

A LOOK BACK

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THE GRAND DESIGN OF THE CONSTITUTION

Hon. William O. Douglas

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THE GRAND DESIGN OF THE CONSTITUTION

Hon. William O. Douglas*†

Modern constitutions drafted by emerging nations usually have a broad welfare basis, containing guarantees that touch employment, education, and health. Our constitution reflects a concern not with welfare but with various types of oppression, surveillance, censorship, inquisitions, and the like. Though none of the words just listed are in the Constitution or Bill of Rights, the history of the eighteenth century made everyone aware of the propensity of government to overreach, to harass, and even to seek revenge on people. Hence the Constitution and Bill of Rights were designed to keep government off the backs of people. That tradition has made a deep imprint on the American character. It is that tradition that has catered to our drive for independence, our passion for individual initiative, our urge for creativeness, and our aversion to submissiveness. Though people of any age group may have lost many of those attributes, the oncoming generation—today's youth—are resolute advocates of the faith. Their revolt is indeed a reaffirmation of the creed of Samuel Adams, Thomas Paine, Thomas Jefferson and James Madison.

Government is indeed an appalling spectre in its modern garb, more powerful, more authoritative, more menacing than was government even prior to 1787. The lawlessness and corruptness of government are doubtless one reason for the almost ferocious rebellion we have witnessed against authority. Dollars talked louder than men when two generations ago conservationists were trying to save a few islands of wilderness from the greed of lumber companies. Powerful lobbies, operating within the offices of government, tinge large areas of administration with corruption.

* Associate Justice, United States Supreme Court.

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Some say that we need a new constitution, one that deals specifically with modern problems.

My thesis is that we never needed our present Constitution more than we do today.

We need not censorship but a freer press; we need more and more tolerance of speech, argument, debate.

My thesis is that we need more closely controlled, not easier, searches.

We need less, not increased, surveillance.

We need to encourage the development of the idiosyncracies of the individual, not to weed out the nonconformists so as to produce a more orderly and submissive people.

We need to develop a Society of the Dialogue so that the entire spectrum of ideas can be explored without lawless intrusions of police, prosecutors, legislators, and judges.

Private initiatives must be encouraged and the expenditure of private energies and resources on the multitude of local, national, and foreign problems must be accentuated.

My thesis is that no one in government should tell us how long or how short to grow our hair, because one's dress and demeanor as well as one's utterances are methods of expressing views and attitudes toward society.

In light of modern urban conditions and the propensity of officials to employ electronic eavesdropping, privacy and solitude are more important to the individual today than they ever have been.

These theses are not drawn from my subjective evaluations of what the good society should be. Rather they are posited upon the principles and precepts embodied in the Constitution and Bill of Rights.

The Constitution and Bill of Rights place important curbs on the Executive, and the Legislative, and on the Judicial branches of our federal government.

It is the Congress, not the President, who has power to declare war. The President can make treaties, but only with the advice and consent of the Senate. The President can name ambassadors, other public ministers and consuls, judges of the Supreme Court and others only with the advice and consent of the Senate. The President, like the Vice-President and all civil officers, may be removed from office on impeachment, which is tried by the Senate. While the President may remove purely executive officers, he may not re-

move members of regulatory commissions who have been confirmed by the Senate (unless the Senate has granted that authority) or members of other quasi-judicial bodies, confirmed by the Senate.

The President may veto laws passed by Congress, but Congress in turn may override the veto.

The agents of the Executive are fenced in by the ban on unreasonable searches and seizures and the requirement of probable cause for search warrants and arrest warrants.

Treason is narrowly defined, a restraint applicable to the Executive and Judicial as well as to the Legislative branch.

As to the Legislative branch Jefferson wrote in 1789, "The tyranny of the legislatures is the most formidable dread at present, and will be for long years." Madison wrote in *The Federalist* that "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."

By the Constitution it is hemmed in:

- the writ of habeas corpus may not be suspended "unless when in cases of rebellion or invasion the public safety may require it";

- no bill of attainder may be enacted;

- no religious test shall be required as a qualification to any office or public trust under the United States;

- no law respecting an establishment of religion or prohibiting its free exercise shall be enacted;

- the same ban extends to laws abridging freedom of speech or of the press;

- the same extends to rights of assembly and the right to petition.

The Judiciary is also hemmed in by the procedural requirements contained in the Bill of Rights—procedures that govern all criminal cases and criminal prosecutions.

The courts must not require excessive bail or excessive fines nor inflict cruel and unusual punishments.

An accused must not be subject for the same offense to be twice put in jeopardy.

An accused shall not be compelled in any criminal case to be a witness against himself.

Life, liberty, and property of all persons are protected by the requirements of due process and equal protection.

The appointment of federal judges "during good behavior" was designed to produce an independent judiciary.

While our federal judiciary is independent, it is dependent on the Congress for the funds necessary for its operation. By article III the jurisdiction of the Supreme Court is defined only where its "original jurisdiction" is concerned. Its entire appellate jurisdiction is determined by Congress. Congress could severely limit the appellate jurisdiction of the Supreme Court—a power which it exercised in an important way only once.¹ The nature and number of the lower federal courts are also left to Congress as is the jurisdiction which they may exercise.

The mucilage which holds the three departments together as an harmonious whole is the mucilage of good will. Mutual respect and the honoring of traditions are the important ingredients.

