens to hold a balance of power. In such a case, one man in the minority may weigh as heavily as ten men securely in either of the two major parties. Court policy making has in recent years been largely in areas wherein the political review is likely to be least effective. This includes areas involving the effectiveness of the political system itself.

We have been accustomed to speak casually of the Constitutional Revolution of 1937, because it can be given a precise date—on the Monday morning when the opinion in *National Labor Relations Board v. Jones and Laughlin Steel Corp.* was handed down. There is no such sharp change of front in the broad area of civil liberties, but a process of gradualness. The clear and present danger doctrine in the protection of freedom of speech is scarcely a generation old in operation, though it was actually announced by Justice Holmes in *Schenck v. United States,*[23] in 1919. It has, of course, been held to have marked limitations in *Dennis v. United States*[24] with the dangers from world communism there to be considered. Religious liberty has been a great concern of the Court. It may be said that there has been more concern than clarity. However, religious minorities have in recent years received stout protection in the genuine manifestations of their faiths.

There is a widespread and sincere but perhaps not very precise concern of the public that justice be done in criminal trials. There is, of course, acute and immediate interest on the part of the defendant. The Supreme Court has been active in protection of the accused. Originally due process of law meant, as applied to jurisdiction, only control over the person and the subject matter. Now by the process of judicial construction, due process applies in all cases wherein a person is restrained in violation of judicial interpretation of the United States Constitution.

For the past 25 years, the United States Supreme Court has been the directing and forceful guide of state courts in the fundamental protection in the rights of persons accused of crime. Twenty-five years ago the right to counsel, as included in the guarantee of due process of law, received clarification in *Powell v. Alabama.*[25] It is interesting to us in Virginia to know that at an early date, the legislature abolished attorneys for hire, but promptly provided for counsel for those unable to plead their causes. Thus, Virginia was many years ahead of the United States Supreme Court in this, and supplied counsel in civil matters. Without the right of counsel, all other rights lose force. No

[23]249 U. S. 47 (1919).
[24]341 U. S. 494 (1951).
[25]287 U. S. 45 (1932).

right can be asserted unless known. This right needs some additional clarification under the Due Process clause, though in Virginia the guarantee is clear in felony cases.

The interesting question is developing of whether it is enough under the Due Process clause to have competent counsel. Should serious errors of counsel be basis for a new trial even though counsel is admittedly competent? On one side it would seem particularly hard that the defendant may lose his liberty or go to his death because of the failure of another man, particularly when appointed by the court. This raises the further question of whether a distinction may be drawn between the indigent who have counsel appointed by the court for them and the person able to afford his own counsel. If it be true that the poor escape the faults of their counsel because counsel are not of their choice whereas the rich, having appointed their own counsel, must take what comes, we may have a plea for equal protection for the rich.

Criminal cases before the United States Supreme Court see the Court in a dual role. It must do justice in the particular case. It is also setting a standard for the nation. Thus it is in a large sense establishing policy for the nation. As a law maker, it has the advantage of perspective. It is free from any local pressures, if there be any such. It is extremely rare that local pressures can be said to have affected any state appellate court, though local excitement may reach the jury in the trial court.

The dual function of the United States Supreme Court in seeing that justice is done in the particular case before it, within the limits of its jurisdiction, and in setting a standard may well be illustrated in *Poret v. Louisiana*.[26] Defendant, a Negro, was indicted for a crime punishable by death. Negroes had been arbitrarily excluded from the grand jury and consequently the indictment would have been dismissed if timely objection had been made. Objection was not taken until a year later, when the defendant, who had fled the state, was returned. After his conviction in a trial to which no objection was made, he sought reversal in the United States Supreme Court because of error in the composition of the grand jury. Looking at the demands of justice in the particular case, one might well think that the action of the trial jury, admittedly fair, in finding guilt beyond a reasonable doubt, adequately indicated that the man had not been put on trial without probable cause, and consequently he was not in fact hurt by the illegally constituted grand jury. If that step were taken, the case

[26]350 U. S. 91 (1955).

loses any aspect of a man's life being taken because of failure to meet a technical requirement, limiting the time in which objection might be taken to the composition of the grand jury. On the other hand, if the predominant function is to eliminate unconstitutional practices, a direct method is to negative the results of any trial in which they occur. The enforcement officers will be slow to use methods which would result in making them go into a new trial. In the *Poret* case, the majority, sustaining the conviction, spoke of the importance of the compliance with the state's reasonable procedural rules. The minority spoke of the sacrifice of a constitutional right as not being an appropriate punishment for escape and fleeing the jurisdiction. As not infrequently, the majority and minority do not meet on the same specific ground. Policy choices do not fit readily into a common denominator.

