THE BILL OF RIGHTS IN THE UNITED STATES: WHAT HAS IT ACCOMPLISHED?

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Quite aside from the merits of specific provisions in the proposed Bill of Rights, its adoption would be unwise and pointless, both because of the restricted range of federal legislative power, giving too little scope for application to justify it practically and because for the real bulwark against oppression trust must ultimately be placed in the wisdom of legislators and the traditions of the common law.

This was the view of 1787, accepted by the framers of the new constitution of the United States.[1] However, the argument did not put to rest the demand for provisions of that nature in the states when called on to ratify.[2] Adoption of a Bill of Rights became a condition to acceptance in a critical number of states,[3] a condition early honored by the first Congress which embodied some although not all of the particular proposals made[4] in the first ten

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[1] See Story, A Familiar Exposition of the Constitution of the United States (1847), p. 255. The motion for a committee to prepare a Bill of Rights was lost by an even division of the vote by states, see 4 The Writings of James Madison (ed. Hunt, 1903), p. 442. Renewal of the demand for a Bill of Rights was unsuccessfully made in the Congress of the Confederation preliminarily to submission to the states for ratification, see 5 *ibid.* (1904), p. 5.

[2] 4 Marshall, Life of George Washington (1926 ed.), p. 317. For a review of the situation in the critically important Virginia Convention, see 1 Beveridge, Life of John Marshall (1919), pp. 468-477.

[3] See the texts of the ratifying instruments lodged by the states with the Congress of the Confederation, 1 Elliott's Debates, pp. 319-338.

[4] Of 124 amendments proposed by state ratifying conventions, twelve were accepted by Congress for submission to the states and ten were finally ratified and became a part of the Constitution, see Ames, The Proposed Amendments to the Constitution (1896), p. 19. The congressional resolution proposing the amendments to the states, opened with the recital, "The conventions of a number of states having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory or restrictive clauses should be added", 1 Elliott's Debates, p. 338.

amendments to the constitution, ever since then collectively called in American constitutional law the Bill of Rights.[5]

Has it turned out to be a virtual dead letter as predicted by the framers? Has it afforded operative guarantees against oppression of individuals? What has developed as the meaning of such of its provisions as have had vitality and meaning? These inquiries or, more exactly, the answers to them are of theoretical interest to the student of the law but also of practical concern to those facing a decision whether to incorporate within the legal structure prescriptions which in substantial measure embody the elements of the American Bill of Rights.

I. *A Cipher? A Minus? or a Plus?*

A very few of the provisions have indeed slumbered uninvoked, or nearly so. This neglect is not peculiar to constitutions, being encountered often enough in connection with all sorts of enacted law,[6] but the assumption of relative permanence attached to the content of constitutions would lead one to expect to discover dormant terms in them. Changed circumstances may eliminate the occasion for applying what seemed significant at the time of drafting and thus render particular items if not obsolete at least inoperative. Quite aside from purely transitional sections, powers granted in the light of contemporary conditions fall into practical decay[7] and it is to be expected that limitations of power should also. The remarkable thing is how little of the Bill of Rights has turned out to be dead wood. There is the Third Amendment, dealing with the quartering of troops, framed in terms of long abandon-

[5] Countless illustrations are available. As a sample, reference is made to (a) the existence since 1938 of an American Bar Association "Committee on the Bill of Rights", (b) Corwin (ed.), The Constitution of the United States of America: Analysis and Interpretation (1953), p. 745, (c) Columbia-Viking Desk Encyclopedia (1953), p. 220, *sub-verb*, "constitution" as illustrating professional, scholarly, and popular usage respectively. The Ninth and Tenth Amendments differ from the first eight in specifying no rights and hence are not in quite the same sense a part of the Bill of Rights. On the other hand, the provisions in the original constitution, dealing with habeas corpus, U.S. const. art. 1, s. 9, cl. 2, bills of attainder and ex post facto laws, *ibid.*, s 9, cl. 3, s 10, cl. 1, and jury trial, U.S. const. art. 3, s 2, cl. 3 deal with guarantees to the individual and are as to their subject matter effectually a part of constitutional civil liberties guarantees. So does clause 1 of both the Thirteenth and Fourteenth Amendment. This article will use the term "Bill of Rights", unless the text otherwise indicates, as excluding the Ninth and Tenth Amendments but including other constitutional guarantees of civil liberties.

[6] *Cf.* the provisions with regard to crossed cheques, Bills of Exchange Act, R.S.C., 1952, c. 15, ss. 168-175.

[7] *E.g.*, the provision concerning letters of marque and reprisal, U.S. const. art. 1, s. 8, cl. 11, and that respecting uniformity of laws relative to property and civil rights, B.N.A. Act 1867, s. 94 (*semble*)

ed practices of military logistics and perhaps the Second assuring to the people the right "to keep and bear Arms" which has been very little noticed.[8] Not much has been done with the Eighth Amendment prohibitions of excessive bail[9] and excessive fines which would seem to have perennial significance; but the confinement of the Amendment to federal as contrasted with state action and the reference to the common law to determining the meaning of its language, matters which will be examined later, suggest that the situation here is not one of constitutional desuetude but may indicate a regular conformity by the federal courts to common-law standards in these matters, obviating any basis for raising claims under the Amendment, a suggestion somewhat confirmed by the continuing state court use of comparable state constitutional provisions.[10] True, other provisions, such as those providing for freedom and against establishments of religion, have been "late bloomers"[11] after long periods of quiescence which may reflect protracted insensitivity to values now conceived as affected by them or may involve no more than the quite normal phenomenon that legal issues tend to arise in clusters and do not present themselves in nicely homogenized spacing over long periods, but certainly does not justify regarding them as dead letters. Overwhelmingly the various provisions of the Bill of Rights have been active, not inert, ingredients in the law.

The Ninth Amendment assurance, that "enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people" calls for separate notice. It, too, has received almost no explicit consideration.[12] Its very existence demonstrates how easy it is as a matter of draftsmanship to forestall the dangers one hears voiced at times that a statement of rights in a Bill of Rights will be misread as a compre-

[8] See *United States* v. *Miller* (1939), 307 U.S. 174 (sustaining conviction under National Firearms Act, for inter-state transportation of unregistered shotgun).

[9] The amendment was applied in *Stack* v. *Boyle* (1951), 342 U.S. 1, which discusses the appropriate procedure for challenging excessive bail.

[10] See *e.g. Gusick* v. *Boies* (1951), 72 Ariz. 233, 233 P. 2d 446; *People* v. *McDonell* (1947), 296 N.Y. 109, 71 N.E. 2d. 423 (both holding bail excessive); *Commonwealth* v. *Bruan*, 88 Pa. Dist. & Co. 257 (fine excessive, *semble*). The doctrines that the provision about fines is a limitation on the legislature only, not the jury, see *Blue* v. *State* (1946), 224 Ind. 394; 67 N.E. 2d 377, *cert. den.* (1947), 330 U.S. 840, and that it does not extend to statutory non-criminal penalties, see *United States* v. *Stangland* (1957), 242 F. 2d 843 (6th. Cir.) materially restrict its scope of action.

[11] See Note, Religious Liberty under the Federal Constitution (1898), 11 Harv. L. Rev. 542.

[12] But see *United Public Workers* v. *Mitchell* (1947), 330 U.S. 75, at p. 94 (dictum by Black, J. that Amendment recognizes right to engage in political activity).

hensive codification.[13] Essentially it is a variant of the "for greater certainty, but not so as to restrict the generality" formula familiar in legal instruments including statutes[14] which, when present, is always available if not always availed of[15] to ward off inferences—which perhaps should not be raised even in its absence. A judgement's failure to advert to such a provision need not mean that it is overlooked since it is capable of performing its full function *sub silentio*. The more spontaneously courts apply such provisions the less occasion there is to mention them, which makes it hard if not impossible to know what effect they have been given.

The Ninth Amendment recognition of a residue of unspecified basic rights, similar in nature to those enumerated, suggests another primary line of inquiry as to the effect of the Bill of Rights of the United States constitution. Even though by and large those provisions have enjoyed real vitality, have they had the stultifying consequence that branches of government other than the judiciary have been less heedful of their responsibility to respect individual rights than they would have been in the absence of positive enactments judicially enforceable? One hears that hypothesis advanced. Any answer is perforce speculative as must always be the case when one supposes a state of affairs radically different from what exists or ever has existed. However, if, as to the recognized but unspecified rights contemplated by the Ninth Amendment, the other branches of government have acted in about the same way as they do in kindred countries where they are unrestrained by constitutional restrictions, that would seem to be some evidence that the adding of the judicial safeguard does not impair the sense of legislative and executive responsibility.[16] The difficulty is to identify a basic right for purposes of making the comparison. The listing of particular rights in the United States constitution even though not exhaustive is extensive. It embraces all those which would come most readily to mind. Most others may plausibly be characterized either as mere corollaries of the listed rights or else as second order rights not really fundamental at all but re-

[13] See, *e.g.*, in the Canadian Bill of Rights, *supra*, p. 1, s. 5: ("Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act").

[14] See, *e.g.*, B.N.A. Act 1867, s. 91.

[15] *Cf. ibid.*; see *A.-G. for Ontario* v. *A.-G. for Canada*, [1896] A.C. 348.

[16] Of course it is still arguable that the general atmosphere of judicial supervision conditions what the legislature feels free to do in the unspecified areas. This, however, is speculation, and, if valid at all would indicate that a system of judicial review makes the legislature more sensitive to individual liberties generally, which is the converse of the suggestion that judicial safeguards reduce legislative concern.

flecting only institutional arrangements locally and temporarily congenial. It takes doing to isolate some thing not open to either objection. Ideally, too, one seeks for some thing about which common values are shared by those like the United States having a Bill of Rights and by those, like the Commonwealth countries, without one.

One such principle, it is submitted, may be found in the proposition that one has a right to an impartial judge. Rooted in the notion that "*aliquis non debit esse Judex in propria causa*"[17] it has branched into a multitude of cases about imputing bias to an adjudicator (characteristically administrative). A fairly recent casual suggestion by Mr. Justice Jackson,[18] tying it in to the hospitable vagueness of due process, whatever its logical force, has not been developed and in any event came too late in the day to explain the status of the unbiased judge principle in American law. It seems proper to view it as an instance of the rights without explicit constitutional prescription which are envisaged by the Ninth Amendment. In both the Commonwealth countries and the United States, it has been accepted as a basic premise.[19] There is a consensus that a judge's possession of an interest in the outcome of a cause destroys his competence to render judgment;[20] and, while there are some variations in detail as to the circumstances which suffice to establish the undue risk of prejudice which will disqualify, there is a core of common agreement much more impressive than the marginal differences.[21] There is no evidence which suggests any variation in the recognition and respect accorded the principle by legislatures or executive officials or courts, as between the United States and the Commonwealth countries. It would be unjust to charge any of them with playing fast and loose with it. Flagrant invasions and reckless disregard are nowhere to be met. The sporadic situations which do occur in the

[17] *Bonham's Case* (1610), 8 Co. Rep. 114a, at p. 118a; 77 Eng. Rep. 646, at p. 652.

[18] See *Wong Yang Sung* v. *McGrath* (1950), 339 U.S. 33, at p. 49; see *Tumey* v. *Ohio* (1927), 273 U.S. 510 (judge pecuniarily interested in result).

[19] See *Bruton* v. *Regina City Policemen's Ass'n., Local No. 155*, [1945] 3 D.L.R. 437, 2 W.W.R. 273 (Sask. C. A.); *Regina* v. *Rand* (1866), L.R. 1 Q.B. 230; *National Labor Relations Board* v. *Phelps* (1943), 136 F. 2d 562 (5th Cir.).

[20] *Dimes* v. *Proprietors of Grand Junction Canal* (1852), 3 H.L.C. 759; *Tumey* v. *Ohio*, *supra*, footnote 18; *cf. Ottawa* v. *Nepean Tp.*, [1943] O.W.N. 352 (Ct. App.) (*semble*).

[21] See Report of the Committee on Ministers Powers (1932) Cmd. 4060, pp. 75-79; Sedgewick, Disqualification on the Ground of Bias as Applied to Administrative Tribunals (1945), 23 Can. B. Rev. 453; Godman, Disqualification for Bias of Judicial and Administrative Officials (1948), 23 N.Y.U.L.Q. Rev. 109.

different locales are similar in context and volume. Involvement of the same persons in the process of decision at more than one level—the so-called "prosecutor-judge" problem—is a known though aberrant pattern in the United States as in the Commonwealth and in both has met with some judicial disapproval[22] and still more vigorous extra-judicial castigation.[23] It cannot be said that legislators have been heedless of the matter, however, and indeed there are common evidences of an inclination to go further in guarding against the assumed evil than the courts have required.[24] Again, there is a prevalent practice of special interest representation in the composition of tribunals which decide certain types of matters having to do notably with licensing[25] and in kindred situations[26] to be met with throughout the common-law world. Legislators have had recourse to this rather freely and courts have not inclined to condemn it as *per se* obnoxious to the principle of unbiased adjudication.[27] The hypothesis that the very existence of a Bill of Rights may tempt the non-judicial branches to run riot in areas where limitations on powers are not expressly spelled out does not seem consistent with the record in this instance. The common pattern of behaviour in the face of a common absence of explicit constraint suggests instead that one cannot properly generalize a lowering of the legislative or executive sense of responsibility as being a consequence of the formulation of guarantees in a Bill of Rights.

How far the courts leave unused the particular items which are enumerated in a Bill of Rights and how far an enumeration

[22] See, *e.g.*, *Leeson* v. *General Council of Medical Education* (1889), 43 Ch. D. 366; *Sandahl* v. *Des Moines* (1940), 227 Iowa 1310, 290 N.W. 697.

[23] See, *e.g.*, Robson, Justice and Administrative Law (3rd ed., 1951), pp. 58-67; Henderson, The Federal Trade Commission (1924), p. 83; Smith, Administration of Justice in Administrative Processes (1944), 30 A.B.A.J. 131.