The structure of the federal government is only part of our problem. It is the state-federal relation that is often the most sensitive and always the most critical.

By the original Constitution States were barred from certain activities; for example, entering into treaties, coining money, enacting bills of attainder or *ex post facto* laws or laws impairing the obligation of contracts.

But apart from those and other related restraints, the States had large authority to deal as they chose with their internal affairs, being subject from the beginning only to the Supremacy Clause of article VI. That clause, however, bore very little on civil rights, rights of minorities, rights of speech, press, and assembly or on the kind of trials and procedures in civil or criminal cases which they might choose to provide.

A great change came with the Civil War Amendments.

Not only was slavery abolished and the franchise extended to all irrespective of race, color, or previous condition of servitude, but other sweeping and fundamental changes were made.

All persons born in the United States or naturalized became citizens.

States were barred from abridging the privilege or immunities of citizens, from depriving any person of life, liberty or property without due process; and the States were commanded not to deny any person equal protection of the laws.

As respects these Civil War Amendments, Congress was given

¹ See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

authority to enforce them, and over the years Congress has passed about some fourteen so-called Civil Rights Acts with that purpose.

Constitutional rights are, however, enforceable in cases or controversies coming before the courts even though Congress has not acted. Thus the Civil War Amendments grant rights within judicial cognizance even though Congress has enacted no legislation to enforce them.

Yet when Congress enacts laws to enforce the Civil War Amendments, it has a power to protect rights against private action as well as against state action,² even though the right as explicitly defined in the Fourteenth Amendment is protected only against state action.

The result of civil rights legislation passed by Congress and judicial decisions based either on those acts or on the text of the Constitution has been to redefine the pre-Civil War type of federalism. Today the States are subject to most of the restraints of the Bill of Rights, which prior to the Civil War Amendments applied only to the Federal Government. Those who proclaim States Rights are therefore usually insisting that Privileges or Immunities, Due Process, or Equal Protection should be construed very narrowly so as to preserve as much state autonomy as possible. The Civil War Amendments and Civil Rights Laws still raise a storm when their meaning and precise application is at issue.

The Supreme Court is in the vortex of this storm, for it is a referee in the federal system. It was so conceived from the beginning.

The Federalist pointed out that the courts had "the proper and peculiar" province to interpret the laws and added:

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

A federal system needs a referee lest its component units become Balkanized, so to speak, each promoting or preferring that interest which is closest to its heart—whether it be protection of a wine industry or the perpetuation of a regime offering second class

² *United States v. Guest*, 383 U.S. 745 (1966).

citizenship to certain minorities. This, I gather, was the thought behind Mr. Justice Holmes' dictum "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I think the Union would be imperilled if we could not make that declaration as to the laws of the several States."³

The high peaks of the Court's contribution can be discussed in the following four areas:

First: The Role of the Judiciary

Chief Justice Marshall stated the principle which has since been honored: if the action is "a mere political act . . . for the performance of which entire confidence is played by our constitution in the supreme executive"⁴ then the act is not "justiciable." What was said of "political" acts of the President is also true of "political" acts of the Legislature. The federal courts have no oversight of them.

Chief Justice Marshall also said that since the Constitution limits the powers of the Legislature, a law that is repugnant to the Constitution is void.⁵

He gave illustrations:

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the Constitution endeavours to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the Legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of the *courts*, as well as of the legislature.⁶

Marbury v. Madison, involved the federal executive and federal

³ O. W. HOLMES, *Law and the Court*, in *COLLECTED LEGAL PAPERS* 291, 295-96 (1920).

⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).

⁵ *Id.* at 176.

⁶ *Id.* at 179-80.

legislative branches. But the same judicial oversight was soon extended to state laws.⁷ And so the role of the Court as referee in the federal system was early established.

The Court does not, of course, read the Constitution as it reads a statute. When it appraises an act in light of the Constitution, it will sustain the statutory limitation or classification unless it can be said to have no rational basis. That is the conventional rule applicable to most social and economic questions.⁸ Yet when legislative restraints touch upon fundamental civil rights, the Court has required that the statute be narrowly and precisely drawn and that a "compelling state interest" be demonstrated in its support.⁹

The notion of "political" as contrasted to "justiciable" questions has given rise to major controversies.

In *Giles v. Harris*¹⁰ a class action brought by Blacks to compel the boards of registrars in Alabama to enroll them as voters was held not to be justiciable. Mr. Justice Holmes for the majority said that that action "to enforce political rights"¹¹ was beyond the competence of courts of equity. Yet the opposite was held in *Nixon v. Herndon*,¹² where a Black sued Texas election officials for damages for refusing to let him vote in a primary election. The defense was that the matter of the suit was "political" and not within the jurisdiction of the federal courts. But as Mr. Justice Holmes said, "The objection that the subject matter of the suit is political is little more than a play upon words."¹³ For the right to vote, though governed by laws passed by the legislature, is one measure of private rights, enforceable by the courts.

Whether a foreign nation should be recognized by this country is a "political" question; yet the construction of treaties made with other nations is grist for the judicial mill.

Whether an amendment to the Constitution has been properly ratified is normally thought to be left to congressional resolution. Yet rights accruing from it are of course justiciable.