Criminal cases are in form the State v. the Individual—e.g., the Commonwealth of Virginia v. John Doe. The court is making the important choice between the interest of the individual and that of the public in the maintenance of law and order. It is, however, not a fight between one man and the state, because the state has a vital interest in the protection of each separate man. And on the other side, the defendant, unless he is on trial for such a serious crime that his present plight makes him forget all else, is on both sides. After the current difficulty is over, he is a great beneficiary of law and order.

A useful series of cases for observing the United States Supreme Court in the process of developing standards of fairness to the defendant and to the community are those dealing with admissibility of evidence obtained by undesirable methods. These standards are yet far from clear. The standards the Court requires in the federal courts are often more strict than those exacted in state courts. In the former, the Supreme Court has broader authority, since it has general powers of review.

In observing the considerations involved, I take first *Rochin v. California.*[27] Here officers seeking to catch peddlers of dope broke into a suspect's room without a search warrant. The man was in bed. On the table by the bed there were two white pills which he quickly swallowed. Over the resistance of the suspect, he was handcuffed and taken to a hospital and there subjected to stomach pumping. The California court admitted the evidence thus obtained; the United States Supreme Court reversed, finding this a denial of due process. In another situation, to use the technical and colorful language of today,

[27]342 U. S. 165 (1952).

the police "bugged" a man's residence—that is, when he was absent, they entered illegally and placed microphones in convenient places. Thus they collected on recording devices his private conversations, he being completely ignorant that he was speaking to the police when he opened his mouth in his own home. The Court found the action of California in making this evidence admissible not a denial of due process of law.[28] What values led the Court to its choice? Would you have made the same choice? Suppose the question is put this way: which would irritate you more, the stomach pump episode or having your private conversation sneak-listened to for a month or so? Perhaps your answer would be there is no choice between rotten apples. Another question—would it make any difference to you if in one case the crime charged was dope peddling and in the other that of violating gambling laws? If a man is suspected of selling dope to children, would you treat him more roughly than if he is suspected of doing a little illegal betting on the races? Remember that in both cases all you have is suspicion.

With the thought that the judicial process may thereby seem more real and the difficulties more substantial, let each consider himself the judge in the case of a person who is in an automobile accident and is suspected of driving while intoxicated. Let us suppose the individual refuses to take the drunkometer test, consisting on his part simply of breathing into a bag. Can the state make the refusal *prima facie* evidence of guilt, which is a form of coercion, or compel his acquiescence by other means? Suppose he defends on the grounds that this is compulsory self-incrimination and a denial of due process of law, and relies on the *Rochin* case?

Is it the state of the defendant's body or the secrets of his mind which cannot be used against his will? The Constitution does not require that a defendant be allowed to sit through his trial wearing a man from Mars suit so that witnesses can not identify him by his physical appearance.

The term compulsory self-incrimination brings to mind a wide variety of memories. It suggests the tortures of the past by which confessions were wrung from poor devils, guilty and innocent alike. Perhaps you may think of Guy Fawkes, guilty in the notorious gun powder plot, whose body was so broken by torture and sickness that he needed the help of the hangman to enable him to reach the gallows. Perhaps you may think of freeborn John Lilburn, a generation after Guy Fawkes, whose courage and stubbornness got for him

[28]Irvine v. California, 347 U. S. 128 (1954).

the whip and the pillory, but with a later vindication by Parliament. His actions helped to fix in our law the thought that no man should be forced to give testimony against himself. Perhaps more strongly in your mind are brain washings and other treatments in various parts of the world. Or it may be that just now self-incrimination suggests a witness at a senate committee, in response to repeated questions reading from paper a long formula invoking a large part of the Constitution including the Fifth Amendment.

It might be suggested here for the purpose of completness that the Fifth Amendment has not yet been completely absorbed into the Fourteenth, but the differences seem to be shrinking. Third degree methods in crude form or in the more subtle form of long questioning cannot be used in state and federal courts.