[24] *Cf.* The Tribunals and Inquiries Act 1958, 6 & 7 Eliz. 2, c. 66, ss. 3, 4 (U.K.); Federal Administrative Procedure Act (1946), 5 U.S.C.A., s. 1005 (c); Labor Management Relations Act, (1947), 29 U.S.C., ss. 141.

[25] See Hene, The Domestic Tribunals of Great Britain (1955), 2 Br. Jour. Ad. L. 24 (table showing extensive use of "domestic tribunals" with licensing powers).

[26] See *e.g.* Labour Relations Act, R.S.O., 1950, c. 194, s 66(2); Securities Act, R.S.M., 1954, c. 188, s. 32; (Anon), Agricultural Lands Tribunals (1954), 1 Br. Jour. Ad. L. 2; Garrison, The National Railroad Adjustment Board (1937), 46 Yale L.J. 567. The departmental memoranda submitted to the Franks Committee on Administrative Tribunals evidence a practice of selecting tribunal members from panels designated by special interest groups so general that it approaches a standard pattern.

[27] See, *e.g.*, *Re Ashby*, [1934] O.R. 421, 3 D.L.R. 565; *State Board of Funeral Directors* v. *Cooksey* (1941), 148 Fla. 271, 4 So. 2d 253. But *cf. Johnson* v. *Michigan Milk Marketing Board* (1940), 295 Mich. 644, 295 N.W. 346.

tends to dissipate legislative responsibility specifically as to unitemized particulars, the questions on which the foregoing discussion has touched, are inquiries significant for the determination of the effect of a Bill of Rights. Even so, they would seem to be less central than the problem whether matters, as to which provisions have been articulated and applied, have been more, or less, extensively and effectively safeguarded than they would have been had nothing about them been incorporated in the Bill of Rights. In detail this depends on the meaning which has been attributed to the individual provisions, a matter which will be dealt with later in this article. One may ask here however whether there has been in general any over all accretion of protection to individual rights compared with what might have been expected had the United States constitution stood as originally enacted without the Bill of Rights. There is again the initial difficulty of assuming a contrary to fact condition and speculating as to what would have been the case, the kind of thing that President Franklin D. Roosevelt used to call an "iffy" question. The fact that one cannot answer with utter assurance does not, however, mean that no reasonable conjecture can be made.

Whatever the validity of Gladstone's view that the United States constitution was a marvellous act of instantaneous inspiration,[28] the Bill of Rights provisions were never conceived of as being in their totality a new creation. Unlike the French Declaration of the Rights of Man[29] and its echoes in other organic acts in nations of civil-law inspiration,[30] the United Nations Universal Declaration of Human Rights,[31] and perhaps some of the terse rhetoric of the Declaration of Independence,[32] the Bill of Rights did not aim at stating theoretical propositions grounded in abstract natural law postulates nor at creating *ab initio* a new heaven and a new earth legally speaking. It was specific, indeed in some ways meticulously concrete, in its inclusions; and it was framed to

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[28] See Bartlett, Familiar Quotations (11th ed. 1938), 450n., quoting from The North American Review of Sept. 1878.

[29] As to the spirit in which these were drafted, see 1 Thiers, Histoire de la Révolution Française (1834), pp. 95-97.

[30] *Cf. e.g.*, Dicey, The Law of the Constitution (5th ed., 1897), pp. 188-192 (Belgium); Adams & Barile, The Implementation of the Italian Constitution (1953), 47 Am. Pol. Sci. Rev. 76-82.

[31] See Lockwood, Drafts of International Covenant and Declaration of Human Rights (1948), 42 Am. J. Int'l. L. 401; Simsarian, Action on Human Rights (1949), 35 A.B.A.J. 205. For the Text of the Declaration see *ibid.*, *32*.

[32] See McLaughlin, A Constitutional History of the United States (1935), pp. 101-105; *cf.* Dana, The Declaration of Independence (1900), 13 Harv. L. Rev. 42.

avoid extensive innovation,[33] but was intimately and extensively related to what were thought to be already existing principles.[34] The American Revolution originated indeed not as a true revolution, in the usual sense of the word, but rather as a civil war, like England's in the preceding century, to assert and secure the existing liberties and privileges of the subject against unconstitutional usurpations by the governing authorities.[35] True it revealed a profound disagreement between American and English thought about the relative constitutional positions of government and the governed, as they resulted from the ambiguous settlements of the seventeenth century, a cleavage which has persisted ever since,[36] but what is important for the present purpose is that the Americans were seeking a retention of, not a change in, what they considered to be their constitutional rights as subjects. The Bill of Rights in large part served as a detailed cataloguing of rights as thus understood, supplemented by some new creation and by some incorporation among constitutional rights of matters then newly emerging and as yet disputed.

The substantial portion of the Bill of Rights which was a "restatement of the law" rested on venerable, indeed as to some of it on very ancient English precedent. It is this which makes the grand documents of English constitutional history to American lawyers no less a part of their legal tradition than of England's. That Fifth Amendment due process of law was a direct descendant of the *lex terrae* of Magna Carta[37] was clearly established. Other provisions, such as the "speedy . . . trial" provisions of the Sixth Amendment, and the jury trial provisions of that and the Seventh Amendment are also foreshadowed by phrases in Magna Carta.[38]

[33] See the speech of Madison introducing the proposed amendments in Congress on June 8th, 1789, reprinted in Writings of James Madison (ed. Hunt 1904), p. 375.

[34] In this respect, the proposed Canadian Bill of Rights in its statement, that "it is hereby recognized and declared that in Canada there have always existed and shall continue to exist the following human rights" reflects a similar approach.

[35] See Ramsay, History of the American Revolution (1793), p. 297; Jefferson, (1774) A Summary View of the Rights of British North America, reprinted in Foner (ed.), Basic Writings of Thomas Jefferson (1944), pp. 5-19; Burnett, The Continental Congress (1941), pp. 122-128.

[36] *Cf. e.g.* Gough, Fundamental Law in English Constitutional History (1955), with McIlwain, The High Court of Parliament and its Supremacy (1910).

[37] *Den ex dem. Murray* v. *Hoboken Land & Improvement Co.* (1855), 18 How. 272 (U.S.); *cf. Ownbey* v. *Morgan* (1921), 256 U.S. 94 (Fourteenth Amendment due process construed in light of ancient custom of London).

[38] "Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi *per legale judicium parium suorum* vel per legum terrae. Nulli vendemus, nulle negabimus, *aut differemus*,

It may be that Magna Carta has been over romanticized and was at its inception a cruder piece of class legislation than later ages have supposed[39] but in any event it was, and indeed still continues to be,[40] for Americans a main strand in their constitutional fabric. The classic documents which issued from the constitutional struggles of the seventeenth century—the Petition of Right,[41] the Habeas Corpus Act,[42] the Bill of Rights[43]—were also reflected in the American constitutional provisions. While they have not been elevated—or reduced—to the status of a charm, as the more ancient instrument has, they were familiar to and cherished by the generation which drafted the American Bill of Rights.[44] Besides the habeas corpus guarantee itself,[45] the provisions respecting excessive fines and bail,[46] cruel and unusual punishment,[47] quartering of troops,[48] and the right of petition[49] are among those having clear antecedents in these documents. All these were rights of identifiable provenance. There was besides the Seventh Amendment reference to "the rules of the common law" *eo nomine* as a standard of decision[50] for the matters there dealt with. The refer-

rectum aut justiciam". (Emphasis supplied). The quotation is from the initial Magna Carta of John, A.D. 1215. These particular provisions reappeared in the reissues and confirmations of the Great Charter by his successors.

[39] *Cf.* 1 Pollock & Maitland, History of English Law (2d ed., 1952), pp. 171-173; 2 Holdsworth, History of English Law (3d ed., 1923), pp. 211, 212.

[40] The ceremony of and the addresses by representatives of the English and American Bench and bar at the dedication of an American Bar Association memorial at Runnymede, see (1957), 43 A.B.A.J. 900, vividly illustrate the common sentiment.

[41] (1628), 3 Car. 1, c. 1. [42] (1679), 31 Car. II, c. 2.

[43] (1689), 1 Wm. & M., Sess. 2, c. 2.

[44] See, *e.g.* Ford (ed.), Essays on the Constitution (1892) p. 163 (Ellsworth), p. 299 (Yates). But *cf. ibid* p. 113 (Winthrop).

[45] U.S. const. art. 1, s. 9, cl. 3 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.") The leading case is *Ex parte Milligan* (1866), 4 Wall. 2 (U.S.); *cf. Duncan* v. *Kahanamoku* (1946), 327 U.S. 304.

[46] *Ibid.*, Amend. VIII. *Cf.* the language in the English Bill of Rights, "10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted."

[47] *Ibid.* See *Weems* v. *United States* (1916), 217 U.S. 349; *cf. Louisiana ex. rel Francis* v. *Reswebber* (1947), 329 U.S. 459; *Graham* v. *West Virginia* (1912), 224 U.S. 616.

[48] *Ibid.*, Amend. VIII. *Cf.* The Petition of Right, VI and X.

[49] *Ibid.*, Amend. I. *Cf.* the English Bill of Rights, "5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal." See Holdsworth, History of English Law (Vol. 10, 1938) p. 696; *cf.*, Note, (1922), 35 Harv. L. Rev. 332. John Quincy Adams is celebrated for his struggle against a flagrant denial of this right by Congress, see Clark, John Quincy Adams (1932), pp. 355-362, 393-407.

[50] *Ibid.*, Amend. VII ("In suits at common law, . . . no fact tried by a jury, shall be otherwise re-examined in any Court of the United States,

ence should not be thought in the light of the *expressio unius* principle to limit recourse to the common law as a source of interpretation, as the Amendment addresses itself directly to trials and reviews "[i]n Suits at common law". This is confirmed by the provisions as to double jeopardy[51] and for confrontation of witnesses[52] which were common-law principles. In instances such as these, where constitutional provisions recapitulated the standard existing liberties of the subject, there seems to have been no intention to accord protection different in scope than that afforded by already existing rules of law. Once in a while—most conspicuously, perhaps, in connection with the prohibition of attainders[53]—the Supreme Court of the United States has shown itself indifferent to the historic content of included rights;[54] but its general impulse has been to recur to it to fix the construction of the constitutional language.[55] If, in the course of time, marginal differences have arisen between American and English courts as to how the safeguards applied in detail to particular situations, that simply parallels what has happened in ordinary private law areas such as tort, contract, and property, where reference to common basic principles has not prevented some diversity in development. One

than according to the rules of the Common Law.") *Cf. Justices of the Sup. Ct.* v. *U.S. ex rel. Murray* (1870), 9 Wall. 274 (U.S.). For an apparent departure from this principle in one class of cases, see *e.g. Rogers* v. *Missouri Pac. R.R.* (1957), 352 U.S. 500 (*semble*).

[51] *Ibid.*, Amend. V (". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"). See 4 Blackstone, Commentaries, pp. 335-338; A.L.I, Official Draft with Commentaries, Administration of the Criminal Law: Double Jeopardy (1935).

[52] *Ibid.*, Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.") See 5 Wigmore, Treatise on the Anglo-American System of Evidence (3d ed., 1940), ss. 1395-1418.

[53] *Ibid.*, art. 1, s. 9, cl. 3 ("No bill of Attainder or ex post facto Law shall be passed"); *ibid.*, s. 10, cl. 1 ("No state shall . . . pass any Bill of Attainder, ex post facto Law . . .").

[54] See *United States* v. *Lovett* (1946), 328 U.S. 303 (legislation for discharge of named federal employee held bill of attainder); *cf. Cummings* v. *Missouri* (1867), 4 Wall. 277 (U.S.) (alternative ground). Compare Maitland, Constitutional History of England (1920), pp. 215, 216, 319; Story, Familiar Exposition of the Constitution of the United States (1847), s 225.

The extension is the more surprising in view of the restricted construction given "ex post facto laws", see *Calder* v. *Bull* (1798), 3 Dall. 386 (U.S.), as to which of course the common law furnished no guidance. *Cf. Home Building & Loan Ass'n.* v. *Blaisdell* (1934), 290 U.S. 398 (contract clause construed in sense contrary to accepted views of 1787).

[55] Thus, *e.g.*, the jury must be a common-law jury, *Thompson* v. *Utah* (1898), 170 U.S. 343, and the verdict unanimous, *Maxwell* v. *Dow* (1900), 176 U.S. 581. Hurst, The Process of Constitutional Construction: The Role of History, in Cahn (ed.), Supreme Court and Supreme Law (1954), pp. 55-64 (suggesting a distinction as between the powers granted in terms of standards and the personal guarantee mainly in terms of institutions).

would scarcely expect to find in rights equated with inherited common-law and constitutional-law notions any real differences between the extent of protection accorded. Whatever the differences in the theoretical susceptibility to alteration, rights starting out the same would remain much alike until and unless altered. Any wider areas of protection resulting from the Bill of Rights must be found in other categories.

One such other involved interests and claims struggling for recognition but which had not yet firmly secured it. A great deal of the Sixth Amendment addresses itself to such matters. Arraignment,[56] it was true, was a recognized right of an accused,[57] the last serious opposition having been made by the long defunct Court of Star Chamber.[58] The right to counsel[59] was not yet recognized.[60] The law had completely discarded the original attitude of not allowing a criminal defendant to produce witnesses in his behalf[61] and by a series of statutes had nearly arrived at a recognition of his right to compulsory process for their procurement[62] without having fully generalized the right, as the Amendment did.[63] The Fourth Amendment provisions enjoining unreasonable searches and seizures and prescribing particularity in search warrants reflected a controversy current at the time the colonies separated from the mother country,[64] and which indeed had an important place among the issues which embittered the separation.[65] Very recent developments had committed English law to the same position as was expressed in the Amendment although only its general

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[56] U.S. const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation").

[57] See 4 Blackstone Commentaries, p. 322.

[58] For an interesting discussion of the establishment of the right, see Wolfram, John Lilburne: Democracy's Pillar of Fire (1952), 3 Syracuse L. Rev. 213.