Whether an Ambassador should be accredited to the Vatican,

⁷ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); 19 U.S. (6 Wheat.) 264 (1821).

⁸ *E.g.*, *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

⁹ *E.g.*, *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

¹⁰ 189 U.S. 475 (1903).

¹¹ *Id.* at 487.

¹² 273 U.S. 536 (1927).

¹³ *Id.* at 540.

whether a bill passed by Congress should be vetoed, what judicial or other officers should be named to fill vacancies—these and a host of related questions are “political.”

As Dean Thayer stated many years ago:

It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow.¹⁴

The distinction between a “justiciable” and a “political” question, as stated in *Baker v. Carr*,¹⁵ turns on “a function of the separation of powers.” There are numerous aspects of this problem. The most important desideratum can be stated as follows:

It is a “political” question if it is found to be “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”¹⁶

As respects the States, article IV, section 4 of the Constitution contains a guarantee by the United States to every State of “a republican form of government.” Rhode Island in the 1840’s was torn by two political factions, each claiming to constitute the lawful government of the State. The Court in *Luther v. Borden*,¹⁷ held that that guaranty is in the keeping of Congress, not the federal judiciary.

Luther v. Borden has not been durable in all its aspects. The Court said that it was no part of the judicial function to protect the right to vote of those “to whom it is denied by the written and established constitution and laws of the State.”¹⁸ Later, the right to vote was protected by a legion of judicial decisions.

In addition, the Court’s refusal to examine the legality of martial law that had been laid on Rhode Island was denounced by Justice Woodbury in his dissent.¹⁹ Martial law, he asserted, raised justiciable questions. “It is but a brand of the omnipotence claimed by Parliament to pass bills of attainder, belonging to the same dangerous and arbitrary family with martial law.”²⁰ That view was

¹⁴ Thayer, *The Origin & Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 137-38 (1893).

¹⁵ 369 U.S. 186, 217 (1962).

¹⁶ *Id.*

¹⁷ 48 U.S. (7 How.) 1 (1849).

¹⁸ *Id.* at 41.

¹⁹ *Id.* at 69-70.

²⁰ *Id.* at 70.

years later put into classic language by Chief Justice Hughes in *Sterling v. Constantin*.²¹

In *Baker v. Carr*²² the Court held that debasement of the votes of some citizens by a State's malapportionment scheme presented a justiciable question. The grant to some blocs of voters of 10 or 20 times the voting strength granted other blocs is a serious dilution of voting power, more insidious than tearing up ballots. The right to vote has presented over the decades many justiciable controversies. *Baker v. Carr* followed in that tradition, as did the reapportionments that took place in State after State.²³

Baker v. Carr involved an apportionment of State representatives and State senators. No coordinate department of the Federal Government stood opposed to the Court. But when elections for Federal Representatives are at issue, article I, sections 2, 4, and 5 of the Constitution give Congress supervisory authority. But in *Wesbury v. Sanders*²⁴—and in earlier and later decisions—the Court held that such supervisory power as Congress has over apportionment is not exclusive, that there is no power in any legislative group to debase a citizen's right to vote and to immunize such action from the judicial power "to protect the constitutional rights of individuals from legislative destruction."²⁵

There were those who thought that the Court would enter a "political thicket"²⁶ if it decided to undertake reapportionments. While dire predictions were made, during the 60's every State had revised legislative districts at least once and in most cases revisions encompassed both legislative houses.²⁷ Some state courts took the lead, notably Iowa and New Jersey. Many three-judge federal district courts did yeoman service in this area.²⁸

Gerrymandering and redistricting are merely different faces of the same device; and the problems of gerrymandering persist.²⁹ The problem is probably an unending one; but it has been shown to be within judicial competence.

²¹ 287 U.S. 378, 401 (1932).

²² 369 U.S. 186 (1962).

²³ See VACHION, JUSTICIABILITY AND THE NATURE OF JUDICIAL OBLIGATION 48 (1962).

²⁴ 376 U.S. 1 (1964).

²⁵ *Id.* at 6.

²⁶ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²⁷ See THE BOOK OF THE STATES, 1970-71 at 57-58.

²⁸ See McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968).

²⁹ See Wells, *The Impact of Gerrymandering*, AFL-CIO AMERICAN FEDERATIONIST, February 1972, at 14.

The modern reach of the justiciability concept is evident in two recent decisions:

*Bond v. Floyd*³⁰ held that a state legislature could not constitutionally bar a qualified candidate who had been duly elected because of his anti-war statements against the Federal Government's Vietnam policy and the operation of the Selective Service laws.

*Powell v. McCormack*³¹ held justiciable the claim of a duly elected Congressman to his seat in the House who meets all the standards for the office specified in the Constitution. The State from which the Congressman comes is the sole judge, under the Constitution, of the intellectual and moral qualifications of the Representative it sends to Congress.

The Federalist (No. 69) states that our President, unlike the old British King, has no power to declare war and to raise and regulate fleets and armies—"all which by the Constitution under consideration would appertain to the Legislature."