Since a major theme in these comments on policy making is the state-national relationship, it should be mentioned here that the Supreme Court has recently held that Congress can grant immunity from state prosecution when testimony is required.[29] This is a departure from earlier cases. The thought of the national government in its discretion granting an immunity to individuals from state prosecution would have been a shocking one to many of the framers of the Constitution. Yet with the great extension of governmental activities both state and federal, and with our development of broad areas of concurrent action, in our closely knit economic and social structure, it is easy to see that immunity from federal prosecution alone would in many cases be but cold comfort. It would merely mean the state penitentiary instead of the federal.

In seeking to decide the automobile driver's case, we might, as a court, ask ourselves what is the reason for excluding evidence improperly gotten. Of course, in the case of a confession obtained by torture or its equivalent, there is no evidentiary value. That would be reason enough for exclusion, though others readily appear. In the stomach pump case, were the dope pills pumped from the defendant's stomach inadmissible out of a sense of fair play to the accused, a sort of sporting spirit, the lack of which would offend us, as would poor play in a tennis match? Is it out of a basic sense of decency, which is a bit more elementary than sportsmanship, or is it that we feel that these things should be stopped because they are a threat to the innocent and that the best way to stop them is to make them not only unprofitable but burdensome to the law enforcement officers? Into the choice of the stomach pump case or the breath taking case may well go some of all

[29]Ullman v. United States, 350 U. S. 422 (1956).

three as well as the spirit of trial by combat in the onlookers and the attorneys. In the stomach pump case I would find an outrage to human dignity which is lacking in the breath taking case; in neither would I find compulsory self-incrimination.

The supervision of state trials, the setting of minimal standards has resulted in major improvements. There is, of course, a cost. The United States Supreme Court taking the responsibility for standards may seem to relieve the state courts of that responsibility. This has not been the case generally. There is also the possibility of extensive reviews proving a substantial burden on effective administration of justice. Consider the case of *United States ex rel. Darcy v. Handy.* Darcy was convicted of murder in Pennsylvania in 1948. The conviction was affirmed by the Supreme Court of Pennsylvania. Certiorari was denied by the United States Supreme Court in 1949. His application for habeas corpus was denied in the state supreme court; certiorari was denied in the United States Supreme Court. A second petition for habeas corpus in the state supreme court was denied. He then applied for habeas corpus in the United States District Court, which was denied. The Court of Appeals of the Third Circuit affirmed. This time certiorari was granted by the United States Supreme Court. On June 11, 1956, more than eight years after the offense, the United States Supreme Court affirmed the Court of Appeals and the case was ended with the verdict of guilty standing.[30]

The objections to the practice exemplified in the *Darcy* case are several. One is the substantial use of time of the federal courts. Another is long delay in the administration of justice though at the urgent request of the accused. A third is possible damage to the prestige and position of the state supreme courts in that one district judge may grant habeas corpus directed to the supreme court of a state. A readily measurable result of the first objection is the amount of work in the federal courts. In the state of Illinois, in a period of 14 years, there were 2,476 petitions for federal habeas corpus commenced in the United States district courts. The figures generally show, over a 9-year period, one and six-tenths per cent of petitioners were successful in gaining habeas corpus. It is said that the state penitentiary of Illinois is the largest law school in the world. The law school is not a particularly good one because the curriculum is unbalanced—it is entirely habeas corpus. Each inmate may take a course of self-instruction in drafting petitions. Some are excellent. It has also been suggested and

[30]351 U. S. 454 (1956).

is probably true that it is a lot better if the inmates work on petitions for release by habeas corpus than to be working in the more conventional methods, with a saw and a file. Yet this sort of therapy is probably not the type of job for which the federal courts were designed.[31]

There is here presented a phase of the ever present problem of man's liberty under fair administration of justice. Take the figure of 1.6 per cent of success in gaining habeas corpus. How many of those are freed ultimately I do not know. Perhaps a half. That would be one in 125 petitioners. Can you balance all of this against one man in 125 being restrained in prison who was not guilty under our laws? A change in this regard will doubtless have to come from congressional regulation of the federal courts' jurisdiction.