[59] U.S. const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense"). See *Johnson* v. *Zerbst* (1938), 304 U.S. 458; *Glasser* v. *United States* (1942), 315 U.S. 60.

[60] See 4 Blackstone, Commentaries 355. The right was provided by 6-7 Wm. IV, c. 114, s 1.

[61] The change was made under the Commonwealth, the evidence being initially received without administration of the oath, see Holdsworth, *op. cit., supra,* footnote 44, (Vol. 9, 1926), pp. 195-196.

[62] See 8 Wigmore, *op. cit., supra,* footnote 52, s 2190, n. 25; *cf.* 2 Hawkins, Pleas of the Crown (2d ed., 1724), Ch. 46, s 30.

[63] U.S. const. Amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor").

[64] See Fraenkel, Concerning Searches and Seizures (1921), 34 Harv. L. Rev. 361.

[65] Otis' speech against writs of assistance (general warrants), see 2

contour had as yet been established.[66] As to the Fifth Amendment guarantee against self incrimination, in England it was taken to be part of the law without having yet been expressly so ruled or enacted.[67] In situations of this sort, where the law was in process of growth, what at least the Bill of Rights did was to ratify and define what was only incipient in the then law. In the event, of course, Commonwealth law has reprehended the oppressions with which the Bill of Rights provisions were concerned and similarly provides protection against self-incrimination,[68] assures to an accused counsel to represent him[69] and subpoenas for the attendance of witnesses,[70] and prescribes requirements for warrants[71] which make an Englishman's home his castle as is an American's. As has been suggested, there were unmistakable indications that these rules were well advanced in the process of development by 1790 but their boundaries were not yet firmly fixed as was the case with the traditional rights discussed earlier. The English experience did not therefore furnish the same body of fixed referents and there was more room for a rather different development. With enough of a common core of principle to produce a considerable overlap, there was yet no common prototype for the American and the English rules. Here then was a place where there was at least a potential for the provisions of the Bill of Rights to give larger or any way different protection than that accorded in their absence. To the extent that such potential has been realized, it seems fair to say that these provisions have made a positive contribution, although of course one can only guess at how far the

Works of John Adams (1850), pp. 523-524 has been said to be the beginning of the American Revolution.

[66] The great judgment of Lord Camden in *Entick* v. *Carrington* (1765), 19 How. State Trials 1029 is the starting point. For a discussion of the state and then development of the law, see Holdsworth, *op. cit.*, *supra*, footnote 49, pp. 667-672.

[67] See 2 Hawkins, *op. cit.*, *supra*, footnote 62, ch. 46, s. 19; Holdsworth, *ibid.*, (Vol. 9, 1926) p. 200; *cf.* 8 Wigmore, *op. cit.*, *supra*, footnote 52, s. 2250. In England, 11-12 Vic., c. 42, s. 18, in 1848 first provided for cautioning witnesses of their rights.

[68] See, *e.g.* Canada Evidence Act, R.S.C., 1952, c. 307, s 5(b); Evidence Act, 1851 14 & 15 Vic., c. 99, s. 3 (U.K.); *cf. A.-G. for Manitoba* v. *Kelly* (1915), 10 W.W.R. 131 (Man. C.A.); *Cates* v. *Hardacre* (1811), 3 Taunt. 428, 128 Eng. Rep. 168 (C.P.).

[69] *Cf.* Cr. Code, Stats. Can., 1953-54, s. 707(2) (summary convictions courts); Trials for Felony Act, 1836, 6 & 7 Wm. IV, c. 114 (U.K.); Annot. 5 Halsbury's Stats. (2d ed. 1948), p. 641.

[70] See, *e.g.* Crim. Code, *ibid.*, s. 603; Criminal Law Amendment Act 1867, 30 & 31 Vic., c. 35, s 4 (U.K.).

[71] *Cf.* Cr. Code, *ibid.*, s 429 (by implication); *Re United Distillers, Ltd.*, [1947] 3 D.L.R. 900, 88 C.C.C. 38 (B.C. Sup. Ct.); *McLeod* v. *Campbell* (1894), 26 N.S.R. 458. There seems to be no specific statute in Great Britain and the extent of protection may be less. *Cf. Elias* v. *Pasmore*, [1934] 2 K.B. 164.

American result would have differed from that reached in England in these particulars had there been no Bill of Rights.

There is a small group of matters as to which the limitations in the United States constitution were definitely legislative in the sense that nothing in the law of England anticipated them. This was conspicuously the case as to most of the First Amendment liberties.[72] With the discontinuance of the practice of licensing publications,[73] something existed which was regarded as and which Blackstone called "freedom of the press"[74] but the continuing vigorous enforcement of the law of seditious libel[75] belied the accuracy of the expression. It was a distinct and broader understanding of what was involved, not confined to the matter of previous restraints on publication, that was contemplated by the Americans[76] and the "freedom of the press" of which they were speaking had only a verbal correspondence to Blackstone's notion. Freedom of speech has not even now been articulated as a distinct concept in English law,[77] however generous the usage which has made "Hyde Park" synonymous with unbridled utterance. As for freedom of religion, that ran directly counter to the state of the law[78] and "an establishment of religion" far from being prohibited was a basic ingredient of the English constitutional structure as in a somewhat attenuated form it still continues to be.[79] Freedom of assembly, like freedom of speech, however much it was enjoyed in practice, received no formal recognition in law.[80] All these were situations where the Bill of Rights set out either to create new law or at a minimum to give to "the law in action" the added solemnity of

[72] Right of Petition, see *supra*, footnote 49.

[73] See Holdsworth *op. cit., supra*, footnote 49 (Vol. 6 1927), pp. 374-376.

[74] See 4 Blackstone, Commentaries, p. 151.

[75] See 3 Shortt & Doughty (eds.), Canada and its Provinces (1913), (suppression of *Le Canadien* and arrest of Bédard in 1808); 7 Campbell Lives of the Lord Chancellors (Mallory ed. 1875), pp. 448-453; 8 *ibid.*, pp. 57-126 (treason trials circa 1795 for urging reforms of Parliament).

[76] See *Near* v. *Minnesota* (1931), 283 U.S. 697; 2 Cooley Constitutional Limitations (8th ed. 1927), p. 885; Chafee, Free Speech in the United States (1948), pp. 9, 10; but see Frankfurter, J., in *Dennis* v. *United States* (1951), 341 U.S. 494, at p. 524 (concurring opinion),

[77] See Dicey, *op. cit., supra*, footnote. 30), Ch. VI.

[78] For a summary of the legislation against dissenters, Catholics, and Jews, see 4 Blackstone Commentaries, pp. 51-59. Vestigial disabilities still remain, see 7 Halsbury's, *op. cit., supra*, footnote 69, *Ecclesiastical Law: Preliminary Note, pp. 15-17.* The progress of relaxation is outlined in Dicey, Law and Public Opinion in England (1940), pp. 343-353. Circumstances familiar to Canadian readers led to a partial advance toward the principle in The Quebec Act of 1774, 14 Geo. III, c. 83.

[79] See, *e.g.*, The Queen Anne's Bounty (Powers) Measure 1937, 18 Edw. 8 & 1 Geo. 6 (No. 1); and the bishops continue to be summoned to the House of Lords.

[80] See Holdsworth, *op. cit. supra*, footnote 49, p. 701; Dicey, *op. cit., supra*, footnote 30, p. 259.

being "the law in books". A few others are to be found designed to sanctify vested rights—the reprobation of *ex post facto* laws,[81] of laws impairing the obligation of contract,[82] and of the taking of "private property . . . for public use, without just compensation"[83] —which have no English counterparts. Even though these rights first[84] formulated in the Bill of Rights might conceivably have taken shape in statutes or court decisions more or less to the same effect, reflecting the same forces as were behind them, it is surely a standard and appropriate use of language to attribute them to the Bill of Rights and to credit them among its accomplishments.

In sum, the conclusion seems warranted that it has meant a real although not readily measurable increase in the protection extended to individuals that the contents of the Bill of Rights were enacted as positive *lex scripta*. Very few have been left to wither on the vine. What evidence one can gather suggests that the hypothesis that they have induced deterioration in the performance of other governmental branches is not supportable. As extensions of what would have been the law in their absence, they operated variously according as they related to settled common law, to unsettled common law, and to no common law at all; but with none of them curtailing and some of them certainly creating or enlarging rights, the aggregate effect was necessarily positive. If all this analysis merely confirms the obvious, the justification must be that, when the technique of raising doubts by raising questions has been employed, the doubts can only be resolved by refining and exploring the questions.

II. *About Judicial Supremacy and Federalism.*

In the United States, the term Bill of Rights connotes a part of the constitution, the organic act of government. In consequence,

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[81] U.S. const. art. 1, s 9, cl. 3, s 10, cl. 1.

[82] *Ibid.* s 10, cl. 1.

[83] *Ibid.*, Amend. V. The law of eminent domain in the United States is no less complex than that of its equivalent, expropriation, in the Commonwealth.

[84] The priority is only in comparison with English law. As will be discussed later, see *infra* text and footnote 149, there were already comparable provisions in existing state constitutions. Also, the Ordinance for the Northwest Territory, adopted by the Congress of the Confederation in July 1787, had provided in article I for freedom of religion ("No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories") as well as, in article II, with respect to so many items later covered in the Bill of Rights—trial by jury, bail, "moderate" fines, cruel or unusual punishment, due process, compensation for public takings, and the obligation of contracts, that the article is almost a condensed version of the Bill of Rights.

under the doctrine of judicial review, which received its classical expression in *Marbury* v. *Madison*,[85] even a statute which or to the extent that it contravenes a Bill of Rights provision is open to challenge.[86] There is nothing unique to the United States about this. The same doctrine, under the designation of *ultra vires* legislation, is applied in appropriate circumstances with respect to the several Dominions in the Commonwealth[87] although the lack of a written constitution and the doctrine of parliamentary supremacy leave no room for its operation in Great Britain.[88] There is, however, something special to provisions constitutional in character, for a statute will be applied and enforced even though it provides, as to a specific subject, for treatment in a manner inconsistent with the terms of a co-ordinate earlier statute in general terms.[89] Indeed one legislature cannot by explicit declaration give its handiwork a permanence immune from change or repeal by later legislation.[90] Nor are the rights conventionally embodied in Bills of Rights, however "fundamental", so different in character that they cannot be invaded by statute if they have not been incorporated in the constitution.[91] To this extent, and it is not negligible, there can be no question that a Bill of Rights as a constitutional instrument has a force and consequence it would not possess as a simple statute or by virtue of some special status intrinsic to its elements.

Superordination above statutes is then a conspicuous characteristic of a constitutional Bill of Rights but the experience of the United States does not reveal it as its sole, nor perhaps in operation its most important, function. There have been amazing-

[85] (1803), 1 Cranch 137 (U.S.).

[86] *Cf.* Curtis, Lions Under The Throne (1947), pp. 9-16; Thayer, The Origin and Scope of the American Doctrine of Constitutional Law (1893), 7 Harv. L. Rev. 129.

[87] See Kerwin, Constitutionalism in Canada, in Sutherland (ed.), Government Under Law (1956), pp. 455, 456; Haines, Judicial Review of Legislation in Canada (1915), 28 Harv. L. Rev. 570-578.

[88] See MacDermott, Protection From Power Under English Law (1957), pp. 45, 46; Dicey, *op. cit., supra*, footnote 30, pp. 141-143. *Cf.* Evershed, Government under Law in Post-War England in Sutherland (ed.), *op. cit., supra*, footnote 87, p. 149.

[89] See Craies, Statute Law (Odgers ed. 1952), pp. 345-348; Note (1937), 37 Col. L. Rev. 293.

[90] ". . . . [A]s it is a prima facie presumption that every legislative enactment is subject to repeal by the same body which enacts it, every statute may be said to contain an implied provision that it may be revoked by the authority which has passed it, unless the right of repeal is taken away by the fundamental law, the overriding constitution which has created the legislature itself". *In re Certain Statutes of the Province of Manitoba* (1894), 22 S.C.R. 577, at p. 655 (per Strong, C.J.). See *Ellen Street Estates, Ltd.* v. *Minister of Health*, [1934] 1 K.B. 590; *cf. Charles River Bridge Prop'rs.* v. *Warren Bridge* (1837), 11 Pet. 420 (U.S.).

[91] See, *e.g. Permoli* v. *1st Municipality of New Orleans* (1845), 3 How. 589 (U.S.) (freedom of religion).

ly few cases where congressional statutes have been invalidated for repugnance to constitutional requirements in this area,[92] although it may be supposed that the possibility has often served as guidance or admonition in drafting legislation.[93] One might not wish to say that the impact on statutes is a secondary question, but certainly in day-by-day application it has been less frequently a matter of concern than have other aspects.

The drama in contests over the validity of statutes has tended to obscure the fact that the great grist of judicial business involving constitutional provisions has been concerned with the assessment of the propriety of administrative and lower-court behaviour. This would be hard to document, since no one seems to have tabulated the decisions in which actions of the executive or the courts of first instance have been held to have offended against either Bill of Rights guarantees or constitutional provisions generally. I shall not undertake the task, which would exhaust the writer and weary the reader without, it is felt, enough gain to compensate. Most cases even before the Supreme Court have not presented any constitutional issues; and, of those which have, relatively few dealt with Bill of Rights guarantees even in the larger sense employed in this article. In that small group, where the United States constitution has been found to have been contravened by federal action, the relevant action reprehended has seldom been that of Congress[94] but has usually been that of a lower federal court[95] or of an administrative agency or official,[96] which has ap-

[92] See Frank, Review and Basic Liberties, in Cahn (ed.), Supreme Court and Supreme Law (1954), p. 110; Hughes, The Supreme Court of the United States (1928), p. 93.

[93] See Hughes, *ibid.*, pp. 95,96.