In the Civil War no declaration of war was made. The war was indeed such that it disrupted the normal functioning of the Congress and was waged internally, most of it on our soil. Nevertheless, claims were made regarding seizure of a neutral vessel under an embargo. The claim was treated as justiciable; and the decision was five-to-four against the claimants. The majority excused the absence of a declaration of war on the ground that "A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on."³² The dissent emphasized that no power short of a declaration of war can give a nation belligerent rights against neutral third parties.³³

The moral was that we live under a rule of law which honors claims of the individual against his government whenever they take his property, enjoin his liberty, or threaten his life.

Whether a war should be declared is for the Congress and the Congress alone. Whether absent a declaration of war property can be seized or men drafted and sent overseas are justiciable questions. In modern times that theory of justiciability was followed in *Youngstown Co. v. Sawyer*,³⁴ which held that President Truman's seizures of the steel mills was unconstitutional, because the power

³⁰ 385 U.S. 116 (1966).

³¹ 395 U.S. 486 (1968).

³² *Prize Cases*, 67 U.S. 635, 666 (1862).

³³ *Id.* at 689.

³⁴ 343 U.S. 579 (1952).

to make laws rested with the Congress, not the President; and no authority for their seizure had been granted.

Youngstown, which involved a seizure of property, arose in the Korean War. It is surprising that the Court has declined to review the seizure of men to fight the Vietnam War.³⁵

Second: The Commerce Clause

The Clause contains only a few words: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several states. . . ."³⁶ In 1787 commerce was movement of people and animals by wagons, people on foot, and travel by boats on waterways.

That concept of commerce was first enlarged by the arrival of railroads and then later by the arrival of automobiles and other mechanized vehicles such as airplanes. Radio and television expanded the concept still further.

Thus the concept of "commerce" in legal as well as in popular concept became something radically different than it meant to the Framers in 1787. Yet there are those who view with alarm the changing meaning of generalized words in the Constitution. They forget Chief Justice Marshall's admonition that "we must never forget, that it is a constitution we are expounding,"³⁷ and that it was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."³⁸

The nature of commerce expanded both by legislative and by judicial interpretations. Manufacturing was once treated as a local enterprise, not as commerce in the constitutional sense. So was child labor. One result was that Congress had no power to exclude the products of child labor from interstate commerce.³⁹

Chief Justice Marshall, in *Gibbons v. Ogden*,⁴⁰ rejected the plea that constitutional "powers ought to be construed strictly." He mentioned that "strict construction" would "cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent." "Commerce, undoubtedly, is traffic," he said, "but it is something more: it is intercourse."⁴¹

³⁵ See *Da Costa v. Laird*, 405 U.S. 979, and cases cited.

³⁶ U.S. CONST. Article I, § 8.

³⁷ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 200 (1819).

³⁸ *Id.* at 203.

³⁹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁴⁰ 22 U.S. (9 Wheat.) 1, 82 (1824).

⁴¹ *Id.* at 83.

The transformation has been complete. Now the authority of Congress over interstate commerce does not differ in character or extent from that retained by the States over intrastate commerce.⁴² Several steps were taken to that end. The *Shreveport Case*⁴³ held that effective control of interstate commerce often made necessary regulation of intrastate transactions affecting interstate commerce. Also inspection of local products has been sustained, though only fractions of them will move in interstate commerce.⁴⁴ In *United States v. Darby*⁴⁵ it was held that the commerce power was ample to give Congress authority to regulate the production of goods for commerce, including compliance with federal minimum wages and federal maximum hours of work. In *Wickard v. Filburn*⁴⁶ it was held that the production of wheat (which is obviously a local activity) used solely for local consumption (which is also plainly a local activity) may nonetheless be controlled by Congress since the wheat market is national and local wheat may flow into the national market and affect price increases and since local wheat, though never marketed, supplies the needs of the grower which otherwise would be satisfied by his purchases in the open market.

Traditionally most activities are local events. As to insurance policies, the Court in 1869 held that their issuance was not a transaction in commerce and therefore a State could regulate the companies engaged in that business.⁴⁷ In 1944 that decision was overruled, the Court holding that federal power was sufficient to regulate the insurance business since in its totality it was interstate and the Commerce Clause was "essential to weld a loose confederacy into a single, indivisible Nation."⁴⁸

The power of Congress to regulate commerce, so far discussed, is the affirmative side of the Commerce Clause. There is also the so-called negative side.

In the early days when the federal power over commerce was not much used, the States were active in regulating business; and frequently complaint was made in the courts that these state laws were unconstitutional because they operated within the federal field.

Chief Justice Marshall gave currency to the idea that the federal power, though wholly dormant, nonetheless precluded state action. Opposed to that concept of federal supremacy was the per-

⁴² *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939).

⁴³ *Houston & Texas Ry. v. U.S.*, 234 U.S. 342 (1913).

⁴⁴ *Curren v. Wallace*, 306 U.S. 1, 11 (1938).

⁴⁵ 312 U.S. 100 (1940).

⁴⁶ 317 U.S. 111 (1942).

⁴⁷ *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868).

⁴⁸ *United States v. Underwriters Assn.*, 322 U.S. 533, 552 (1944).

sistent use by the States of their police power to regulate all sorts of business activities. The tides of judicial opinion have ebbed and flowed on the force of the commerce power which remained wholly dormant. But they were not resolved in Marshall's favor, for the Court held in *Cooley v. Board of Wardens*,⁴⁹ that the States may regulate except in an area which "imperatively" demands "a single, uniform rule."