Looking over the past twenty-five years, one will realize that through the decisions of the United States Supreme Court standards of protection of the defendants throughout the United States have been improved substantially. This is not limited to any one area. The years have seen these standards determined by the United States Supreme Court in particular cases gladly met and often surpassed in trials in state courts.

The expression, "due process of law" has roots in Magna Charta in that a free man may not lose his liberties or free customs or be in any manner destroyed except by a legal judgment of his peers or by the law of the land. The words due process of law appear specifically in 28 Edward III in 1335. The equal protection of the laws clause has no such historical background except so far as the idea of equality is absorbed in due process. Equal protection of the laws was widely discussed and the very phrase was used in the anti-slavery agitation before the Civil War. Argument was drawn from the Declaration of Independence and similar expressions in the state constitutions. Efforts to get judicial decisions outlawing separate schools for white and colored failed prior to the Civil War in *Roberts v. Boston*[32] and in *Van Camp v. Board of Education.*[33] The former of these two cases in an opinion by Chief Justice Shaw is looked upon as the early authoritative declaration of the separate but equal doctrine.

In the October Term, 1952, the Supreme Court of the United States heard arguments in the *Segregation* cases. At the end of that term the Court restored the cases to the docket and assigned them for reargu-

[31]See Federalism and State Criminal Procedure (1956) 70 Harv. L. Rev. 1.
[32]5 Cush. 198 (Mass 1850).
[33]9 Ohio 407 (1859).
[34]345 U. S. 972 (1953).

ment in the following term.[34] The order specifically asked for discussion of certain questions. Each of these is important in viewing the position of the Supreme Court in establishing policy generally and specifically with respect to this very material policy change in the United States. The first three have particular value with respect to the art or technique of finding meaning in constitutional terms.

The first asked: "What evidence is there that Congress which submitted it and the state legislatures and conventions which ratified the 14th Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in the public schools?"

The briefs went into volumnious detail on this very interesting question of the importance of the interpretation of the constitutional provision by the framers and the adopters. After reargument and the submission of this evidence the Court said of it: "This discussion and our own investigation convince us, that, although these sources cast some light, it is not enough to resolve the problems with which we are faced. At best they are inconclusive." In the light of the rest of the opinion it is hard to see how convincing evidence either way would have gone very far to solve the problem.

With all deference, it seems to me that the evidence discloses as conclusively as such evidence can disclose that at the time of the adoption of the amendment it meant neither to the Congress nor to the conventions which adopted it that segregated schools were forbidden.

In an interesting article Alexander M. Bickel, a law clerk for Justice Frankfurter during the October Term, 1952, says: "The obvious conclusion to which the evidence, thus summarized, easily leads is that Section 1 of the 14th Amendment, like Section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the moderates, and hence, as originally understood, was meant to apply neither to jury service nor suffrage, nor anti-miscegenation statutes, nor segregation."[35]

This is a competent opinion but the other evidence is more convincing. At the very time the Amendment was proposed, Congress provided for the maintenance of the segregated schools in the District of Columbia[36] and this maintenance was continued under congressional control until the case of *Bolling v. Sharpe*.[37] Further, of 37

[35]Bickel, The Original Understanding and the Segregation Decision (1955) 69 Harv. L. Rev. 158.

[36]14 Stat. 342 (1866), 14 Stat. 216 (1866). See Carr v. Corning, 182 F. (2d) 14 (1950).

[37]347 U. S. 497 (1954).

states in the union at the time the Amendment was adopted, 23 continued to maintain segregation in schools.

The second question asked by the Court was in substance: Assuming a negative answer to the first question, both as to the understanding of Congress and that of the ratifying states, did the framers understand that future Congresses might in the exercise of the power under Section 5 of the Amendment abolish segregation or that it would be within the judicial power in light of future conditions to construe the Amendment as abolishing such segregation of its own force. Thus the second question looks to the understanding of the framers, but with respect to authority of the Amendment for the future. If the Court had stopped with this, the focus would still be on the understanding of the framers. The third question was in substance: Assuming that the answers to the second question do not dispose of the issue, is it in the judicial power in construing the Amendment to abolish segregation in the public schools? That means can the Court apply to the words of the Amendment the meaning consistent with those words which in its judgment best meets the needs of today, without any finding that such meaning was in the understanding of the framers. The answer of the Court is yes.