[94] Besides those involving statutes, *supra*, footnote 92, there are cases where Bill of Rights safeguards have been relevant to the validity of Congressional investigations, see *e.g. Watkins* v. *United States* (1957), 354 U.S. 178; *cf.* Note, (1949), 49 Col. L. Rev. 87 (self incrimination); Comment, (1956), 65 Yale L.J. 1159; Note (1957), 71 Harv. L. Rev. 141-148.

[95] This has naturally arisen most often under Amendments V-VIII, inclusive, which prescribe procedural safeguards as to trial. Taking as representative, the Sixth Amendment right of confrontation, see Corwin (ed.), The Constitution of the United States of America (1953), p. 884 (listing eight Supreme Court judgments involving the clause of which only *Kirby* v. *United States* (1899), 174 U.S. 61 challenged the constitutionality of legislation).

[96] The due process clause which summarizes the notice and hearing requirement has in the United States been as fruitful a source of litigation as has the "natural justice" concept in the Commonwealth. See Hankins, The Necessity for Administrative Notice and Hearing (1940), 25 Iowa L. Rev. 457. One of the most notable cases was *Morgan* v. *United States* (1936), 298 U.S. 468; (1938), 304 U.S. 1. But other clauses arise for consideration also, see, *e.g. Oklahoma Press Publishing Co.* v. *Walling* (1946), 327 U.S. 186 (self incrimination, search and seizure, Wage-Hour Administrator); *Lovell* v. *City of Griffin* (1938), 303 U.S. 544 (freedom of the

plied its authority in a way not permitted under the constitution. It is long settled that a statutory grant of power in itself good may be so exercised that the particular exercise is constitutionally bad, in which event the latter will be disallowed without in any way reflecting on the statute.[97] Altogether aside from judicial supremacy, action by an official or an official body purportedly under and pursuant to a statutory grant of authority but which is not in conformity with the authority delegated will be disapproved.[98] *Ultra vires* is a doctrine neither peculiarly American nor peculiarly constitutional.[99] Only to the extent that a basic statute may have to be read in the light of constitutional provisions so that the challenged administrative action is called on to comply with statute and constitutional injunction[100]—again a notion not peculiarly American[101]—is there anything special about the impact of constitutional provisions on official action. Except where validity of legislation is called in question, it makes little if any difference whether a limitation on authority is a simple statute or a constitution superior to statute. Individual safeguards constitutionally specified must be respected, or action, administrative or judicial, is invalid;[102] individual safeguards legislatively specified must be respected, or action, administrative or judicial, is invalid;[103] and one finds no suggestion of any distinction, theoretical or practical, between invalidation on the one or the other ground. Even without any doctrine of judicial supremacy, most of the cases involving a Bill of Rights guarantee which have arisen could and prob-

press, city manager). As specimens of the abundant periodical literature, see Macmahon, The Ordeal of Administrative Law (1940), 25 Iowa L. Rev. 425; Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court (1921), 35 Harv. L. Rev. 127.

[97] *Yick Wo.* v. *Hopkins* (1886), 118 U.S. 356.

[98] See, *e.g. Waite* v. *Macy* (1918), 246 U.S. 606; *Addison* v. *Holly Hill Fruit Products, Inc.*, (1944), 322 U.S. 607.

[99] *Cf. Ex parte Brent*, [1955] O.R. 480, 3 D.L.R. 587, *aff'd. A.-G. of Canada* v. *Brent*, [1956] S.C.R. 318; *Re Milk Board & Crowley*, [1954] 3 D.L.R. 519, 12 W.W.R. (N.S.) 626 (B.C.S.C.); Griffith and Street, Principles of Administrative Law (1952).

[100] See *Wong Yang Sung* v. *McGrath*, *supra*, footnote 18; *cf. United States* v. *Nugent* (1953), 346 U.S. 1.

[101] See, *e.g. Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198.

[102] In some circumstances, however, there may be no judicial recourse available against such invalid conduct, see, *e.g., Kentucky* v. *Dennison* (1861), 24 How. 66 (U.S.); *Colegrove* v. *Green* (1946), 328 U.S.549; Dodd, Judicially Non-Enforcible Provisions in Constitutions (1931), 80 U. Pa. L. Rev. 54.

[103] Cf., *e.g., Universal Camera Corp.* v. *National Labor Relations Board* (1951), 340 U.S. 474 (Administrative Procedure Act provision imposing more stringent requirements on evidentiary basis for Board's determination than constitutionally required held binding on Board and courts).

ably would have been decided just as they were, were the status of the provisions incorporating it precisely that of a basic statute.

Constitutional provisions have thus been both themselves legislation of an extraordinary type and standards to which ordinary legislation must conform; they have also been a corpus of principles for the construction of statutes and of delegated legislation. The familiar expression of this is the formula that statutes are to be construed to avoid constitutional doubt.[104] The obvious consequence has been to permit measures to avoid running the constitutional gauntlet and, it may be surmised, to save from condemnation some which would not have survived but for this technique. The reverse of the picture, however, has been to inject additional elements into the materials of interpretation which produce constructions that might not have resulted in their absence, sometimes to a degree which has attenuated the legislative language into virtual extinction.[105] This doctrine has been most used in situations where without its use the enacted law might have been in constitutional jeopardy; but even where that risk is remote, one interpretation might be preferred to another because more harmonious with the spirit and object of a constitutional provision. To what extent the ethos as distinguished from the requirements of terms in the Bill of Rights affects the climate of construction and so shapes the application of legislation cannot be stated with assurance. It certainly has done so on occasion.[106] No doubt the Bill of Rights has also been a part of the "taught tradition" of American lawyers whose "toughness" has been seen as a significant factor in the law's development[107] so that, even where no specific allusion to it nor even any conscious association with it is made, it will have guided the election between possible interpretations of legislation which is so important a part of the judicial function.[108] So doing, it would be serving in much the same way as those other elements of professional tradition sometimes styled canons of interpretation,[109] which find their formal expres-

[104] *United States* v. *Witkovich* (1957), 353 U.S. 194; *Crowell* v. *Benson* (1932), 285 U.S. 22; *Granada County Supervisors* v. *Brogden* (1884), 112 U.S. 261.

[105] See *United States* v. *Harriss* (1954), 347 U.S. 612.

[106] See, *e.g.*, *Nardone* v. *United States* (1937), 302 U.S. 379 (construing statute to render inadmissible evidence obtained by wire taps); Note (1939), 24 Wash. U.L.Q. 256.

[107] *Cf.* Pound, The Universities and The Law (1941), 26 Iowa L. Rev. 191.

[108] *Cf.* Gray, The Nature and Sources of Law (2d ed. 1921), pp. 170-186; Pollock, Judicial Caution and Valour (1929), 45 L.Q. Rev. 293.

[109] See Craies *op. cit.*, *supra*, footnote 89, p. 8. For catalogues of the propositions so regarded, see 1 Blackstone, Commentaries, pp. 87-91; Driedger, The Composition of Legislation (1957), Ch. XIII.

sion in the Interpretations Acts familiar to lawyers.[110] In the avoidance of constitutional doubt principle, there are overtones of the doctrine of judicial supremacy but, quite independent of that doctrine, the enactment of Bill of Rights guarantees has the demonstrated capacity to be an interpretational matrix influencing the content of legislation generally. If recourse to them for that purpose has been inexplicit, obscure, and episodic, that perhaps only confirms the resemblance to the Interpretations Acts.[111] However much or little used, they are available for use.

Federalism is a feature of the American constitutional system traditionally at least equal in importance to judicial supremacy. Originally it so conditioned the incidence that it may be said to have dominated the effectiveness of the Bill of Rights. Even today, it is of real although diminished significance. Despite a certain confusion of thought initially with regard to whether the first eight amendments were a limitation on the federal government or on government, *Barron* v. *Baltimore*[112] settled relatively early that their provisions did not apply to the states.[113] The addition of the Fourteenth Amendment gave an opening for re-examining the question. The narrow construction of the "privileges and immunities" clause[114] in the *Slaughter House Cases*[115] put an effective quietus on it as a basis for requiring of the states that they abide by limitations similar to the Bill of Rights limitations in the United States. The "equal protection" clause,[116] which had no parallel there,[117] is not framed in language appropriate as a basis for claiming that it was

[110] See, *e.g.*, R.S.C., 1952, c. 158; R.S.O., 1950, c. 184; *cf.* Driedger, *ibid.*, Ch. XIV.

[111] Thus, the Interpretation Act, R.S.C., 1952, c. 158, is noted as having been judicially cited only twice between September 1952 and December 1958; The Interpretation Act, R.S.O., 1950, c. 184, is noted as having been judicially cited only seven times between June 1950 and November 1958, see Canada Statute Citator (perm. ed.); Ontario Statute Citator (perm. ed.)

[112] (1833), 7 Pet. 243 (U.S.).

[113] The individual guarantees expressed in U.S. const. art. I, s. 10, cl. 1 (attainders, *ex post facto*, obligation of contracts) did not of course come within the ambit of the ruling and were enforceable against the states, see, *e.g.*, *Trustees of Dartmouth College* v. *Woodward* (1819), 4 Wheat. 518 (U.S.).

[114] See Warren, The New "Liberty" Under the Fourteenth Amendment (1926), 39 Harv. L. Rev. 437-439.

[115] (1873), 16 Wall. 36 (U.S.).

[116] U.S. const. Amend. 14 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

[117] By reverse feedback, the due process clause of the Fifth Amendment has been held to impose on the federal government restraints equivalent to those operative as against the states under the "equal protection" clause, see *Bolling* v. *Sharpe* (1954), 347 U.S. 497 (racial segregation in schools), thus giving a retroactive incorporating effect analogous to that involved in Fourteenth Amendment due process.

designed to replicate vis-à-vis the states the older protections against federal action, and it has never been argued that it so operates. That clause has had an eventful life of its own, achieving latter day prominence as the main instrument for condemning differential treatment on grounds of race,[118] after a long and ordinarily unsuccessful record of invocation as a bar to classification for purposes of social and economic legislation,[119] but its history is separate and special. It is the due process clause[120] which has primarily been looked to in support of the claim that *Barron* v. *Baltimore* has been upset either wholly or in part by the Fourteenth Amendment.

Under the commonplace of exegesis naturalized in the law as construction *in pari materia*,[121] it was obviously awkward to derive from "nor shall any state deprive any person of life, liberty or property, without due process of law" in the Fourteenth Amendment an incorporation by reference of the entirety of the first eight amendments in the face of the use of substantially identical language in the Fifth Amendment. Had it been so comprehensive as to include the aggregate of the Bill of Rights, it would appear sufficient to have adopted that one clause of the Fifth Amendment and superfluous to have specified other guarantees. "The conclusion is . . . irresistible", said Mr. Justice Matthews, speaking for the court in 1884, "that when the same phrase was employed in the fourteenth amendment to restrain the action of the states, it was used in the same sense and with no greater extent."[122] Avoiding so distinct an identification of the two, *Twining* v. *New Jersey*[123] held that the Fourteenth Amendment did not impose on the states the Fifth Amendment provisions against self-incrimination and has since been a leading case for the proposition that, whether or not Fourteenth Amendment due process was co-terminous with that of the Fifth Amendment, at any rate it was not inclusive of everything expressed in the Bill of Rights amendments. This much was re-affirmed in the equally classic case of *Palko* v. *Connecticut*[124] which, however, in recognition of intermediate developments, disavowed the unnecessary breadth of expression of Mr. Justice

[118] See, *e.g.*, *Shelley* v. *Kraemer* (1948), 334 U.S. 1; *Brown* v. *Board of Educatio* , (1954), 347 U.S. 483.

[119] *Cf.* Rottschaeffer, Constitutional Law (1939), pp. 551-555; Powell, The Supreme Court and State Police Power (1932), 18 Va. L. Rev. 630-640.

[120] See Note, The Federal Bill of Rights and the Fourteenth Amendment (1938), 26 Geo. L.J. 439.

[121] See Maxwell, The Interpretation of Statutes (10th ed., 1953), pp. 33-35; 2 Sutherland, Statutory Construction, (3rd ed., 1943), Ch. 52.

[122] *Hurtado* v. *California* (1884), 110 U.S. 516, at p. 535; see *Maxwell* v. *Dow* (1900), 176 U.S. 581 (accord).

[123] (1908), 211 U.S. 78. [124] (1937), 302 U.S. 319.

Matthews and, in a famous opinion of Mr. Justice Cardozo, found as "a rationalizing principle" that the due process of the Fourteenth Amendment contemplated "those 'fundamental principles of liberty and justice which lie at the basis of all our civil and political institutions' "[125] and embraces the rights which are "of the very essence of a scheme of ordered liberty".[126] Reluctance to accept this conclusion, an attitude to which Mr. Justice Black has been conspicuous in giving the lead,[127] led to much controversy within the profession based on divergent views of historical and other materials.[128] This reluctance seems to have reached its high water mark in *Adamson* v. *California*,[129] which, together with *Rochin* v. *California*,[130] adhered to the orthodox position of the *Twining* and *Palko* cases. If *stare decisis* is to have any meaning at all in American constitutional jurisprudence, it would seem that the Supreme Court is committed to the view that the Bill of Rights limitations on the federal government, which do not apply *ex proprio vigore* to the states, have not been made to apply by reason of the Fourteenth Amendment.

Nevertheless abandonment of Mr. Justice Matthews' position suggests that some kinds of things the United States may not do because of the first eight amendments the states may not do because of the Fourteenth, Mr. Justice Cardozo's "rationalizing principle" being an effort to provide a criterion. The *Palko* opinion vouchsafed instances as well as a test, the First Amendment freedoms of speech, press, religion, and assembly and the right to counsel being specified as having been given Fourteenth Amendment protection.[131] As to the First Amendment freedoms the matter is pretty well settled by now. It has been both said[132] and denied[133] that they occupy a "preferred position" but the issue there is as to whether against either the federal or a state government, they are to be more jealously guarded than are others of the guaranteed rights, an issue

[125] *Ibid.* at pp. 325, at p. 328. [126] *Ibid.*, at p. 325.

[127] *Cf. e.g.*, Curtis, *op. cit.*, *supra*, footnote 86, pp. 285-287.