During most of the first century of our existence, Congress did not use its commerce power extensively. Near the end of last century the Interstate Commerce Act and the Sherman Act were passed and after the turn of the century came a great proliferation of legislation under the Commerce Clause. The evolution of the greatest common market of the world by a vibrant, active federalism was a joint achievement of the Congress and the Court.

The police power of the States is honored, though a particular State enactment is in a field where Congress has legislated, if the State enactment can be fitted into the federal scheme of control over commerce. If there is collision, the State law falls. Moreover, there may at times be a federal act which preempts the field, in which event complementary State regulations fall.⁵⁰

States may tax segments of interstate commerce that occur within their borders; and great battles have taken place concerning the appropriate formulae for identifying what those segments are. States may not, however, discriminate against interstate commerce in their taxing projects. Nor may they by licensing taxes or otherwise place conditions on the privilege of engaging in an interstate enterprise. Nor may they tax that which is only a step in the interstate movement.⁵¹

Sales taxes and use taxes have stirred great controversies; and they are sustained even as applied to interstate transactions where there is a local sale, delivery, or other incidence of the transaction within the State, where equality between local and interstate commerce is the theme, or where the sales or use tax does not aim at or discriminate against interstate commerce.⁵²

Whatever the nature of the commerce issue, the basic problem is to reconcile competing constitutional demands—that interstate commerce not be unduly impeded by state action, that interstate

⁴⁹ 53 U.S. (12 How.) 318, 339 (1851).

⁵⁰ *Campbell v. Hussey*, 368 U.S. 397 (1961).

⁵¹ *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 147, 166 (1954).

⁵² *McGoldrick v. Berwind-White Co.*, 309 U.S. 33 (1940); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Freeman v. Hewitt*, 329 U.S. 249 (1946).

commerce be made to pay its way, and that the police power of the States be given due deference.

The enormous volume of litigated cases in the commerce field illustrate as well as any, *first*, the need of a referee in our federal system, and *second*, the effort of the Court to fit together federal and state requirements, saving to each as much latitude as possible.

However the problem is viewed, the creation of our great common market has been a significant achievement.

Third: The Diversities Among Us

The Constitution is written in large generalities—among them being Privileges and Immunities, Due Process, and Equal Protection. Those generalities like Speech, Press, Assembly, and Petition in the First Amendment and Unreasonable Searches and Seizures in the Fourth serve somewhat the function of Magna Carta in England.

The late Max Radin has shown how Magna Carta has been a potent symbol of freedom in England.⁵³ *Lex terrae* and *liber homo* are still living words. Radin wrote:

There is, of course, no doubt now that Magna Carta could be abolished by Act of Parliament. I am fairly convinced Chapter 29 will not be.⁵⁴ And it seems to me clear that what will prevent its abolition is the sense that, since at least 1297, it has been something more than a statute; it has been an assertion of the existence of fundamental rights of free men, however differently they might have been listed at different periods.

Magna Carta . . . did not save England from Tudor despotism. But this was a despotism of fact rather than of law, and neither Henry nor Elizabeth ever claimed that there were "privileges" of their subjects they could lawfully disregard. If, despite Magna Carta, men came within the verge of surrendering their birthright to Henry, that was their fault—not the Charter's. And, as a matter of fact, it is an open question whether without the splendid symbolism of *nullus liber homo*, Wolsey and Cromwell might not have succeeded in turning the despotism of fact into one of law.⁵⁵

The analogy between Magna Carta and our Bill of Rights is not complete. But Magna Carta is potent and the message it has transmitted concerning "the right of Englishmen" is a stirring one. I believe that our ideals expressed in the Bill of Rights serve somewhat the same function.

⁵³ Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060 (1947).

⁵⁴ The ch. 29 referred to is the one contained in the official charter of Henry III 1224-25, being chs. 39 & 40 of the original.

⁵⁵ Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1090-91 (1947).

Men do not live by bread alone. The aim of civilization is not the "packaged goods" theory. The end product of society is not to surfeit every human being with all the necessities and comforts of life. The aim is human dignity, liberty, and freedom and their development with the least possible interference or control by government. The ideals are spiritual; the aim is humanistic; the end product should be the full development of the potentials of the individual.

The concepts I have mentioned are not defined in the Constitution or Bill of Rights. They are generalized and omnibus; and their precise meaning has given rise to many disputes—many in the litigated cases and many in the political forums. Even "speech" and "press" which seem non-technical have been hotly debated, as witness the controversies over so-called obscenity. Moreover, picketing and other protests of groups of people marching or assembling in public places have been rather closely confined in the interests of law and order. Where "speech" and "press" (which may not be regulated) end and where action (which may be controlled under the police power) begins is often an obscure line on particular facts. In the field of so-called "subversive" talk or discourse or pamphleteering by which "subversive" ideas are spread, the restrictions on "speech" and "press" have been pronounced. Philosophical observations about "subversive" ideas are permissible. But advocacy has been condemned, which is only another way of saying that our society will tolerate radical ideas but not those intensely held.