The answer to the third question, just given so briefly, can be put more clearly. The course of judicial treatment of the Equal Protection Clause is quite similar to that of the Due Process Clause. The latter, starting with words of procedure, has become a guarantee of fundamental fairness in the treatment of the individual by government. Into a concept of fairness or due process can be put, and from it consequently can be taken, all embracing doctrine of right of the individual with respect to government. The Equal Protection Clause is more restrictive in character, being directed to one aspect of fairness, equality of treatment. The more precise character has made it more obviously applicable in some situations. An easy example is that of a small state tax based upon some totally inept classification. Applications in relatively exact fashion do not obscure the fact that the clause is becoming or has become a broad guarantee of equality in state action in regard to persons in the jurisdiction, with the shape of equality subject to judicial determination.

We should not jump from question to answer in complete disregard of years of judicial history. In viewing the history of changing implications it is well to mention the fate of Section 2 of the 14th Amendment providing when the right to vote at any election is denied to a twenty-one year old male citizen of any state, except for commission of crime,

the basis of that state's representation shall be proportionately reduced. In other words, the basis of representation shall be reduced in every state which adopts a literacy test for voting. The Amendment of course has never been enforced. It would be highly inconvenient to do so. It is as dead as is the original idea of the Electoral College.

The Slaughterhouse Cases[38] in 1873 presented the first Supreme Court test of the scope of the Equal Protection Clause. The butcher who unsuccessfully objected to the monopoly of slaughtering animals in New Orleans relied on this clause as well as on the Privileges and Immunities and Due Process Clauses of the 14th Amendment. Justice Miller, speaking for the Court, said: "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."[39] The Justice was a poor prophet. A careful writer of 40 years later made a computation which showed at that time less than 5 per cent of the total litigation under the Amendment dealt with questions involving the Negro race. It has served business, large and small, tax payers of all sorts and minority groups. The gist of the clause is classification. That is, the state may treat people or businesses differently but on some rational basis.

The Equal Protection Clause has been repeatedly used in the protection of civil rights. The trend was clearly marked in an interesting sequence of cases dealing with the Texas primary law and concerned with the question of what is state action. First a state statute forbade voting by Negroes in the primary. This was held invalid in *Nixon v. Herndon.*[40] A new statute gave the power of exclusion to a committee of the party. This was invalid in *Nixon v. Condon*[41] since the committee acted under state authority. Later the statute was repealed and the party prohibited Negro voting in its primary. This was found permissible in *Grovey v. Townsend.*[42] *Smith v. Allwright*[43] overruled this case in 1944, though the statutes were the same. The Court relied in part on the general statutes designed to control the primaries of all parties. Following this case, South Carolina repealed all primary statutes. The Fourth Circuit in 1947 found that the Democratic Party was in effect performing a public function, and that because of this it could not discriminate.[44] Certiorari was denied by the United States Supreme

[38] 16 Wall. 36 (U. S. 1873).
[39] 16 Wall. 36, 81 (U. S. 1873).
[40] 273 U. S. 536 (1927).
[41] 286 U. S. 73 (1932).
[42] 295 U. S. 45 (1935).
[43] 321 U. S. 649 (1944).

Court.[45] The last case in this group to date is that of the Texas Jay Bird Party, a political club which, before the primary, held an election among its all-white members to select candidates to receive the club's support in the primary. Apparently the Jay Birds had so much influence that their nomination went a long way towards determining the ultimate election. The Count found in the Jay Birds enough state action to bring them within the 14th Amendment.[46] In the offing very obviously is the thought that the failure of a state to act when the United States Supreme Court thinks it should act may amount to state action.

The modern school cases begin in 1938 with *Missouri ex rel. Gaines v. Canada*[47] in which a Negro applicant was denied admission to the University of Missouri Law School, the state paying his tuition at the law school of his choice in any one of the four neighboring states. The Court found that this was invalid since whites were supplied a legal education in the state of Missouri. The *Gaines* case was followed by the establishment of a law school for Negroes in St. Louis. Ten years after the *Gaines* case came *Sipuel v. Oklahoma,*[48] followed quickly by *McLaurin v. Oklahoma*[49] and *Sweatt v. Painter.*[50] These involved inequality of treatment under the old separate but equal doctrine. At the same time there was apparent in many ways the strength of the general movement to outlaw governmental classification on the ground of race. *Shelley v. Kraemer*[51] and *Barrows v. Jackson*[52] held that court enforcement of restrictive covenants based on race violated equal protection. An executive order removed the principle of segregation from the armed forces. At this time came *Brown v. Board of Education,* and *Bolling v. Sharpe* with the result you know.