[128] Compare Flack, The Adoption of the Bill of Rights (1908) with Fairman and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? (1949), 2 Stanf. L. Rev. 5, 139.

[129] (1947), 332 U.S. 46 (5-4 decision with elaborate dissent by Black, J. to establish "that one of the chief objects of the [XIVth] Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states".)

[130] (1952), 342 U.S. 165.

[131] *Palko* v. *Connecticut*, *supra*, footnote 124, at p. 324.

[132] See, *e.g. Thomas* v. *Collins* (1945), 323 U.S. 516, at p. 530; *Kovacs* v. *Cooper* (1949), 336 U.S. 77, at p. 88.

[133] See *Kovacs* v. *Cooper* (1949), 336 U.S. 77, at p. 90 (concurring opinion of Frankfurter, J.); *Brinegar* v. *United States* (1949), 338 U.S. 160, at p. 160 (Jackson, J. dissenting).

appropriately postponed for later examination. There is no longer any real doubt that the Fourteenth Amendment has incorporated (or perhaps more accurately, adopted) the First.[134] Indeed this is so true that freedoms of speech, press, assembly, and religion have latterly been seldom discussed in the context of federal action but usually in connection with the states, the complete equivalence of the requirements dispensing with any occasion for treating the lines of authorities as separate.

With possibly one exception,[135] no other of the guarantees has been treated quite like that. Even the *Palko* reference to right to counsel was qualified later in that decision by a recognition that it was the particularities of the denial in *Powell* v. *Alabama*,[136] "not the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted by a federal court",[137] which were critical. Concerned with the first eight amendments as bearing on federal action, the Supreme Court's task has been that of the detailed amplification of established categories. Concerned with Fourteenth Amendment due process as conditioning state action, it has also looked into the qualitative aspects of the challenged action, eschewing merely categorical standards and inquiring into whether what was done can fairly be said to "offend accepted notions of justice".[138] To recur to the right to counsel, for instance, whether its withholding in state prosecutions is constitutionally offensive is a very nice question which has given right to a body of decisions so complex as to be almost incomprehensible[139] in contrast with the situation in federal prosecutions where counsel must be allowed unless deliberately waived.[140] Self-incrimination, as it has been interpreted for Fifth Amendment purposes, is not prohibited by due process

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[134] See Chafee, *op. cit., supra*, footnote 76, pp. 387, 388.

[135] See *In re Oliver*, (1948), 333 U.S. 257 ("public trial").

[136] (1932), 287 U.S. 45.

[137] See *Palko* v. *Connecticut*, *supra*, footnote 124, at p. 327.

[138] See *Adamson* v. *California*, *supra*, footnote 129, at p. 68.

[139] Compare *inter se Betts* v. *Brady* (1942), 316 U.S. 455; *Hawk* v. *Olsen* (1945), 324 U.S. 42; *Bute* v. *Illinois* (1948), 333 U.S. 640; *Townsend* v. *Burke* (1948), 334 U.S. 736; *Uveges* v. *Pennsylvania* (1948), 335 U.S. 437; *Gibbs* v. *Burke* (1949), 337 U.S. 773; *Gallegos* v. *Nebraska* (1951), 342 U.S. 55. See Chapman, The Right of Counsel Today (1948), 39 J. Crim. L. & Criminology 342. Political scientists have been led to make intricate if arid mathematical games out of these cases, see Kort, Predicting Supreme Court Decisions Mathematically (1957), 51 Am. Pol. Sci. Rev. 1; Schubert, Study of Judicial Decision Making (1958), 52 Am. Pol. Sci. Rev. 1007.

[140] See *Johnson* v. *Zerbst*, *supra*, footnote 59; *Glasser* v. *United States*, *supra*, footnote 59.

in state proceedings[141] but physical or mental torture is.[142] Although searches and seizures not satisfying federal standards of reasonableness and of particularities of warrant may be authorized in state procedure,[143] "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is", so we have been told, "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause".[144]

Any intrusion on "the very essence of a scheme of ordered liberty" is forbidden the states as a denial of Fourteenth Amendment due process. It would seem to be forbidden to the federal government, too, as a denial of Fifth Amendment due process and additionally as an infringement of rights affected by the categorical guarantees, if such is the case, its federal invalidity in that event being on dual grounds. Thus due process and the aggregate of Bill of Rights guarantees though not mutually inclusive are not mutually exclusive. Always accepting as special the situation of the First Amendment rights, there seems to have been a return to the position of Mr. Justice Matthews that the due process of the Fifth and that of the Fourteenth Amendments are equivalent but with the corollary that he failed to appreciate the latent potentials of the former. The First Amendment freedoms are sanctified against both states and United States. Aside from that, *Barron* v. *Baltimore* still stands and the Bill of Rights amendments are restrictions only on federal action. They have not been made applicable to the states by the Fourteenth Amendment. However, that amendment has enlarged the guarantees against state action infringing on individual liberties by striking down whatever denies due process of law. This may coincide with extreme situations where similar federal action would fall under the ban of the Bill of Rights.

A distorted understanding of the entirety of individual protection against oppressive action stems from the easy confusion of the Bill of Rights in the United States constitution with the Bill of Rights in the United States. The American federal scheme, it has been stated on high authority, differs in critical respects from that

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[141] *Twining* v. *New Jersey, supra,* footnote 123; *Adamson* v. *California, supra,* footnote 129; *Taylor* v. *Alabama* (1948), 335 U.S. 252.

[142] See *Brown* v. *Mississippi* (1936), 297 U.S. 278; *Ashcraft* v. *Tennessee* (1944), 322 U.S. 143; *Haley* v. *Ohio* (1948), 332 U.S. 596; *Watts* v. *Indiana* (1949), 338 U.S. 49.

[143] See *National Safe Deposit Co.* v. *Stead* (1914), 232 U.S. 58; *Stefanelli* v. *Minard* (1951), 342 U.S. 117.

[144] *Wolf* v. *Colorado* (1949), 338 U.S. 25, at pp. 27-28; see *Rochin* v. *California, supra,* footnote 130 (accord).

of Canada.[145] While the remark did not allude specifically to the fact that each of the American states has, unlike the Canadian provinces, a constitution of its own comparable to the federal charter, that is a fact and one which has a bearing on the way the federal system and Bill of Rights guarantees have interacted in the United States. To get a real analogy to the United States, one must suppose not a Canadian Bill of Rights statute standing in isolation but such a statute companioned by similar statutes in the provinces (a state of affairs which indeed is not beyond the realm of contemplation), since a common feature of American state constitutions is that they too have Bills of Rights which, within the area of competence of the several states, serve the same purpose as does that of the United States constitution. The circumstance has corollaries which call for some consideration.

The state constitutional provisions differ in detail from but have very much in common with each other and the federal Bill of Rights. Characteristically some items appearing in the latter are left out of, others not spelled out in it are inserted in any given state constitution, the insertions and additions differing state by state.[146] The gist of almost every federal provision appears, however, in almost every state constitution, not necessarily expressed in identical language, but with variations in the detail of arrangement or phrasing.[147] Borrowing is evident—much borrowing between the states and, what is more significant for present purposes, borrowing between levels of government. Characteristically the clauses of the first eight amendments were anticipated and, it may be supposed, suggested by similar provisions in the older state constitutions.[148] Later movement has been in the other direction, with the constitutions of newly admitted states and the new constitutions of old states reflecting the contents of the federal guarantees,[149]

[145] See *A.-G. for Australia* v. *Colonial Sugar Refining Co.*, [1914] A.C. 237, at p. 253 (P.C.); *cf.* Scott, The Special Nature of Canadian Federalism (1947), 13 Can. J. Econ. & Pol. Sci. 13.

[146] See Munsterburg, The Americans (1904); *cf.* Hurst, The Growth of American Law: The Law Makers (1950), Ch. 11.

[147] See 1 Bryce, The American Commonwealth (1888), pp. 423-326 for a synopsis of the Bill of Rights provisions characteristically found in American state constitutions. A similar tabulation today would show little change.

[148] The self-incrimination clause, for instance, appeared in seven pre-1789 state constitutions, see Pittman, The Colonial and Constitutional History of the Privilege against Self-incrimination (1935), 21 Va. L. Rev. 763; that of free speech in three, see Chafee, *op. cit., supra*, footnote 76, p. 5. Eight state bills of rights preceded that of the United States, see McLaughlin, Constitutional History of the United States (1935), p. 115.

[149] The practice of the Congress, in exercising its power to admit new states, see U.S. const. art. IV, s. 3, cl. 1, to do so by special act, often though by no means invariably following the framing of a proposed state

a general acquaintance with the constitution of the United States having almost inevitably influenced the patterns of specifications in the states. The conventional preoccupation of those concerned with the operation of the Bill of Rights of the United States constitution in an environment of federalism has been with the extent to which its terms have been applicable *ex proprio vigore* to the states. It is submitted that another legitimate aspect of the question is the function of the federal provisions as a template for the state constitutions[150] and that their substantial contribution as a "model statute", so to speak, should not be overlooked. Though models might indeed be sought anywhere and reference need not be and has not been confined to the terms of the federal prototype, the presence of the latter in the background consciousness of the general public and more particularly of practitioners of law and politics has given them a special importance.[151] Not the least consequence of the federal Bill of Rights has been its availability as a basic text from which similar specifications in the constituent states have derived.

The way that provisions have been construed and applied involves a more complex problem. It is standard doctrine that the ultimate authority as to the law of each state, including save in exceptional instances[152] its constitutional law[153] is the court of last resort of the state so that all other courts, including the federal courts when a case before them raises issues of state law, are bound

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constitution, may have contributed to the normal imitative impulse, especially since Congress possesses and occasionally exercises the power to prescribe constitutional terms as a condition to admission which may however be repealed by the state thereafter, see *Coyle* v. *Smith* (1911), 221 U.S. 559. *But cf. Stearns* v. *Minnesota* (1900), 179 U.S. 223.

[150] Characteristically the state constitutions contain a profusion of detail not found in that of the United States and much of it more like ordinary legislation than fundamental law, see, Eaton, Recent State Constitutions (1892), 6 Harv. L. Rev. 53, 109 and to that extent depart from the federal model; but, embedded in them all is a common nucleus of organizational arrangements and of limitations on government reflecting that model.

[151] American treatises, casebooks, and articles on constitutional law quite generally concentrate on the United States Constitution to the total or virtual exclusion of state constitutional provisions. Familiarity with this frame of reference inevitably gives a federal cast to professional thinking about constitutional law concepts.

[152] The principal exceptions relate to the contract clauses, *cf. Gelpcke* v. *Dubuque* (1864), 1 Wall. 175 (U.S.); Hale, The Supreme Court and The Contract Clause (1944), 57 Harv. L. Rev. 852-872., and the interstate compact clause, *cf. West Virginia* v. *Sims* (1951), 341 U.S. 22; Abel, Ohio Valley Panorama (1952), 54 W. Va. L. Rev. 186.

[153] See, *e.g., American Federation of Labor* v. *Watson* (1946), 327 U.S. 582, at p. 596; *Highland Farms Dairy* v. *Agnew* (1937), 300 U.S. 608, at p. 613; *Post* v. *Supervisors* (1881), 101 U.S. 667, at p. 669.

by the state court interpretation.[154] Not even the Supreme Court of the United States feels free to undertake in ordinary circumstances an independent attribution of meaning to the law of a state.[155] The obvious possibility emerges that the highest courts in various states may attach different meanings to even identical language in their written law, including their constitutions, and that, if and to the extent that they do so, provisions, including Bill of Rights guarantees, though the same in form may differ in substance both among the states and between the states and the United States. There is no authority, not even the Supreme Court of the United States, competent to impose a uniform reading of the terms on the states. No state court may sanction what the federal law, a rule for all,[156] forbids, so that even if particular action is read by the state court as compatible with the state's Bill of Rights it may yet be invalid if, for example, it offends "the very essence of a scheme of ordered liberty";[157] but that leaves unquestioned the state's interpretation of its constitution and goes to the question of the meaning of the United States constitution, in the particular instance of Fourteenth Amendment due process, which is for federal determination.[158] Hence, there is considerable diversity among the states and not infrequent divergence between the states and the United States as to the meaning of Bill of Rights guarantees expressed in virtually or precisely the same terms. The provisions about jury trial have for example been variously read[159] as have

[154] See, *e.g.*, *Erie R.R.* v. *Tompkins* (1938), 304 U.S. 64; *Elmendorf* v. *Taylor* (1825), 10 Wheat. 152 (U.S.); *cf. Rescue Army* v. *Municipal Court of Los Angeles* (1947), 331 U.S. 549 (by implication).

[155] See, *e.g.*, *Barsky* v. *Board of Regents*, (1954), 347 U.S. 442.

[156] U. S. const. art. VI, cl. 2 ("This Constitution, and the Laws . . . and . . . Treaties . . . of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). See, *e.g.*, *Testa* v. *Katt* (1947), 330 U.S. 386; *cf. United States* v. *Texas* (1950), 339 U.S. 707 (antecedent status as separate state in international law not deemed to change rule.)

[157] See *Palko* v. *Connecticut supra*, footnote 124, at p. 325.

[158] As to First Amendment freedoms, whatever competence the state court may have to determine the meaning of a state constitutional provision identical in language with a First Amendment guarantee presents an abstract question, since, whatever lesser requirement the state may be willing to accept, the challenged measure will in any event be bad because of failure to meet the federal test, see, *e.g.*, *Near* v. *Minnesota, supra*, footnote 76.