Perhaps the most ringing denunciation of the lowering by Congress and the Court of First Amendment barriers was made by Justice Black in his dissent in *Barenblatt v. United States*:⁵⁶

The fact is that once we allow any group which has some political aims or ideas to be driven from the ballot and from the battle for men's minds because some of its members are bad and some of its tenets are illegal, no group is safe. . . . History should teach us then, that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out. It was knowledge of this fact, and of its great dangers, that caused the Founders of our land to enact the First Amendment as a guarantee that neither Congress nor the people would do anything to hinder or destroy the capacity of individuals and groups to seek converts and votes for any cause, however radical or unpalatable their principles might seem under the accepted notions of the time.⁵⁷

Yet in spite of narrowly confining constructions, vigorous segments of First Amendment rights have survived, making this Nation

⁵⁶ 360 U.S. 109, 150-51 (1958).

⁵⁷ *Id.* at 150-51.

one of the few islands in the world where a large part of the spectrum of ideas may be discussed. The preservation of these vital segments has given America its character and prestige among the nations of the earth, greater than all its bombs and armed might. It has helped make prophetic what Thomas Paine wrote in *Common Sense*, March 21, 1778—"Had it not been for America, there had been no such thing as freedom left throughout the whole universe."

Due Process in the Fifth and Fourteenth Amendments has procedural connotations. Yet like *lex terrae* of the Magna Carta, it is a matter of substance too. Late last century and in the early parts of this one, judges often filled the Due Process clauses with what Justice Holmes called "new principles" gleaned from outside the Constitution and "generalized into acceptance of economic doctrines which prevailed about fifty years ago and a wholesale prohibition of what a tribunal of lawyers does not think . . . right."⁵⁸

Peckham, once on the New York Court of Appeals and later to be a member of the Court, denounced an act fixing the rates of elevators as "vicious in its nature, communistic in its tendency."⁵⁹ Peckham wrote *Lochner v. New York*,⁶⁰ holding void a state act which limited the working hours of employees in bakeries. Holmes in his dissent said:

I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.⁶¹

The "comfortable classes of the community," said Holmes,⁶² were responding to the fear of socialism.

In the 50's and 60's and 70's people were responding to the fear of communism, for the cold war took a fearful toll here as well as in Russia. Its main impact was on the First Amendment which now is applicable to the States by reason of the Fourteenth.⁶³

The substantive, as distinguished from the procedural, aspects of Due Process have by judicial construction, starting last century, been held to include most of the provisions of the first eight amendments. Some of the decisions holding that a specific provision, like

⁵⁸ O. W. HOLMES, *Path of the Law*, in COLLECTED LEGAL PAPERS 167, 184 (1920).

⁵⁹ *People v. Budd*, 117 N.Y. 1, 71, 22 N.E. 670, 695 (1889).

⁶⁰ 198 U.S. 45 (1905).

⁶¹ *Id.* at 76.

⁶² O. W. HOLMES, *Path of The Law*, in COLLECTED LEGAL PAPERS 167, 184 (1920).

⁶³ *Stromberg v. California*, 283 U.S. 359 (1931).

free speech, was incorporated in the Fourteenth Amendment have pinpointed the provision to the word "liberty" as used in the Due Process Clause. Usually, however, the particular guaranty of the first eight amendments held applicable to the States has been related to the totality of the Fourteenth Amendment which protects not only "liberty" but "privileges and immunities" and also covers the guaranty of Equal Protection.

The former notion of substantive Due Process has been displaced by other conceptions of substantive Due Process. They are not confined to the precise limits suggested by a literal reading of the first eight amendments but also include related rights. Speech, press, free exercise of religion, assembly, and the like, carry with them associated rights—*e.g.*, the right to belong to a group espousing the cause one embraces.⁶⁴ Beyond those rights is a penumbra of rights sometimes labelled right of privacy which, like the associated right of belonging, give more force to the barriers against, say, police surveillance which implicates one's conscience (First Amendment), one's home (Fourth Amendment), one's beliefs or convictions (Self-Incrimination Clause of the Fifth), as well as the fundamental rights contained in the Ninth Amendment.⁶⁵

As indicated, Holmes thought of Due Process as the barrier protecting "fundamental principles as they have been understood by the tradition of our people and our law." In today's parlance the idea is the same, though the reference is to fundamental rights. Equal Protection is one of them and the line has been fairly consistently drawn. When it comes to social and economic matters on which the Constitution and Bill of Rights are silent, the police power is pervasive and not every inequality in regulation will be deemed a violation of Equal Protection, provided it is rational. But, as already noted, when it comes to fundamental rights the test is different. The rights themselves may not be infringed; but regulation of the manner of their exercise is sustained if the reasons are "compelling."

Classifications of people based on race are suspect. So are classifications based on wealth. The law cannot make everyone equal; and that never has been its goal. There is much controversy over specific cases tendered for decision. Some think that the easy and elastic way in which Due Process was once used to expand judicial supremacy now threatens Equal Protection. I doubt if that is true. Since law deals with questions of degree, there are usually differing conclusions concerning Equal Protection.

⁶⁴ NAACP v. Button, 371 U.S. 415, 430-31 (1963).

⁶⁵ Griswold v. Connecticut, 381 U.S. 479 (1965).