There are questions on which we may speculate. For example, should the Court have postponed decision on the ground that Congress clearly had the power to act by the terms of the Amendment, and that in a matter of this scope deference was due to Congress. The question would attempt a distinction between this case, the familiar cases of equal protection involving relatively specific matters.

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[45]Rice v. Elmore, 165 F. (2d) 387 (1947).
[46]Rice v. Elmore, 333 U. S. 875 (1948).
[47]345 U. S. 461 (1953).
[48]305 U. S. 337 (1938).
[49]332 U. S. 631 (1948).
[50]339 U. S. 637 (1950).
[51]339 U. S. 629 (1950).
[52]334 U. S. 1 (1948).
[53]346 U. S. 249 (1953).

The Court recognized the scope and varied nature of the problem. The determination that this extensive and difficult problem should be worked out by the local school authorities subject to the federal courts is an important exercise of policy making powers. Given the choice, the people affected might well prefer this method to congressional action and supervision. On that we can but guess. In all frankness, it should be said that congressional action would probably not have come so soon.

An illustration of state action now under way with the Court's acquiescence at least is the pupil assignment plan of North Carolina. This plan was sustained in the Fourth Circuit, the court holding that a Negro applicant must exhaust his state administrative remedy before appealing to the federal courts.[53] Certiorari was denied in the United States Supreme Court last fall.

It may seem to you that I have labored the obvious in this discussion of the policy making powers of United States Supreme Court. All judges make law in a very real sense. They will have to make law to some extent unless laws are drawn to a scale of precision which anticipates and provides precisely for every contingency. Of course that is beyond the imagination. The common process is a slow pragmatic case by case, here a little there a little, method of law making. Any judicial interpretation of a statute or determination of common law which does not suit the people can readily be changed by their representatives.

With constitutional law it is different. The judicial determination may be far reaching in importance and great in extent. The general provisions in our Constitution such as due process of law and the equal protection of the laws express in the abstract ideals which all men of good will accept. Simply stated they are fair play and equality before the law. We have seen that these concepts have had varying interpretations in varying situations. They will continue to have varying interpretations as long as men's minds differ.

Marshall's great reminder was: we must never forget it is a constitution we are interpreting. A constitution is not readily changed as is a statute or a common law rule. This is a major value of a constitution—a method whereby there will be some stability, rather than basic doctrines changing with each change of mind. The people shall have what they want, provided in their sober second thought they really want it.

The difficulty in modification of the Constitution makes the Su-

[53]Carson v. Warlick, 238 F. (2d) 724 (1956).

preme Court a very powerful body in shaping the course of our civilization. In dealing with the constitutional guarantees of human dignity, it often has the application of the national conscience in its keeping. It is a sort of diplomatic priesthood. I am not using diplomatic in any technical sense of relevance to foreign affairs. There has been talk about the type of justice at home which will impress people abroad. The conscience of the nation is its own. It is not a subject of barter or to be coldly calculated as a weapon in a cold war. While we properly have a decent respect for the opinions of persons abroad, we do not make that the determinant of fundamental justice.

Justice Stone said of the United States Supreme Court: "... while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."[54]

This was a wholesome warning to the Court, but is not to be taken in too absolute a sense. The Court is the weakest of the three branches of the government in the actual allocation of powers in the Constitution. Its strength is in the respect of the people of the country.

The executive may of course refuse to enforce its orders. Its entire appellate jurisdiction is subject to such exceptions and regulations as Congress may make. If reduced to its original jurisdiction granted by the Constitution it would have practically nothing to do. Thus the thought that the Supreme Court, under the Constitution, is entirely removed from the electorate is not accurate. The electorate could completely change its character as an institution.

We live under a federal government which cannot exist as such without an umpire. In particular is an umpire necessary as between the states, otherwise the Constitution might have many different meanings in different states. Looking over our history, which agency would the American people prefer as an umpire: The President, acting through some commissions; the Congress; or the Supreme Court?

[54]United States v. Butler, 297 U. S. 1, 79 (1936).