[159] Compare, *e.g.*, *Thiel* v. *Southern Pacific Co.*, (1946), 328 U.S. 217 with *Fay* v. *New York* (1947), 332 U.S. 261; and *People* v. *Dunn* (1899), 157 N.Y. 528 ("blue ribbon" jury). Compare *Vicksburg & Meridian R.R.* v. *Putnam* (1886), 118 U.S. 545 with *State* v. *Steinle* (1921), 116 Wash. 608, 200 Pac. 313 (comment by judge on evidence). *Cf. Minneapolis & St. Louis R.R.* v. *Bombolis* (1916), 241 U.S. 211 (trial of federal cause of action in state court by jury not meeting requirements of Seventh Amendment).

those against double jeopardy,[160] and the examples could be multiplied. Quite generally, where there has been a difference, it has worked out that the state Bill of Rights provisions have been read more permissively than have their federal counterparts, with the conspicuous exception of "substantive due process" which, in respect to economic and social legislation, has fallen into disfavour as a federal doctrine[161] but preserves its vigour in many of the states.[162] Conceivably the states' exactions under their constitutions could be more stringent than the federal requirements. Thus, for instance, freedom of speech, press, religion, and assembly which must as a minimum satisfy the First Amendment now incorporated into the Fourteenth, could be still more sternly guarded by the states which need not be content with the First Amendment as an adequate standard. No such tendency is discernible. In practical operation what results is that states sometimes give, and have been sustained in giving, less protection to the individual under their constitutional language corresponding to that used in non-First Amendment items of the Bill of Rights than he would receive against federal action, within the leeway provided by the *Palko* doctrine about the Fourteenth Amendment.

The impact of the federal constitution has not, however, been negligible. Without being an imperative, it has been an influential guide to state courts. As might be expected, state citation of federal decisions has been so frequent as to defy citation but its value as evidence of federal influence is rendered uncertain because one can never know how far a state court, having reached a conclusion independently satisfactory to it, has adorned with federal support what it would have concluded anyway. More persuasive are those cases where a state court in deciding a state constitutional issue confines its attention to the federal interpretation in a parallel area and grounds its judgment wholly on analysis in a federal case or line of authorities,[163] and most persuasive of all the ones where state courts abandon a position which they have

[160] Compare *Kepner* v. *United States* (1904), 195 U.S. 100 with *Palko* v. *Connecticut, supra,* footnote 24 and *State* v. *Felch* (1918), 92 Vt. 477, 105 Atl. 23 (state appeal from conviction). *Cf. Trono* v. *United States* (1905), 199 U.S. 521 with *People* v. *Gordon* (1893), 99 Calif. 227, 33 Pac. 901 (retrial for greater following appeal from conviction for lesser offense).

[161] See Hastie, Judicial Method in Due Process Inquiry in Sutherland, *op. cit., supra,* footnote 87, p. 341. The proposition set out in the text is developed more fully later in this article.

[162] See Paulson, The Persistence of Substantive Due Process in the States (1950), 34 Minn. L. Rev. 92.

[163] See, *e.g., Bass* v. *State* (1943), 182 Md. 496, 35 A. 2d 155; *State* v. *Andrews* (1922), 91 W. Va. 720, 114 S.E. 257; *cf. State Highway Board* v. *Gates* (1938), 110 Vt. 67, 1 A. 2d 825.

permissibly arrived at in opposition to a federal construction and adopt the federal view.[164] There is manifest here a radiation of the United States Bill of Rights beyond its direct operation, attributable to its superior dignity and to that of the court authoritatively construing it in the federal system. Nor, in failing to rely on the cases where the federal decisions were less clearly determinative, was there any intention to do more than to recognize that their effect was indeterminate and certainly no purpose to discount them as having had no real significance. The truth would seem to be rather that the presence and the federal interpretation of the Bill of Rights of the United States constitution has had persuasive though indefinite consequences in shaping the limitations which the states have imposed on themselves. A quite special although unmistakeable indication of this is provided by situations where, in the absence of any term in the state constitution correlative to a particular item in the federal Bill of Rights, states by judicial or legislative action have nevertheless imported such a term into state law.[165]

Quite aside from whatever consequences it may have had by way of command to the constituent members for matters within their purview, a federal Bill of Rights, so the experience of the United States would suggest, constitutes a standing invitation to those members to provide similar guarantees and to apply them in a similar sense as the federal safeguards. The latter branch of the invitation may have little meaning in a system such as Canada's where the division between federal and provincial competence relates solely to legislative powers and where the federal Supreme Court freely undertakes to settle the meaning of provincial law, including provincial statutes, uninhibited by any contrary construction by the highest courts of the several provinces. In line with this understanding, it is perhaps to be expected that as, if, and when any of the provinces follow a lead given by the Dominion in legislating a Bill of Rights, its content and consequences will be open to settlement by the Supreme Court of Canada and that

[164] *Cf. Wolf* v. *Colorado, supra*, footnote 144, at pp. 36-37 (Appendix Table F, listing states rejecting their prior contrary rule to follow the rule of *Weeks* v. *United States* (1914), 232 U.S. 383, that illegally obtained evidence is not admissible). Mention may also be made of legislative adoptions of stricter federal standards, as in the "wire tapping" situation, see *e.g.* Md. Stats., 1956, c. 116, s. 1; Ore. Stats., 1955, c. 675; R.I. Stats., 1949, c. 2325, s. 1.

[165] Thus, in the only two states having no constitutional provision against self-incrimination, it has been adopted in one by judicial holding, see *State* v. *Height* (1902), 117 Iowa 650, 91 N.W. 935 ("due process" clause as basis) and in the other by statute, see N.J. Rev. Stats., 1937, s. 2: 96-7 (comparable to provisions of The Canada Evidence Act)

the latter will settle it in a sense consistent with that placed on the federal statute. What is relevant is that, even should the rationale of *Barron* v. *Baltimore* fully apply to prevent the terms of a Bill of Rights from conditioning the actions of the members, as indeed it apparently still would in the United States except for the "due process" provisions of the Fourteenth Amendment and in fact still does in the rather substantial areas unaffected by that Amendment, the secondary effects attributable to the central government's having a bill of rights may be considerable.

Judicial supremacy and a federal structure are leading characteristics of the constitutional polity of the United States. They have therefore had a great and undeniable importance in shaping the application of the Bill of Rights. Nevertheless their significance, separately or together, has been it would not be quite accurate to say accidental but still only circumstantial. A good deal that the Bill of Rights has accomplished is quite apart from its function as a basis for invalidating statutes. A good deal lies outside the federal realm or the realm where the Fourteenth Amendment is a bar to state action. No doubt such matters are only a part of the picture, perhaps a small part of the picture, but it would not seem correct to dismiss them as trivial.

III. *What has been done as to some particular items*

The bulk of the available material makes selection necessary so only some of the particular items of the Bill of Rights will be dealt with here. This is not meant to imply any judgment as to the relative values incorporated in those selected for consideration and in others. Rather it reflects a wish to deal with what it is thought on somewhat impressionistic grounds may be of most interest and use to Canadian readers. Absence of any approximate equivalent in the proposed Canadian statute is an automatic basis for first exclusion. Beyond that it is a matter for judgment affected by many factors—how substantial a body of doctrine has been elaborated about a particular provision, how live and active its present role, how definite the construction at which the American courts have arrived, how comparable it is in expression to a clause in the proposed statute—not all tending in the same direction. If aspects are neglected, of special interest to some readers, as seems inevitable, it is hoped they will extend their indulgence on the assurance of a willingness to supply on request so far as possible references to any other information desired.

The command that no one "shall be compelled in any criminal

case to be a witness against himself" is a much blunter formula than the direction that no direct or delegated legislation shall be "applied so as to . . . authorize a court, tribunal, commission or board or other authority to compel a person to give evidence if he is denied counsel or other constitutional safeguards."[166] In their different ways they recognize the privilege *nemo tenetur seipsum accusare* which, it has been said, "expresses a characteristic principle of English law"[167] but their thrust is different. The second quoted phrase expresses a conditional right, *i.e.*, one which operates only if accomplished by the denial of some other and independent constitutional safeguard and somewhat invidiously emphasizes administrative proceedings as if they were prime offenders, but when it does apply swells out into a right that "a person" is not compellable "to give evidence". The first, which is used in the Bill of Rights of the United States constitution, addresses itself only to "a criminal case" and directs that no one there need be a witness "against himself". To unravel the complexities of the more verbose provision is beyond the terms of reference of this article although incidental light may be shed by looking at the issues which have arisen under the briefer one in the United States. The easy case is that of a person charged with crime who clearly cannot be made to take the stand;[168] but the protection goes much beyond that. It may be claimed in the course of proceedings which are not criminal and indeed not before a court at all[169] and it may be claimed by one neither an accused nor otherwise a party to the pending proceedings whose status in them is solely that of a witness.[170] What is critical is the danger that the matter inquired about may be relevant to support either an actual or a potential prosecution of the witness. If so, it is not enough to immunize him from use of the evidence in that prosecution but he must be wholly immunized against prosecution on account of any matter disclosed by the evidence.[171] The danger must, however, be of a criminal prosecution; exposure to hazards of contumely, civil liability, or other undesirable consequences do not suffice.[172] Moreover, it

[166] Canadian Bill of Rights, *supra* p. 1, s 3(c).

[167] Brooms, Legal Maxims (10th ed., 1939), p. 660.

[168] See Wigmore *op. cit.*, *supra*, footnote 52, ss. 2263, 2264.

[169] See Note, Rights of Witnesses in Administrative Investigations (1941), 54 Harv. L. Rev. 1214-1215.

[170] See, *e.g.*, *McCarthy* v. *Arndstein* (1924), 266 U.S. 34; *Blau* v. *United States* (1950), 340 U.S. 159.

[171] See, *e.g.*, *Counselman* v. *Hitchcock* (1892), 142 U.S. 547; *cf. Silverthorne Lumber Co.* v. *United States* (1920), 251 U.S. 385 (similar rule as to information obtained by unlawful search).

[172] See *Hale* v. *Henkel* (1906), 201 U.S. 43; *Ullman* v. *United States* (1956), 350 U.S. 422; *cf. Adams* v. *Maryland* (1954), 347 U.S. 179 (validity

must be a risk personal to the witness so that contingent criminal consequences for third persons[173] are not within the range of protection afforded.[174] The witness is not to judge for himself the reality or substantiality of an apprehended prosecution but is to urge his claim to the court or tribunal leaving to it the determination of validity[175] which may in practice present a difficult puzzle of how to make the danger appear without disclosing the testimony itself.[176] Another bothersome question is how far the witness may go without giving rise to a waiver[177] which is one way the privilege may evaporate since to be available it must be timely urged.[178] This cursory survey epitomizes the main aspects of the safeguard so far as relates to the conduct of the court or tribunal at a hearing. Another branch of the guarantee relates to involuntary confessions made to the police. Their reception at a trial too falls within the prohibition of compulsory self-incrimination.[179] The unfortunate though perhaps inescapable result is to set the courts wandering in a perfect quagmire of particulars to determine the fact of involuntariness. Plainly an application of physical violence to procure a statement suffices, but how about holding one incommunicado "pending investigation"—and how short a detention will vitiate the use of the confession?[180] How about the use of psychological pressure without physical coercion?[181] How far do individual characteristics of the accused such as age, illiteracy, and the like affect the problem?[182] The Supreme Court of the United States has shown on the whole a tender regard for the witness, even going beyond what the Fifth Amendment guarantees

of federal statute excluding use of federally compelled testimony in state courts).

[173] See, *e.g.*, *Oklahoma Press Pub. Co.* v. *Walling* (1946), 327 U.S. 186 (official of company); *United States* v. *White* (1944), 322 U.S. 694 (union representative).

[174] *Cf. Rogers* v. *United States* (1951), 340 U.S. 367 (refusal to answer questions because others would be implicated an "untenable ground").

[175] *Ibid.* See Griswold, The Fifth Amendment Today (1955), Ch. 1.

[176] *Cf. Hoffman* v. *United States* (1951), 341 U.S. 479.

[177] See, *e.g. Quinn* v. *United States* (1955), 349 U.S. 155; *Emspak* v. *United States* (1955), 349 U.S. 190; *Bart* v. *United States* (1955), 349 U.S. 219; *Blau* v. *United States, supra,* footnote 170.

[178] Mention should also be made of the doctrine that public records kept pursuant to a statutory obligation are not entitled to the privilege, see *Shapiro* v. *United States* (1948), 335 U.S. 1.

[179] See, *e.g., Ashcraft* v. *Tennessee, supra,* footnote 142; *cf. Bram* v. *United States* (1897), 168 U.S. 532; *Waley* v. *Johnson* (1942), 316 U.S. 101 (coerced guilty plea).

[180] See, *e.g., Watts* v. *Indiana, supra,* footnote 142; *Turner* v. *Pennsylvanis* (1949), 338 U.S. 68.

[181] See, *e.g., Malinski* v. *New York* (1945), 324 U.S. 401; *Leyra* v. *Denno* (1954), 347 U.S. 556.

[182] See, *e.g., Haley* v. *Ohio, supra,* footnote 142; *Lisenba* v. *California* (1941), 314 U.S. 219.

against self-incrimination might require in federal trials.[183] Most of the decisions have indeed involved not federal action but extorted confessions by state officials offending Fourteenth Amendment "due process", but their language indicates that at least as much would be called for by the senior amendment. As to any evidence potentially incriminating, the decisions under the federal guarantee have afforded protection certainly as broad as that given by the alternative form of language (and certainly broader insofar as it is not subsidiary to the denial of some further constitutional right) with its operation extending beyond criminal cases or court cases to the operations of administrative agencies—indeed to inquiries by the committees of Congress itself[184]—and beyond the familiar contours of protection under the Canada Evidence Act.[185] As to particular applications, there have naturally been those who feel that the clause was unduly whittled down[186] just as there have been others who have felt on occasion it was unduly expanded.[187] Such difference of opinion is endemic. A dispassionate judgment might find the clause as construed by the court to have given latitude for the protection of the vast body of interests envisaged by the maxim, *nemo tenetur seipsum accusare*.

"Free speech means to most people, you may say anything that I don't think shocking".[188] That has made the freedom of speech guarantee abstractly a popular favourite. Concretely it is one of the hardest constitutional guarantees to live with for only those who say things that a great many people do think shocking

[183] *Cf. McNabb* v. *United States* (1943), 318 U.S. 332 (invoking supervisory control of Supreme Court over methods of lower federal courts).