The result of our system is to give tempestuous elements most of the benefits of Hyde Park in London. There is large leeway in allowing dissenters to let off steam. The permissible spectrum of ideas is not as broad as Jefferson and Madison wanted, but it is tolerably wide. The idea of Due Process and the idea of Equal Protection are related to ideas of Justice as well as to Law and Order. It has been the prominence of Justice in our constitutional scheme that has enabled us so far to weather the growing pressures for conformity and the mounting agitation for suppression of minorities. Free Speech, Free Press, Due Process, Equal Protection—these are potent symbols. Their meaning may be as vague and unclear to many as are the words of Magna Carta. But like Magna Carta, our own Great Charter keeps alive the spirit of independence in our people, brightens the conscience of the nation, and gives us the unity through diversity to solve the increasingly complex problems that will plague all nations.

As William Irwin Thompson recently wrote "Clearly a democracy in which Everyman is considered equal is the only political form in which . . . a universal consciousness is possible."

Our diversity is not limited to personal or civil rights in the usual sense but extends to property rights as well. Free enterprise has been our norm; but many other forms have been adopted. In 1920 the Court in a unanimous opinion held that there were no constitutional barriers to the launching by North Dakota of a rather extensive experiment in socialism.⁶⁶ Under that program the Bank of North Dakota (operated under the supervision of the Industrial Commission) was established, which as of December 3, 1971 had nearly 200 million of assets.

Indigents across the Nation have been granted welfare; and industry has been extensively subsidized. Farmers have been paid out of taxpayers' funds for not planting crops. Indirect subsidies through tax preference are numerous. Cooperatives, water districts, and other unconventional devices have been invented to meet specific needs. The concern felt by Mr. Justice Holmes,⁶⁷ and Mr. Justice Brandeis,⁶⁸ that the States be allowed to improvise social and economic remedies for their ills has been honored. There are many "thou shalt nots" in the Constitution and Bill of Rights, so far as civil rights are concerned, but only one main one affecting property rights and that is in the Just Compensation Clause of the Fifth Amendment.

⁶⁶ *Green v. Frazier*, 253 U.S. 233 (1920).

⁶⁷ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921).

⁶⁸ *New State Inc. v. Liebmann*, 285 U.S. 262, 311 (1932).

There is not even a constitutional ban on "socialism for the rich."

Fourth: The Accusatorial Versus the Inquisitorial Criminal Procedure

Our system is accusatorial; that is, the accused need prove nothing; the prosecution must prove all. There is nothing in the Constitution that says the accused is presumed to be innocent nor that the jury to find him guilty must be convinced beyond a reasonable doubt. Yet those rules are implicit in the accusatorial system. There are those, however, who prefer a presumption of guilt and a judgment of conviction on the preponderance of the evidence. They, however, are of the school of the inquisition which today is rampant in Russia and present in modified forms on the Continent.⁶⁹

Our violations of the requirements of the accusatorial system are so widespread and so long continued "that many have come to regard it as right."⁷⁰ The need for probable cause to make a search or an arrest comes first. The right to bail, granted by the Eighth Amendment, is at war with the police practice of holding an accused for questioning. So is the requirement for prompt arraignment. So is the right to counsel, for once the police have unfettered control over an accused, the critical stage of the "criminal prosecution," as those words are used in the Sixth Amendment, takes place before the trial. Long detention, incessant questioning, and the use of other coercive devices tend to overwhelm an accused and usually result in a confession that may or may not be true. But once made, it becomes the veritable keystone of the "criminal prosecution." "The American people like to boast that they are willing to pay the price the accusatorial system exacts in the terms of handicaps to the police in return for the insurance it provides against the unjust punishment of innocent citizens."⁷¹ Yet "relentless questioning in secret at all hours of the day and night with only those whose duty it is to ensnare him to determine where the line between fair and foul is to be drawn" is only "a tragic indictment of contemporary society."⁷²

A whole host of rules buttress the accusatorial system. Yet police and prosecutors work hard to relax them. In the District of Columbia the police once arrested as "suspects" about 100 people,

⁶⁹ See, HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY*, 478-79 (1960).

⁷⁰ Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 24 (1958).

⁷¹ *Id.* at 25.

⁷² *Id.* at 25-26.

though it was known that only three committed the crime. In the District it was, indeed, common for years to make arrests "for investigation"—the common practice in Russia but completely foreign to our Bill of Rights.

Mr. Justice Brandeis once said that "[i]f the government becomes a lawbreaker, it breeds contempt for the law. . . ."⁷³ The mounting transgressions of government in this regard are, as I have said, one reason for the almost ferocious rebellion we witness against authority. There is indeed a delicate balance between the needs of the law-enforcing agencies and the constitutional commands that the integrity of government be honored and that the liberties of the people be respected.

There has been a marked increase in *in forma pauperis* cases in recent years. I refer to petitions from prisoners or other indigents. Though Congress in 1892⁷⁴ had passed an Act giving citizens who took a pauper's oath, the right to proceed in any federal court without payment of fees, it had been little used in Supreme Court practice until the regime of Hughes as Chief Justice. While he had no desire to turn the Court into a police court, he was alert to cases involving civil rights and racial minorities.⁷⁵ The result of the grant of petitions quickened the interest of all sorts of indigents. While the number of such cases was only 22 in the 1930 term, they had mounted to over 2300 by 1969.

Thus the cases of a racial caste and of a poverty caste have mounted in number. Though the percentage of such cases granted for oral argument is low, averaging perhaps three per cent, some of them have been landmark cases.⁷⁶

The landmark decisions coming *via* the *in forma pauperis* route are numerous, if not legion; and their results have aroused many people. Devices to keep minorities suppressed have always had vociferous supporters. Decisions which have given succor to minorities have usually been denounced by the media.