[184] See, *e.g.*, *Quinn* v. *United States*, *supra*, footnote 177; *Emspak* v. *United States*, *supra*, footnote 177.

[185] Many aspects such as waiver by not invoking, personal character of the privilege, etc. seem identical under the Canadian and American systems. See, *e.g.*, *R.* v. *Lunan*, [1947] O.R. 201, 3 D.L.R. 710 (C. A.) (privilege available in Royal Commission inquiry). The Canadian statute seems more generous in that it may be invoked "upon the ground that his answer . . . may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person," not just criminal liability, but is less so in providing that "the answer so given shall not be used or receivable" which, while precluding any reference to it in the trial, see *Moorehouse* v. *Connell* (1920), 17 O.W.N. 351, does not protect against derivative and consequential prejudice, see *Kelly* v. *Mathers* (1915), 31 W.L.R. 931 (Man. K.B.) *aff'd.* (1916), 25 Man. R. 580, 23 D.L.R. 225 (C. A.), as does the American requirement immunizing from any subsequent prosecution on account of the conduct revealed.

[186] *Cf.* Griswold, *op. cit.*, *supra*, footnote 175.

[187] See, *e.g.*, Baker, Self-Incrimination: Is the Privilege an Anachronism? (1956), 42 A.B.A.J. 633; *cf.* Pittman, The Fifth Amendment: Yesterday, Today, and Tomorrow (1956), 42 A.B.A.J. 509 (examination of historical scope).

[188] Letter of Holmes of 14 June 1925 in 1 Howe (ed.), Holmes-Laski Letters (1953), p. 752.

having occasion to invoke it. A miscellany of social deviants—Jehovah's Witnesses, labor agitators, political and social extremists, peddlers of pornography—have served as guardians of the general interest in this connection. Very often the free speech claim has arisen concomitantly with one under some other First Amendment freedom—assembly, religion, and notably the press, and the judgment has dealt with both.[189] Freedom of speech, rather than one of these others, is chosen for consideration here because of its close association with all of them. It is not really a guarantee of vocal liberty at all but of liberty of communications as a whole. Thus, picketing[190] and movies[191] and display of emblems[192] have been held to be as truly within its protection as verbal utterance. That is within the tradition of the series of noble opinions of Holmes and Brandeis JJ.[193] who in the decade following World War I awoke the slumbering words of the First Amendment. The former associated the constitutional safeguard with a belief in "free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market".[194] The latter declared, "Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth: that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."[195] It was less in the speaker's claim to speak than in an unhampered exposure of others to be spoken to that the signal value of the provision was found. From their deep conviction as to this was elaborated in this same series of opinions the famous "clear and pre-

[189] Indeed, a single case may concurrently involve press, speech, and religion. See, *e.g. Follett* v. *Town of McCormick* (1944), 321 U.S. 573.

[190] See *Thornhill* v. *Alabama* (1940), 310 U.S. 88; *American Federation of Labor* v. *Swing* (1941), 312 U.S. 321. But *cf. Giboney* v. *Empire Storage & Ice Co.* (1949), 336 U.S. 490; *International Brotherhood of Teamsters* v. *Vogt* (1957), 354 U.S. 234.

[191] See *Joseph Burstyn, Inc.* v. *Wilson* (1952), 343 U.S. 495; *cf. Commercial Pictures Corp.* v. *Regents of University of New York* (1954), 346 U.S. 587, reversing per curiam (1953), 305 N.Y. 336; 113 N.E. 2d 502.

[192] See *Stromberg* v. *California* (1931), 283 U.S. 359.

[193] See Corwin (ed.), The Constitution of the United States of America 1953), pp. 773-777.

[194] See *Abrams* v. *United States* (1919), 250 U.S. 616, at p. 630 (dissenting opinion).

[195] See *Whitney* v. *California* (1927), 274 U.S. 357, at p. 375 (concurring opinion).

sent danger test"[196] to which later judgments at least ritualistically subscribed until two decades later it was bled to death by a friendly Hand[197] and, through an expansion of it by others, the "preferred position" thesis[198] which won less general acceptance.[199]

The Holmes-Brandeis view as to the purpose and scope of freedom of speech can hardly be said to have been used as a guide in recent application. True, there have been repeated rebuffs to those who sought to cash in on it as a pure commercial benefit for the special advantage of distributors of verbal wares,[200] and so far the consumer interest protected has been recognized as primary. True, too, competing legitimate concerns of the public have been made to bend — cleanliness of the streets,[201] domestic quiet,[202] business responsibility

[196] In *Schenck* v. *United States* (1919), 249 U.S. 47, at p. 52, Holmes J. first formulated it as follows: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent". The concurring opinion of Brandeis, J. in the *Whitney* case further defined what was requisite, saying, at pp. 377, 378, ". . . no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression . . . . Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as a means for averting a relatively trivial harm to society . . . . The fact that speech is likely to result in some violence or in destruction to property is not enough to justify its suppression. There must be the probability of serious injury to the state."

[197] See *Dennis* v. *United States* (1951), 341 U.S. 494, at p. 510 ("Chief Justice Learned Hand, writing for the majority below, interpreted the phrase as follows: 'In each case [courts] must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'. 183 F. 2d, at p. 212. We adopt this statement of the rule").

[198] Starting judicially in a footnote to *United States* v. *Carolene Products Co.* (1938), 304 U.S. 144, at p. 152, n.4, it received its clearest expression in *Thomas* v. *Collins* (1946), 328 U.S. 331, at p. 353. *Cf.* Hyman, Judicial Standards for the Protection of Basic Freedoms (1952), 1 Buffalo L. Rev. 221.

[199] *Cf. Kovacs* v. *Cooper, supra,* footnote 133, at p. 88 (per Frankfurter, J. concurring); *Brinegar* v. *United States, supra,* footnote 133, at p. 180 (per Jackson, J. dissenting).

[200] See *Valentine* v. *Chrestensen* (1942), 316 U.S. 52 (distribution of advestising hand bill not protected); *Breard* v. *Alexandria* (1951), 341 U.S. 622 (door-to-door soliciting); *Associated Press* v. *National Labor Relations Board* (1937), 301 U.S. 103 (labor legislation applicable to publishing business). *But cf. Grosjean* v. *American Press Co.* (1936), 297 U.S. 233 (discriminatory graduated tax on newspapers).

[201] See *Lovell* v. *City of Griffin, supra,* footnote 96; *Schneider* v. *Irvington* (1939), 308 U.S. 147.

[202] See *Martin* v. *Struthers* (1943), 319 U.S. 141; *Douglas* v. *City of Jeannette* (1943), 319 U.S. 157 (accord); *cf. Marsh* v. *Alabama* (1946), 326 U.S. 501 (right of owner of company town to exclude from premises).

protection,[203] even avoidance of riots and breaches of the peace[204] —some of which perhaps were only colourably involved in the actual cases although so to charge might have involved the Supreme Court in the distasteful business of impugning legislative good faith. Labor organizers[205] and Jehovah's Witnesses,[206] pickets[207] and Communist meeting sponsors[208] are by profession, temperament, or definition anxious to broadcast their views about matters of public concern and their testifyings come easily enough within the classic rationale. With "motion pictures . . . an organ of public opinion . . . designed to entertain as well as to inform",[209] the connection is more tenuous; but the criterion had already been abandoned with the holding that magazines containing "nothing of any possible value to society" were "as much entitled to protection as the best of literature", and the court's express refusal to "accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas."[210] Reading the freedom of speech guarantee as making inviolable the freedom not to speak, a position which may by now have been approached in some of the "Communist-oath" cases,[211] although their rationale is obscured by involvement with the provision against self-incrimination, represents the ultimate topsyturvy, with the withholding of information from public knowledge the last heir of a concern for ample and informed discussion of public affairs.

Sub-standard literature does not have a preferred position though; pronunciamentoes to the courts about the disposition of litigation are equally favoured. The Canadian[212] and English[213]

[203] See *Thomas* v. *Collins* (1945), 323 U.S. 516.

[204] See *Terminiello* v. *Chicago* (1949), 337 U.S. 1; *cf. Cantwell* v. *Connecticut* (1940), 310 U.S. 296.

[205] See *Thomas* v. *Collins*, *supra*, footnote 203.

[206] See *Lovell* v. *City of Griffin*, *supra*, footnote 96; *Cantwell* v. *Connecticut*, *supra*, footnote 204; *Jones* v. *Opelika* (1943), 319 U.S. 103; *Murdock* v. *Pennsylvania* (1943), 319 U.S. 105; *Martin* v. *Struthers*, *supra*, footnote 202; *Douglas* v. *City of Jeannette*, *supra*, footnote 202; *Follett* v. *Town of McCormick*, *supra*, footnote 189; *Marsh* v. *Alabama*, *supra*, footnote 202; *Tucker* v. *Texas* (1946), 326 U.S. 517; *Niemotko* v. *Maryland* (1951), 340 U.S. 268.

[207] See *Thornhill* v. *Alabama*, *supra*, footnote 190; *American Federation of Labor* v. *Swing*, *supra*, footnote 190; *Bakery & Pastry Drivers* v. *Wohl* (1942), 315 U.S. 769; *Cafeteria Employees Union* v. *Angelos* (1943), 320 U.S. 293.

[208] See *Herdon* v. *Lowry* (1937), 301 U.S. 242; *De Jonge* v. *Oregon* (1937), 299 U.S. 353.

[209] See *Joseph Burstyn Inc.* v. *Wilson*, *supra*, footnote 191, at p. 501.

[210] See *Winters* v. *New York* (1948), 333 U.S. 507, at p. 510.

[211] *Cf. Konigsberg* v. *State Bar of California* (1957), 353 U.S. 252; *Slochower* v. *Board of Higher Education* (1956), 350 U.S. 551.

[212] See *Re Nicol*, [1954] 3 D.L.R. 690 (B.C. Sup. Ct.); *cf.* Fischer, Civil and Criminal Aspects of Contempt of Court (1956), 34 Can. Bar Rev. 121, at p. 124, footnote 16.

[213] See *R.* v. *Gray*, [1900] 2 Q.B. 36, at p. 40; *Skipworth's Case* (1873), L.R. 9 Q.B. 230; *Rex* v. *Editor of the New Statesman* (1928), 44 T.L.R. 301.

position perhaps goes too far in its disregard of the legitimacy of public concern with the quality of performance of the judiciary and its conceivably not quite disinterested removal of the conduct of judges from the realm of open discussion. Subjecting them, after judgment has become final, to even inaccurate and intemperate comment on their handling of particular cases may serve the public interests to which Holmes and Brandeis adverted, and this is so whether the judges are appointed or elected since it evinces a healthy concern with the calibre of judicial selection to which those responsible should be kept sensitive. Judges like other officials to be really respected must function respectably. But to hold, as the Supreme Court has, that freedom of speech precludes a court from holding in contempt those who, while a case is still pending, suggest to it in a coercive context[214] the disposition to be made or utter untrue accounts and intemperate comments about the course of the proceedings[215] seems little related to a legitimate public interest. "Free trade in ideas" which may legitimately shape the public disposition toward the performance of the judiciary is not the appropriate technique in our tradition for shaping the disposition of a particular litigation,[216] and the application there of freedom of speech rests on assumptions other than those of Holmes and Brandeis. The unfortunate but foreseeable effect of such a breadth of tolerance to comment on pending cases has been to paralyse statutory efforts to prevent dissemination of circumstances relative to prosecutions in a way calculated to reach and predispose potential jurors.[217] On occasion, such dissemination has been held effectually to have destroyed the possibility of a fair trial within the relevant venue.[218] Interpretations of freedom of speech which present a dilemma like that make one wonder just what interest is served by the guarantee.

Tracing the particulars in application of a broad standard always means that cases nearly alike may be on opposite sides of a very narrow line. Thus minute distinctions between how ordinances limiting the use of loudspeakers are drafted may affect the question of whether they offend against the First Amendment;[219] and agitated

[214] *Cf. Craig* v. *Harney* (1947), 331 U.S. 367; *Pennekamp* v. *Florida* (1946), 328 U.S. 331. *Quaere*, however, whether in either of the above cases the judgment can properly be said to have been final.

[215] See *Bridges* v. *California* (1941), 314 U.S. 252.

[216] See *ibid.*, at pp. 283, 284 (dissenting opinion of Frankfurter, J.)

[217] See *Baltimore Radio Show* v. *State* (1949), 193 Md. 300, 67 A. 2d 497, *cert. den. Maryland* v. *Baltimore Radio Show* (1950), 338 U.S. 912.

[218] *Cf. Shepherd* v. *Florida* (1951), 341 U.S. 50 (*semble*).

[219] Compare *Saia* v. *New York* (1948), 334 U.S. 558 with *Kovacs* v. *Cooper*, *supra*, footnote 133.

audiences on the public streets may under some conditions, differ enough from agitated crowds in and surrounding public halls to call for differential application of the free speech guarantee to the speaker who has agitated them.[220] The life of lawyers, officials, and trial judges is not made easier by having to reconcile such nice distinctions, but that is *nihil ad rem.* Even the Supreme Court may occasionally stumble and yet continue to follow the path of the law; and there is indication of something disturbingly like a retreat in the approval of criminal sanctions for "group libel"[221] framed to stifle expression of one point of view on problems of public concern. Where Holmes "wholly disagree[d] with the argument . . . that the First Amendment left the law as to seditious libel in force",[222] his successors invoked early English cases to buttress such legislation[223] and found "action which encroaches on freedom of utterance under the guise of punishing libel" good as "sanctioned by centuries of Anglo-American law."[224] The libel involved was of an underprivileged minority and it may have been felt—though it was not said—that the danger was clearer and more present than if it had been by a member of such minority. A relevant analogy may be found in a similar differential approach to freedom of association depending on what the association favored.[225]

It is still true that the United States Supreme Court is zealous in protecting freedom of speech. It is less clearly true how far if at all "clear and present danger" or "preferred position" or, for that matter, the ideal of "free trade in ideas" as an incident "to the discovery and spread of political truth" have any bearing on the clause as applied. The philosophy about it has shifted but to what? No longer conceiving it as an instrument for avoiding thought control on matters of public concern, the court has seemingly shifted to its steady maintenance as a firm foundation for a tower of babble and a sally port for relieving intellectually fashionable underdogs—which is as confusing in legal practice as it is in architectural metaphor. But a great deal of public intellectual ferment does get protection—collaterally.

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[220] Compare *Terminiello* v. *Chicago, supra,* footnote 204 with *Feiner* v. *New York* (1951), 340 U.S. 315.

[221] See *Beauharnais* v. *Illinois* (1952), 343 U.S. 250.

[222] See *Abrams* v. *United States, supra,* footnote 204, at p. 630 (dissenting opinion).

[223] See *Beauharnais* v. *Illinois, supra,* footnote 221, at p. 258, footnote 7.

[224] *Ibid.,* at p. 263.

[225] Compare *Bryant* v. *Zimmerman* (1928), 278 U.S. 63 (Ku Klux Klan, restrictive statute good) with *National Association for the Advancement of Colored People* v. *Alabama* (1958), 357 U.S. 449 (restrictive statute bad).

Due process of law is the third item to which it is proposed to give individual attention. As already noted, it appears in both the Fifth and the Fourteenth Amendments. How the latter has served to exact of the states full adherence to the First Amendment liberties but only so much compliance with the remaining content of the first eight amendments as relates to "the very essence of a scheme of ordered liberty" need not be repeated. The variation of treatment between the provisions of the older amendments reflects the essential dichotomy between "substantive due process" and "procedural due process" which has been fundamental to judicial development of the constitutional phrase.

Generally speaking, "procedural due process" has not been a very troublesome concept. It is this which has been assimilated[226] to the *lex terrae* of Magna Carta, the chain of descent passing through Plantagenet legislation[227] and Coke's Second Institute.[228] Its gist is the requirement of notice and opportunity for a hearing.[229] It is substantially the same requirement as is familiar to lawyers and judges in other common-law countries under the designation of "natural justice",[230] which similarly has as its root idea the maximum *audi alteram partem*.[231] Neither the "due process" nor the "natural justice" formulation requires that proceedings retain all the customary incidents of the trial of an action at common law.[232] Both demand that departures do not go so far as to jeopardize the reality of the opportunity to have one's case presented and considered.[233] As corollaries of that central principle, special techniques and doctrines have developed. One rather natural conse-

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[226] See *Den ex dem. Murray* v. *Hoboken Land & Improvement Co.*, *supra*, footnote 37.

[227] (1355), 28 Edw. III, c. 3 apparently first transformed "the law of the land" of Magna Carta into "due process of law".

[228] (1669), pp. 50-51.

[229] See *Coe* v. *Armour Fertilizers Works* (1915), 227 U.S. 413.

[230] See *St. John* v. *Fraser*, [1935] S.C.R. 441, at p. 451; *Local Government Board* v. *Arlidge*, [1915] A.C. 120; Report of the Committee on Ministers' Powers *supra*, footnote 21, pp. 75-80; *cf.* Willis, Administrative Law and the British North America Act (1939), 53 Harv. L. Rev. 279.

[231] See *Knapman* v. *Board of Health*, [1954] O.R. 360, 3 D.L.R. 760, *aff'd.*, [1954] 3 D.L.R. 248, *aff'd.*, [1956] S.C.R. 877; *Innes* v. *Wylie* (1844), Car. & Kir. 257; 174 Eng. Rep. 800 (N.P.); Griffith & Street, *op. cit. supra*, footnote 99, p. 156.

[232] See, *e.g.*, *Federal Communications Commission* v. *Pottsville Broadcasting Co.* (1940), 309 U.S. 134; *Wilson* v. *Esquimalt Nanaimo Ry.*, [1922] 1 A.C. 202, (1921), 61 D.L.R. 1 (by implication); *Local Government Board* v. *Arlidge*, *supra*, footnote 230, at p. 138; Report of the Committee on Ministers' Powers, *supra*, footnote 21, at p. 80.

[233] See, *e.g.*, *Moore* v. *Dempsey* (1923), 261 U.S. 86; *Toronto Newspaper Guild, Local 87* v. *Globe Printing Co.*, [1953] 2 S.C.R. 18; de Smith, The Right to a Hearing in English Administrative Law (1955), 68 Harv. L. Rev. 569.

quence has been the subjection of statute-created presumptions to judicial examination to see whether there is a rational link between the facts presumed and the matter occasioning the presumption.[234] One not so natural and quite recent derivation has been the fabrication of the "vagueness" doctrine, with its tenuous links to assumed lack of notice[235] which has been a vehicle for implementing judicial views on legislative policy and so has permitted a subtle contradiction in practice of the current deflation of substantive due process shortly to be noted. However beneficial or mischievous particular corollary propositions may be, the explicit assurance of "natural justice", which is the central theme of procedural due process, can not but commend itself to those who believe that the principle is important enough to deserve clear affirmation.

"Substantive due process" has had a briefer and more fitful career. It is a notion which has overwhelmingly often been invoked to invalidate legislation, either statutory or delegated. Aside from a casual dictum in the unhappy *Dred Scott* decision[236]—no very auspicious beginning—the federal courts did not apply it to condemn legislation until almost the end of the century, when the elaboration of an artificial notion of "liberty of contract"[237] opened the way to a vast expansion of its operation, although this doctrine had been anticipated by state decisions on similar state constitutional provisions.[238] Once started, it was the sovereign device by which judicial was substituted for legislative determination of social and economic policy despite pious disclaimers, most but not all of the casualties being state enactments. In its heyday, "substantive due process" was found not to permit maximum hour legislation,[239] minimum wage legislation,[240] statutes that union membership should

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[234] *Tot* v. *United States* (1943), 319 U.S. 463; *Western & Atlantic R.R.* v. *Henderson* (1929), 279 U.S. 639.

[235] In its inception, the vagueness doctrine was also ascribed at least in part to the right of a criminal accused to be informed of the charge, *cf.* U.S. const. Amend. VI; *International Harvester Co.* v. *Kentucky* (1914), 234 U.S. 216; *United States* v. *L. Cohen Grocery Co.* (1921), 255 U.S. 81, but, its extension to civil actions making that inadequate, the rationale was shifted to the due process requirement of the Fifth Amendment, see *A. B. Small Co.* v. *American Sugar Refining Co.* (1925), 267 U.S. 233, and it is now usually discussed in due process terms, see, *e.g. Jordan* v. *DeGeorge* (1951), 341 U.S. 223. The most frequent application continues to be in criminal matters.

[236] See *Scott* v. *Sandford* (1857), 19 How. 393, at p. 450 (U.S.).

[237] See *Allgeyer* v. *Louisiana* (1897), 165 U.S. 578, at p. 589; *cf.* Hughes, The Supreme Court of the United States (1928), pp. 204-213.

[238] See Shattuck, The True Meaning of the Term "Liberty" in Federal and State Constitutions (1891), 4 Harv. L. Rev. 388-391; Pound, Liberty of Contract (1909), 18 Yale L.J. 454.

[239] *Lochner* v. *New York* (1905), 198 U.S. 45.

[240] *Adkins* v. *Children's Hospital* (1923), 261 U.S. 525.

not be a ban to employment,[241] statutes providing for compulsory arbitration of labor disputes,[242] limiting the markup of ticket scalpers,[243] restricting the fees chargeable by private employment agencies[244] and adapting to contemporary conditions the ancient assize of bread.[245] That other and indeed more statutes were sustained did not conceal the fact that the court was reading into the constitution its own convictions about the general advantage and tolerable qualifications of the doctrine of laissez faire, over urgent protests especially by Brandeis and Holmes JJ.[246] Judicial choice was preserved by using the elastic test of businesses "affected with a public interest",[247] which were not entitled to the same breadth of contractual freedom as others. This gloss on the constitution was not destined to survive. Responsive to the Brandeis-Holmes insistence that the policy and wisdom of legislation be really left to the legislature, the court first wavered,[248] then recanted.[249] Now "[i]t is clear that there is no closed class or category of business affected with a public interest".[250] The older cases and their premises no longer have "continuing validity as standards by which the constitutionality of the economic and social programs of the states is to be determined".[251] "The day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought".[252] Dangerous as it is in principle to mass brief excerpts

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[241] *Coppage* v. *Kansas*, (1915), 236 U.S. 1; *Adair* v. *United States* (1908), 208 U.S. 161.

[242] *Chas. Wolff Packing Co.* v. *Court of Industrial Relations* (1923), 262 U.S. 522; (1925), 267 U.S. 552.

[243] *Tyson* v. *Banton* (1927), 273 U.S. 418.

[244] *Ribnik* v. *McBride* (1928), 277 U.S. 350.

[245] *Jay Burns Baking Co.* v. *Bryan* (1924), 264 U.S. 504. On the assize of bread, see 4 Blackstone, Commentaries, p. 157.

[246] See the list of Brandeis opinions (1931), 45 Harv. L. Rev. 106 and of Holmes opinions (1931), 44 Harv. L. Rev. 820-821.

[247] The idea, borrowed from a treatise of Lord Hale, see McAllister, Lord Hale and Business Affected with a Public Interest (1930), 43 Harv. L. Rev. 759, and first applied to sustain state regulation of grain elevators, see *Munn* v. *Illinois* (1876), 94 U.S. 113, was warped from a permissive into a limiting concept, *cf. Chas Wolff Packing Co.* v. *Court of Industrial Relations*, *supra*, footnote 242, 522 at pp. 535-536; *New State Ice Co.* v. *Liebmann* (1932), 285 U.S. 262.

[248] *Cf. O'Gorman* v. *Hartford Fire Ins. Co.* (1931), 282 U.S. 251 with *Ribnik* v. *McBride* (1928), 277 U.S. 350 and *New State Ice Co.* v. *Liebmann*, *ibid.* See Powell, The Supreme Court and State Police Power (1932), 18 Va. L. Rev. 162.

[249] *Nebbia* v. *New York* (1934), 291 U.S. 502; *West Coast Hotel Co.* v. *Parrish* (1937), 300 U.S. 379.

[250] *Ibid.*, at p. 536.

[251] *Olsen* v. *Nebraska* (1941), 313 U.S. 236, at p. 247.

[252] *Williamson* v. *Lee Optical Co.*, (1955), 348 U.S. 483, at p. 488.

from judicial language as a demonstration of the state of the law, in the particular instance the quotations do seem to indicate fairly what has happened to substantive due process. Attempts to use it to strike down economic and social legislation have been so unsuccessful over the last two decades that they have dwindled and virtually disappeared[253] with the single exception of public utility rate cases. The evolution of a special doctrine for them, that common carriers and similar enterprises are entitled to a fair return on the rate base,[254] has become fairly embedded in American law and has survived[255] though even it may be less rigid than once appeared.[256] The implications and meaning of the doctrine and its application have produced in the United States a complex and voluminous body of holdings most of it concerned formally with statutory construction and the details of administration. It differs from all but perhaps the price-fixing decisions in the superseded line of authorities to the extent that the deprivation is of "property", without reliance on the spurious "liberty" of contract, as a basis and so has clearer constitutional warrant. Whatever the strength of that distinction, the rate cases do stand as a vestigial remnant of constitutional due process limitations on the substance of economic and social legislation. "Substantive due process" is also represented, outside the economic field, by the use of the Fourteenth Amendment in connection with the First Amendment freedoms, where "liberty" is the key word in the clause.[257] Finally state courts in construing state constitutions have lagged behind the United States Supreme Court in abandoning substantive due process in the field of social and economic legislation.[258] With these residual qualifica-

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[253] In addition to the cases cited in the last four notes, see *Day-Brite Lighting, Inc.* v. *Missouri* (1952), 342 U.S. 421; *American Federation of Labor* v. *American Sash Co.* (1949), 335 U.S. 543-544 (concurring opinion); *cf. Townsend* v. *Yeomans* (1937), 301 U.S. 441 (accord); *Berman* v. *Parker* (1954), 348 U.S. 26 (by analogy).

[254] See *Smyth* v. *Ames* (1898), 169 U.S. 466; *St. Joseph Stock Yards Co.* v. *United States* (1936), 298 U.S. 38.

[255] See *Baltimore & Ohio R.R.* v. *United States* (1953), 345 U.S. 146 (by implication).

[256] See *Federal Power Commission* v. *Hope Natural Gas Co.* (1944), 320 U.S. 591.

[257] The verbal link between "liberty" and "freedom of speech, . . . press" and "the free exercise" of religion is obvious; how, as a textual matter, "liberty" includes so much of the First Amendment as prohibits "an establishment of religion" is less clear but that result has nevertheless been reached, see *Everson* v. *Board of Education* (1947), 330 U.S. 1. *Cf. People ex rel. McCollum* v. *Board of Education* (1948), 333 U.S. 203 with *Zorach* v. *Clauson* (1952), 343 U.S. 706.

[258] See Paulsen, The Persistence of Substantive Due Process in the States (1950), 34 Minn. L. Rev. 92.

tions, it appears that "due process of law" has been restored to its primary and historical meaning of procedural due process.

These three examples are fairly representative of the operation of the Bill of Rights guarantees. One, against self-incrimination, shows how a concept closely akin to common-law notions has by a process of true interpretation been adjusted to the particulars of varying cases so as to assure and develop the safeguards implicit in those notions. Another, freedom of speech, without common-law antecedent, had at one time a rational and continues to have an enthusiastic development in the Supreme Court, so that it affords very real protection to individuals even though just what is being protected and why it should be is becoming a bit obscure. The last, due process, with very ancient common-law sources retained them in one aspect, procedural due process, but added another aspect, substantive due process, which except in special circumstances proved to have poor survival value. The whole story perhaps is that a Bill of Rights is what the court makes it. Wise and responsible judging can find in its safeguards powerful weapons for preserving individual rights of a fundamental character against government encroachment. Weak judges on the one hand or over zealous ones on the other can make them something quite different. Like all legal texts, their significance is in their application; but at any rate they do provide something articulate to be applied.