⁷³ *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

⁷⁴ 27 Stat. 252.

⁷⁵ The parade of key cases started, some of the earliest being *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Bob White v. Texas*, 309 U.S. 361 (1939); *Ex parte Hull*, 312 U.S. 546 (1941). Edwin McElwain, one of Hughes' law clerks, has told the story in his article *McElwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 20 *et seq.*

⁷⁶ *Powell v. Alabama*, 287 U.S. 45 (1932) (an indigent in a state capital case is entitled to a court-appointed lawyer); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (an indigent in a state felony prosecution is entitled to a lawyer); *Leyra v. Denno*, 347 U.S. 556 (1954) (coercive confession obtained by psychological pressures not admissible in state proceedings); and finally *McGautha v. California*, 402 U.S. 183 (1971) and its companion case (juries need not have standards to impose the death penalty and a trial for guilt and a separate trial on punishment need not be provided).

A rich person or one from the upper classes when arrested or detained by the police quickly has his lawyer at his side. When the same right was extended to indigents by *Miranda v. Arizona*⁷⁷ an outcry went up.

It was not because police cannot operate under these rules. The FBI—our most efficient police force—does so. The decision has not had a paralyzing impact on law enforcement. Most criminal cases are disposed of on guilty pleas—federal about 90 per cent, New York about 95 per cent, California about 74 per cent.⁷⁸ The controversy concerns a relatively small number of cases.

Roscoe Pound, former Dean of the Harvard Law School, said long ago that our “system of lawless interrogation operates unequally and unfairly against the timid, the ignorant, and the poor, and in favor of the bold wrongdoer, the wrongdoer with an organization behind him, and the man of wealth who is advised of his immunity and how to take advantage of it.”⁷⁹

If we shift to the inquisition, we should do so openly and avowedly by constitutional amendment, not by twisting the existing accusatorial system out of shape. My hope is that we continue to give the accusatorial system a real try. Neither it nor the inquisition will of course cure crime; the springs of crime are deep in social, psychological, and political conditions beyond the ken of courts.

We could promote respect for law by the government if we took a leaf out of a chapter on Indian law.

For well over a hundred years, Indian police have operated under restraints far stricter than that of *Miranda*. No confession made by an accused to a police officer, while in custody, is admissible as evidence against him, unless the confession is made in the immediate presence of a magistrate who, upon inquiry, has satisfied himself that the statement was freely and voluntarily made.⁸⁰ Today, the rule exists in substantially the same form as it did a century ago.⁸¹

The impetus for this rule was the First Report of Lord Macauley's Indian Law Commission, in 1837. That report concluded that only an exclusionary rule adequately safeguarded an accused or suspect being detained against the possibility of police misconduct

⁷⁷ 384 U.S. 436 (1966).

⁷⁸ See *Santobello v. New York*, 92 S.Ct. 495, 499 (1971).

⁷⁹ 24 J.A.L. & Cr. 1014, 1015 (1934).

⁸⁰ Indian Code of Criminal Procedure, Act XXV of 1861, §§ 148, 149 (Prinsep, 3d ed. 1869); Indian Evidence Act, Act I of 1872, §§ 25, 26.

⁸¹ Code of Criminal Procedure, Act V of 1898, as amended, §§ 162, 164, and Evidence Act, §§ 25, 26 [in I Sarkar, *Criminal Laws of India* (3d ed. 1960)].

during interrogation.⁸² The rule reflected a concern for the reliability of the fact-finding process. As early as 1874, for example, one commentator listed some fourteen separate factors, ranging from torture to the accused's vanity, affecting the reliability of a confession extracted by the police without a magistrate's inquiry into voluntariness.⁸³

Miranda is but a pale shadow of this rule of Colonial and Modern Indian law. It is anomalous that *Miranda* should be so controversial in a country which prides itself on a unique devotion to individual liberties and freedom from overweening governmental restraints.

Miranda has become a symbol for those who would reject our time-honored accusatorial system.

The alternative is resort to torture. In that connection there is on display in the State Museum in Ulan Bator, capital of Outer Mongolia, the nine methods of torture used by the Chinese against the Mongolians when they occupied the country for about two centuries ending July 11, 1921.

One method of torture involved stretching the neck by gradually withdrawing thin boards on which the victim stood, until at last he swung free. Pulling the legs in opposite directions was another. Whipping with a cane was on the list. So was pouring hot metal on a shaven head.

If a man passed all the tests he became immune, for the spirits were on his side. Then he became a mighty criminal who could rob and steal and rape without restraint.

If we choose the inquisition for the unpopular minorities in our midst—whether it be the Chinese against Mongolians or South Africans against Blacks or at home the powers-that-be against the suspect Chicano—and save the accusatorial regime only for the elite, then we will be saying that though all men are equal, some are more equal than others. That is not the American constitutional theme.

⁸² See extract quoted in FIELD, *LAW OF EVIDENCE IN BRITISH INDIA*, 542-43 (1873).

⁸³ CURRIE, *INDIAN CODE OF CRIMINAL PROCEDURE*, 61 (5th ed. 1874).